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California Employment Law Letter

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What's Inside

On HRHero.com

Discrimination

You can't discriminate against employees on the basis of such things as race, age, or disability. A whole host of laws cover those bases, including Title VII, the ADA, and the ADEA. At www.HRHero.com, you can find the following resources to help ensure your company isn't illegally discriminating:

- HR Sample Policy—Equal Employment, www.HRHero.com/lc/policies/203.html
- HR Sample Policy—Harassment and/or Discrimination, www.HRHero.com/lc/policies/204.html

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LEGISLATION

New employment laws for 2013

by Jim Brown

Start preparing revised policies now to comply with the new employment laws passed by the California Legislature this year, and set reminders to implement the changes in 2013. While some of the laws approved this year may not be immediately applicable to your workplace, there are a few—such as the restrictions on employer use of social media and the protections for religious clothing and grooming standards—that may require your company to take a closer look at current practices. Below is a summary of some of the new California laws affecting public and private employers next year. Additional legislation for 2013 will be covered in a later issue of California Employment Law Letter.

Employee use of social media

Assembly Bill (AB) 1844 prohibits employers from requiring employees or job applicants to disclose user names or passwords for the purpose of accessing personal social media. Likewise, the new law prohibits employers from requiring employees or applicants to access personal social media in the presence of management. The prohibitions *do not* apply when the request is made of a current employee as part of an investigation into allegations of employee misconduct or a violation of law, but the request must be based on a reasonable belief that the access will result in relevant information. The restrictions don't apply to electronic devices issued by an employer.

Religious dress, grooming standards

AB 1964 clarifies that religious dress and grooming standards are subject to protection under the Fair Employment and Housing Act (FEHA). The new law also specifies that segregating an employee from customers, the public, or coworkers based on religious dress or grooming standards (e.g., head coverings, facial hair, or jewelry) is not a reasonable accommodation. Although the law makes an exception for situations where accommodation would create an "undue hardship," as a practical matter, it still means that employers must be much more careful when defining and enforcing employee dress codes. In addition, you should ensure that employees who wear religious clothing or hairstyles are not being systematically isolated from customers or public view.

Written commission agreements

AB 1396, which was signed into law last year and takes effect on January 1, 2013, requires that whenever the contemplated method of paying an employee involves commissions, there must be a written contract that sets forth the method by which the commissions will be computed and paid. You must also provide the employee with

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a signed copy of the contract and obtain a signed receipt for the contract from him.

If the contract expires but the employee continues to work under its terms, the terms will be presumed to remain in full force and effect until the contract is superseded by a new contract between the parties or either party terminates the employment relationship.

Criminal background checks

AB 2343 clarifies existing law regarding criminal history that is furnished by the California Department of Justice in connection with employment, licensing, and certification inquiries. In addition to another summary report, the new law requires the provision of certain follow-up information, including information regarding the subsequent arrest of a person about whom information was already requested. If any of the information results in adverse action involving employment, licensing, or certification, it must promptly be provided to the affected individual. To that end, the new law is very similar to the requirements of the federal Fair Credit Reporting Act (FCRA) and the California Investigative Consumer Reporting Agencies Act (ICRAA).

Fee awards for human trafficking allegations

AB 2212 puts more teeth in existing law on human trafficking (a term that may include forced labor operations) but expands slightly the situations in which the costs of investigation and discovery (the pretrial exchange of evidence) as well as attorneys' fees may be awarded to the prevailing party. The new law may be of interest in a situation in which a business is accused of running a "sweatshop" because a successful defense might enable the business to recover costs associated with the investigation as well as attorneys' fees incurred in fighting a nuisance/abatement action by the government. AB 2212 is a criminal statute (it amends the Penal Code), so it remains unclear to what extent it could be used in private litigation.

Access to prevailing wage laws

Senate Bill (SB) 1370 directs the Department of Industrial Relations (DIR) to list all California statutes dealing with prevailing wage requirements on its website. The new statute takes effect June 1, 2013, and the listing must be updated February 1 of each calendar year. The information should be a useful resource for employers subject to prevailing wage laws. However, it also makes it easier for employees to investigate whether their employer is in compliance.

Public employees' health insurance premiums

AB 2142 authorizes the California Public Employees' Retirement System (CalPERS) to equalize premiums more broadly than presently is the case. Currently, employee groups are insured through many different contracts, with premiums being more or less expensive depending on the group's demographics, the geographic area of the group, and other factors. The new law requires that premiums reasonably reflect the costs of providing the services, authorizes multiple forms of cost-containment programs, and forbids CalPERS from contracting with or approving health plans that vary rates based on the geographic location of the employees in the plan. Public employers affected by this law will want to prepare for possible changes in premiums.

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MARK'S IN-BOX

Do at-will notices violate the NLRA?

by Mark I. Schickman

The National Labor Relations Board (NLRB) is often wrongly viewed as an agency that deals only with union matters. This year more than ever, the NLRB is proving that view wrong.

Remember that "concerted activity" protected by the National Labor Relations Act (NLRA) occurs anytime *two or more employees act together* to complain about or try to improve their working terms or conditions. So the NLRB is moving to challenge policies or agreements that could *possibly* be interpreted to infringe on concerted activity—whether they're found in the union context or not.

Earlier this year, the NLRB made its presence felt in one common area of policy by issuing a memorandum stating that the most common forms of employer social media policies violate the NLRA. Essentially, the NLRB took the position that social media websites are the modern-day equivalent of the water cooler—the place where everybody gathers to discuss their opinions about work. So, according to the NLRB, an employer can no more demand that employees censor their thoughts on social media sites than it could monitor and control water-cooler conversations. Therefore, the Board disapproved of policies requiring employees to be civil while communicating on social media, refrain from speaking harshly about other employees, or safeguard confidential employment matters.

More recently, the NLRB has taken aim at the most common types of at-will-employment provisions, claiming that they, too, violate employees' organizational rights. The Phoenix Regional Office filed a complaint against a Hyatt hotel (which Hyatt eventually settled). The Board seemed to be specifically targeting language that says (as we think it should) that an employee's at-will status cannot be changed except by a written agreement signed by a high-ranking officer of the company. The NLRB argues that a union contract might change at-will-employment status, and such a policy doesn't recognize that fact—making employees believe they would remain "at will" even if they unionize.

To comply with the Board's view, your policy would have to carve out an express exception for organizational activity—an exception no employer wants to put in print. Could you imagine an at-will policy that read, "The at-will nature of your employment cannot be changed except by a written agreement signed by the company president—or unless you unionize"? I don't think too many employers would publish that policy. Therefore, if the NLRB's challenge is successful, it could significantly limit the language that employers have successfully used for the past decade as the contractual base of at-will employment.

Legislation by administrative activity

We are seeing the Obama administration making a wide swath of regulatory and administrative moves because it's unable to get any significant employment legislation through Congress. The NLRB is only one example of that phenomenon. The U.S. Department of Labor (DOL) has been increasingly aggressive, especially in its search for supposed independent contractors who are actually employees in its view. Similarly, the Equal Employment Opportunity Commission (EEOC) has been increasing its enforcement efforts, also administratively targeting issues that will not get legislative support in Congress.

President Barack Obama doesn't know if he will have a second term, so his key advisers are speeding up many efforts to make sure his presence is felt if he has to leave the Oval Office in January. It's no understatement to suggest that he has empowered an activist NLRB whose policies have gone further than any past Board.

It remains to be seen whether the NLRB's attempts to be a major player in the nonunion context will be successful. In 2011, less than 12 percent of all workers were union members—a number that has been steadily declining, especially in the private sector. While the Board's recent initiatives seem to be aimed at increasing the number of union members, its efforts to reach nonunion workers may be fueled by its recognition that the American union movement will continue to decline. To remain relevant and powerful in a potentially postunion environment, the NLRB might have decided to refocus its efforts on nonunion employers. It will be interesting to see how this trend plays out following the November presidential election.

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Responsibilities of Department of Human Resources

SB 1309 consolidates the Department of Personnel Administration (DPA) and the administrative functions of the State Personnel Board (SPB) into a single agency: the Department of Human Resources. The mostly technical changes contained in the law ensure that the SPB's nonconstitutional functions transferred to the Department of Human Resources are reflected in statute, including overseeing bilingual and interpreter services, administering exams and appointments, ensuring employment forms comply with federal and state laws, and having responsibility over certain civil rights issues, such as monitoring state departments' equal employment opportunity (EEO) program obligations. The law also prohibits discrimination in the terms, conditions, and privileges of employment with the state based on a medical condition, mental disability, or physical disability and would require the SPB, after finding that discrimination has occurred, to order the discrimination to cease and desist. These technical changes apply only to public employers.

Public employee pension benefit changes

AB 340 makes changes to the pension benefits that may be offered to public employees hired on or after January 1, 2013. Among the changes are a new maximum benefit and a lower-cost pension formula for newly hired employees, with a requirement to work longer to reach full retirement age and a cap on the amount used to calculate an individual's pension. New employees will also be required to share the costs of pension benefits equally with the employer. Notably, current employees of the California State University system are not affected by the 50/50 cost sharing. In total, new employee contributions will increase to eight percent. The legislation will not affect private employers except to the extent that public employment pensions may now become less attractive compared to private employer 401(k) benefits.

Certificate of compliance for MEWAs

SB 615 prohibits a self-funded or partially self-funded multiemployer welfare arrangement (MEWA) from offering, marketing, representing, or selling any product, contract, or discount arrangement as minimum essential coverage or as compliant with the "essential health benefits" requirement of the federal Affordable Care Act (ACA) unless it actually meets the applicable requirements under the Act. To ensure compliance, the MEWA must receive a certificate of compliance from the insurance commissioner. The new legislation could affect any nonprofit corporate employer involved in multiemployer trusts with at least 200 members. Therefore, any company that meets those parameters should learn the requirements for minimum essential benefits under the ACA and review its program benefits to ensure compliance with the minimum required benefits.

Repeal date of teacher training benefits

SB 1291 extends to January 1, 2019, the repeal date of the California Training Benefits Program (CTBP) and requires that a determination of automatic eligibility for benefits under the CTBP be issued to an unemployed teacher who meets the following criteria:

- The unemployed teacher must be a permanent or probationary public schoolteacher.
- The teacher mush participate in a credential preparation or training program approved by the Commission on Teacher Credentialing (CTC).
- The training program must be in the areas of math, science, or special education for K-12.
- The teacher must have been laid off and must enroll in the training program within three years of being laid off.

In essence, the new law allows laid-off but qualified teachers who are seeking additional credentialing in math, science, and special education to receive extended unemployment benefits for the duration of their training.

Deposition of witnesses

AB 1875 drastically limits current discovery procedures in California state courts by placing a seven-hour preliminary limit on depositions, similar to the current rule in federal courts. While a court may permit more deposition time when necessary, the new time limit may be a headache in cases in which a witness is uncooperative or simply when the facts of the case are complex. Fortunately for employers, cases filed by an employee or a job applicant alleging injuries related to the employment relationship are excluded from the seven-hour limit.

Mediation in labor disputes under Brown Act

Under the Meyers-Milias-Brown Act, collective bargaining disputes may be resolved by both sides agreeing to mediation. If the mediator is unable to settle the matter within 30 to 45 days of his appointment, the employee organization may request that the parties' differences be submitted to a fact-finding panel. **AB 1606** clarifies that mediation is not a prerequisite to fact-finding and that fact-finding can also be requested 30 days after a declaration of impasse. The law further provides that the right of an employee organization to request a fact-finding panel cannot be waived. For public employers, the new law means that fact-finding panels will become more difficult to avoid—even if voluntary mediation is refused.

Bottom line

One of the biggest impacts of the new laws is going to be in the use of social media. Obviously, if your company currently has a policy requiring some disclosure of passwords or consent to viewing employees' or applicants' external social media sites, you will have to end the policy. More important, if your company has an informal practice of seeking social media information on employees or applicants, that practice may now be problematic and could cause potential liability. If your company seeks social media information anytime you conduct an internal investigation, you will have to narrow your search to make sure you're seeking only information relevant to the particular investigation. Finally, if you are considering an adverse employment action based on social media information, you will need to make sure the information was properly obtained and the action justified or you will face a heightened likelihood of litigation.

Another significant new law is the requirement for written commission agreements. Affected employers must provide each employee who is paid in whole or in part on a commission basis with a written commission agreement that satisfies the requirements of the new law.

You must also be aware of the religious dress and grooming standards under the FEHA. California employers have long known of the obligation to accommodate bona fide religious dress or grooming as part of the prohibition on religious discrimination. One of the natural tendencies of supervisors and managers when faced with religious dress issues is to take steps that may isolate or reduce the employee's contact with the public. The new law makes it clear that any isolation of an employee based on religious dress or grooming will not be tolerated. Given the more focused approach of the new protections, you should revisit any situation in which an employee has requested a religious accommodation and make sure the accommodation is consistent with the new standards.

The myriad of other laws are more focused in their application (e.g., human trafficking industries, prevailing wage jobs, and public employer health and welfare benefits). To the extent one of the new laws is applicable to your company, you should conduct a heightened review to ensure compliance. As with any new legislation, seek legal counsel if you have any questions about compliance.

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WAGE AND HOUR LAW

Employer prevails on reporting time and split shift claims, recovers its fees

by Joel Van Parys

The California Court of Appeal has provided guidance to employers on reporting time pay and split shift pay and when attorneys' fees will be awarded for successfully defending against such claims. The court also decided when a release signed by an employee is effective. Altogether, this case sheds light on some discrete areas of the law and provides guidance for how and when employers may obtain attorneys' fees in litigation.

Reporting time claim

California law provides that if an employee reports to work as scheduled and isn't put to work or is furnished with less than half of the scheduled day's work,

CALIFORNIA NEWS IN BRIEF

Hospital settles national origin discrimination claims. A San Joaquin Valley acute care hospital has agreed to pay $975,000 to settle a national origin discrimination lawsuit filed by a class of approximately 70 Filipino-American workers. The Delano Regional Medical Center workers claimed they endured ongoing harassment and discrimination by top-level hospital managers. The suit, filed by the Equal Employment Opportunity Commission (EEOC) and the Asian Pacific American Legal Center, contained allegations that supervisors, staff, and even volunteers were encouraged to berate and reprimand Filipino-American employees for nearly six years. According to the EEOC, staff made fun of the workers' accents and ordered them to speak English even when they already were.

Nursing home ordered to recognize union, hire previous workers. The National Labor Relations Board (NLRB) has adopted the recommendations of an administrative law judge (ALJ) and ordered the owner of Yuba Skilled Nursing Center in Yuba City to hire 50 employees it failed to hire after assuming operations of the center last year. Employees at the home had been represented by the Service Employees International Union (SEIU), United Healthcare Workers West, before it was bought by Nasaky, Inc. Under the National Labor Relations Act (NLRA), new owners of a union facility are obligated to recognize and bargain with the existing union as a successor employer, according to a statement from the NLRB. The union claimed in charges filed with the NLRB that the new owners failed to hire the longtime employees to avoid that obligation. ✤

he shall be paid for half of the scheduled day's work but in no case paid for less than two hours or more than four hours of work. In this case, employees of AirTouch claimed they were owed reporting time pay for having to attend store meetings. It was undisputed that the store meetings were scheduled, they always lasted at least half the time scheduled, and the employees were paid their regular wages for time spent attending the meetings (which were shorter than two hours long). Nonetheless, the employees claimed they were entitled to be paid for a minimum of two hours for every store meeting they had to attend, even if the meeting lasted only an hour.

The court rejected the claim, holding that California's reporting time pay law doesn't require employers to pay employees for a minimum of two hours of work every time they report to work. Rather, the focus is on whether the employee is furnished with at least half of the scheduled day's work. If a meeting is scheduled for an hour and lasts an hour (or even a half hour), the employee is entitled only to regular pay for time actually spent attending the meeting and isn't entitled to any additional reporting time pay.

Split shift pay claim

On certain occasions, the employees were required to attend a store meeting on the same day as a regular work shift. The store meeting and the sales shifts weren't back to back but were separated by a block of time. That constitutes a "split shift." Under California law, when an employee works a split shift, he is entitled to one hour of additional pay at the minimum wage in addition to the minimum wage required for that workday. The AirTouch employees claimed their employer failed to pay them the additional hour of pay when they worked split shifts. AirTouch argued that no additional pay was owed because every time the employees worked split shifts, they were paid more than the sum of minimum wage for all hours worked plus an additional hour at minimum wage.

The court agreed with AirTouch's analysis and rejected the employees' split shift claim. The employees had argued that the Wage Order simply means an employee must be paid an additional hour at his regular wage when a split shift is worked. Rejecting that argument, the court reasoned that the split shift provision refers not to "regular wages" but to "minimum wages." Moreover, the provision is contained in the "Minimum Wage" section of the Wage Order, making it clear that the regulation is directed solely at payment of minimum wages. Paying a total amount that covers the minimum wage plus an additional hour satisfies the Wage Order.

Release bars one employee's claims

In addition to providing favorable rulings on the split shift and reporting time pay requirements, the court held that one employee's claims were barred by virtue of the fact that he had previously signed a general release of claims in favor of AirTouch. Relying on Labor Code Section 206.5, the employee argued that the release couldn't bar claims for wages owed but unpaid. The court disagreed, holding that the release was valid and effective because Section 206.5 bars only a release of wages that are undisputedly owed. In this case, whether the employee was owed reporting time pay or split shift pay was disputed; therefore, the release was valid.

Court awards attorneys' fees to AirTouch

After prevailing on the merits of the case, AirTouch sought to recover its attorneys' fees. The court considered whether Labor Code Section 218.5 permits a prevailing employer to recover its attorneys' fees incurred to successfully defend reporting time and split shift pay claims. In consideration of the California Supreme Court's recent ruling on this subject in *Kirby v. Immoos*, the court held that AirTouch could recover its fees on the reporting time pay claim but not the split shift pay claim.

The court reasoned that the split shift pay claim was a minimum wage claim and was thus governed by Labor Code Section 1194, which has a one-way fee-shifting provision that doesn't allow a prevailing employer to recover its fees. However, the court held that the reporting time pay claim wasn't a minimum wage claim and therefore fell under Labor Code Section 218.5's two-way fee-shifting provision, which allows the prevailing party (whether it's the employee or the employer) to recover attorneys' fees. As such, the court held that AirTouch was entitled to attorneys' fees incurred to defend the reporting time pay claim. *Aleman v. AirTouch Cellular* (California Court of Appeal, Second Appellate District, 9/20/12).

Bottom line

While AirTouch prevailed on the reporting time claim, it's significant that the meetings at issue in this case were of a scheduled expected duration. The outcome might have been different (and a minimum of two hours' pay owed) if there was no expectation as to how long the meetings would last from which it could then be determined whether the employees "worked" at least half the scheduled time. Employers relying on this case should carefully review the reasons employees are reporting to work to determine whether it reduces the amount of reporting time pay owed. Additionally, you should carefully review any release agreements you execute with employees to ensure the language covers disputes between the parties about whether wages are due at all.

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REASONABLE ACCOMMODATIONS

How to avoid common mistakes when accommodating employees with disabilities

by Alka Ramchandani

In many countries, even today, an individual with a disability is often shunned or abandoned. In America, we give individuals with disabilities equal opportunities and make sure they are on the same playing field as their able-bodied counterparts. That being the case, our government has put stronger restrictions on employers to make sure that disabled individuals have the ability to perform their job functions. As an employer in California, you must not ignore the little things. A comment about an employee's need for a Dictaphone to avoid typing or a cart to avoid carrying boxes can lead you down the path to a litigation disaster. The accommodation process in California is based on policies, documentation, and effective communication.

The lead article in our September 10 issue reviewed some tips for accommodating workplace disabilities. This article explores common mistakes employers make when accommodating employees with disabilities and how to avoid them.

Essential functions can be your friend or foe

One of the leading arguments in disability discrimination cases is "that is not an essential function of my job" or "that task could have been eliminated." Make sure your job descriptions specify the essential functions of the job. You don't have to eliminate essential functions, but you do have a duty to reasonably accommodate employees so they can perform the essential functions. Remember, you aren't under any obligation to create a new position for a disabled employee, but you must find a position the employee can perform with or without a reasonable accommodation.

Interactive process is a two-way street

It's important to pay attention and recognize when an employee has made an accommodation request. You are required to work with the employee to identify what she can and cannot do. Communicate with the employee about her limitations, and determine what's necessary to help her perform the essential functions of the specified job. Sometimes, making a list together will help you identify multiple accommodations and provide options for determining which accommodation is the least burdensome on your company. Having an open line of communication with the employee is your best defense to a disability discrimination lawsuit.

The quarterback has to communicate the play

It's important to make the employee's supervisors and managers aware of any accommodations. You have to let supervisors and managers know which tasks the employee can and cannot do so they can make sure he is working within his limitations. Often, the HR department may discuss a reasonable accommodation with an employee but fail to disclose the accommodation to his supervisor. That lapse could result in the supervisor asking the employee to perform activities outside his limitations. Performance evaluations and reviews need to reflect the performance of an employee subject to the accommodation.

You have to get the 411

Employers are often under the mistaken impression that accommodation requests are the workers' compensation carrier's responsibility. Piggybacking on a workers' comp assessment isn't sufficient under California law. You must communicate with the employee directly and make your own assessment of her limitations. Courts look at how employers, not workers' comp carriers, attempt to accommodate employees' requests for reasonable accommodations.

Hansel and Gretel would have left a paper trail

No documentation means no defense. Your company should have a policy in place that provides a systematic process for how to respond to a request for accommodation. Document everything from the initial request for an accommodation to any inquiry about whether the accommodation is reasonable. Document that you considered each accommodation and whether it was found to be unreasonable or an undue hardship. Remember to keep private medical information separate from personnel files.

Look at all possibilities and ask the right questions before you claim undue hardship.

Being sidelined doesn't mean he isn't part of the team

Most employers think they can terminate employees who exhaust their leave. Under the Americans with Disabilities Act (ADA), that isn't true. In fact, an employee may request leave as an accommodation, and the ADA doesn't place a specific time limit on that leave. After

WORKPLACE TRENDS

Survey finds employers struggling to fill key positions. The slow economic recovery has resulted in a flood of people looking for work, but a recent survey found that 70% of U.S. employers polled said they had at least some difficulty filling key positions in the past year. Workforce consulting company Right Management asked more than 100 U.S. companies if they found it hard to fill key positions. Forty-five percent said definitely, 25% said they had some difficulty, and 31% said they had no trouble. "U.S. employers have been facing greater recruitment challenges than firms in most industrialized nations with the exception of Japan," Michael Haid, Right Management's senior vice president for talent management, said. "The problem is what's been described as a 'talent mismatch' with prospective job applicants lacking technical competencies or hard skills required by specific industries."

Report finds most workers have access to paid or unpaid leave. The U.S. Bureau of Labor Statistics (BLS) reported in August that 90% of wage and salary workers had access to paid or unpaid leave at their main jobs in 2011. On average, 59% of the workers had access to paid leave, and 77% had access to unpaid leave. By occupation, workers in management, business, and financial operations were the most likely to have paid leave (77%). Seventy-six percent of workers in the public sector had paid leave, compared with 57% of private-sector workers. Among wage and salary workers age 25 and older, 72% of those with a bachelor's degree or higher had access to paid leave, compared with 35% of workers with less than a high-school diploma.

Top companies for work-life balance named. Careers website Glassdoor has released a list of companies it considers the best for offering employees work-life balance options. The top five companies named are MITRE, North Highland, Agilent Technologies, SAS Institute, and CareerBuilder. The second-annual report is based on feedback shared by employees within the past year. Glassdoor's survey gathers employee feedback on the best reasons to work for their employer as well as the downsides.

Study highlights risky resumes. What do you look for in an applicant's resume? Probably not the kind of information that turned up in CareerBuilder's study of 2,298 hiring managers nationwide when they were asked about the most memorable and unusual applications that crossed their desks. One candidate noted that her resume was set up to be sung to the tune of *The Brady Bunch,* another bragged that he was "homecoming prom prince" in 1984, and another called himself a genius and invited the hiring manager to interview him at his apartment. Another hopeful listed "to make dough" as his objective. ✤

leave covered by the Family and Medical Leave Act (FMLA) expires, you can check back with the employee to see if his limitations have improved and reevaluate whether another accommodation is available to help him perform the essential functions of his job. You can also explore whether there is an alternative available position he can perform with or without reasonable accommodation.

That's not all, folks

Often, employers believe the duty to accommodate is satisfied once they find a reasonable accommodation for the employee. Again, that isn't true. You are under a constant duty to communicate with the employee to make sure the accommodation is working. You should encourage the employee to notify HR or her supervisor if any modifications to her accommodation are needed.

Think outside the box

Although you aren't obligated to eliminate essential job functions, you still have a duty to determine whether you can reasonably accommodate an employee so he can perform his essential functions. It's important to look at all possibilities and ask the right questions before you claim undue hardship. If the requested accommodation is unreasonable, don't stop there. Ask the employee if he can think of another option. If there's no way to accommodate him so that he can perform his essential job functions, look at whether he is qualified for any alternative available position. If all else fails, remember you can also provide a leave of absence as a reasonable accommodation.

Shut the door on your way out

Accommodations are like a deck of cards—once a single card goes missing, the whole deck is useless. Failing to get the final medical release can lead to a disability discrimination claim. Don't let an employee return to normal duty without a proper medical release. Assuming the employee is free of restrictions after her doctor's note has expired isn't wise.

Looking the other way doesn't work

Disability discrimination claims are often paired with harassment or retaliation claims. Monitoring the situation is essential because it's common for coworkers to complain about "pulling extra weight" or "having to pick up slack" for an accommodated employee. Those types of complaints may lead to harassment or retaliatory conduct. Make sure that if an accommodated employee complains about any acts of harassment or retaliation, you address her complaints and take proper action to resolve them.

Bottom line

Today in California accommodation is a convoluted process. It's important to remember that accommodation is based on three concepts: proper policies, sufficient documentation, and effective communication. If you adhere to those three concepts and follow our tips, you may be lucky enough to stay out of litigation trouble.

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AGE DISCRIMINATION

Discrimination claims detailed enough for lawsuit to proceed

A disgruntled employee's lawsuit doesn't have to spell out every detail of her complaint. But court rules require at least enough information to establish that there may be a legally recognized claim. How much information is enough? That was the question for the U.S. 9th Circuit Court of Appeals (whose rulings apply to all California employers) when it recently reviewed the sufficiency of an employee's court filing.

Case dismissed for lack of specifics

Kathryn Sheppard filed a lawsuit against her former employer, David Evans and Associates. She claimed she had been subjected to age discrimination in violation of federal law and wrongfully discharged under Oregon law.

Evans argued that Sheppard's complaint didn't state specific facts that would support her claims. The trial court agreed but offered Sheppard a do-over, permitting her to beef up the complaint. After she did so, Evans contended that even the amended lawsuit provided insufficient detail, and the trial court again agreed. The case was dismissed, and Sheppard appealed.

How much information is enough for a lawsuit?

Court rules require that a complaint contain "a short and plain statement of the claim" that, if proven, would entitle the employee to seek damages. The 9th Circuit observed that Sheppard's factual allegations consisted of just 17 brief paragraphs, most of which contained only a single sentence. Had she presented sufficient facts?

Turning first to Sheppard's age discrimination claim, the court noted the minimum requirements for an initial showing. She would have to show that she was:

(1) At least 40 years of age;

(2) Performing her job satisfactorily;

(3) Discharged; and

(4) Either replaced by a substantially younger employee with lesser or equal qualifications or discharged under circumstances leading to an inference of age discrimination.

One way to raise such an inference is with facts showing that her job duties were still being performed by other younger employees.

Sheppard's complaint, although brief, met at least those minimal requirements. It stated that she was over 40 years old, had been performing satisfactorily, and was discharged while five younger comparators continued their employment. Accordingly, the 9th Circuit concluded that she had provided enough information to move forward on her age discrimination claim.

The court then considered whether Sheppard had stated sufficient facts to pursue her wrongful discharge claim. Oregon law recognizes a claim for wrongful discharge when an employee is dismissed for exercising a job-related right that reflects an important public policy. The facts must show a causal connection between the employee's exercise of her right and her discharge.

Sheppard's complaint stated that she had requested time off under the Family and Medical Leave Act (FMLA). As soon as she scheduled the surgery for which the leave was requested, she was fired. Those facts were enough, under the "commonsense" standard used by the court, to support the wrongful discharge claim.

Sheppard's lawsuit was reinstated and sent back to the trial court for further proceedings. *Sheppard v. David Evans and Assoc.*, Case No. 11-35164 (9th Cir., Sept. 12, 2012).

Lesson: Don't count on technical defenses

The employer in this case twice persuaded a trial court that the lawsuit filed by a former employee didn't contain enough specifics. That would have been a great way to end the lawsuit. But remember that courts may, as the 9th Circuit did, use plain old common sense to evaluate such defenses. There is often a reluctance to dismiss employment claims on technical grounds, so the outcome in this case isn't surprising. ✤

EMPLOYEE MISCONDUCT

The do's and don'ts of dealing with employee theft

Do you suspect an employee is stealing from you? Often, the first reaction to those suspicions is emotional—you want to confront and discipline the wrongdoer. Although that may ultimately occur, the best initial response is to take a deep breath and call your company attorney. Consulting with counsel will help protect the legal rights of both your company and the employee and help you understand and manage the liability risks associated with accusations of employee theft.

Do's

Here are the things you should do if you suspect one of your workers of stealing from the company:

✓ Consult with counsel.

✓ If you have reasonable suspicion (or actual proof) of employee theft, your attorney will likely suggest you conduct an investigation.

- ✓ Meet with the accused employee so he can respond to the evidence you've gathered.
- ✓ Meet with any other employees who have knowledge of the situation.
- ✓ Determine if a reasonable explanation exists or if there are mitigating factors or circumstances that might be raised or need further investigation.
- ✓ Prepare a report of the incident, the investigation process, and its results, with appropriate recommendations on actions to be taken.
- ✓ If theft has occurred, you may need to make a report to law enforcement.

Don'ts

You should steer clear of the following pitfalls:

- Do not detain or restrain an employee. False imprisonment is against the law, and charges can be filed against you if you force an employee to remain somewhere (e.g., your office) and there was no reasonable basis for the action. Depending on the situation and the employee you're dealing with, there may also be an element of personal danger involved in trying to detain someone. Contact the authorities or your attorney for specific advice if this situation comes up.
- Do not defame the employee. Publicizing the fact that a person was fired because he stole six plants and some artwork from the office may not be worth the expense of a possible defamation claim.
- Do not threaten to prosecute if you're not sure you're going to file charges. Keep in mind that filing charges against someone is a money- and time-consuming process. Weigh the costs involved in prosecuting someone for theft, and make sure it's worth it.

Disciplining or dismissing an employee for theft

If the employee's misconduct was serious enough to breach your trust and he has raised no mitigating factors or circumstances, dismissal and, possibly, criminal charges may be the appropriate course of action. However, employee theft that is less clear-cut may require discipline instead of dismissal.

Because even an employee who is dismissed (or disciplined) for suspicion of theft can file suit against her employer, there are a few things worth noting before you take that step, particularly if the employee has protected class status. First, you must demonstrate that on a balance of probabilities, it's more probable than not that the employee committed theft. Documentation of the investigation must focus on the allegation without reference to age, gender, national origin, disability, or any other protected status.

Second, if the employee is discharged, the investigation report must explain which items were taken and the effect of the theft on the company. There's a difference between the theft of a pen, for example, and the theft of a computer file. Essentially, the report should convey the breach of fundamental trust between the employer and the employee, justifying the dismissal.

Lessons for employers

The best practice for minimizing employee theft is having good security practices—particularly with respect to protecting electronic data. Security is much more than a computer password. It's the ability to look back and find the tracks a computer-savvy employee-thief believes have been carefully covered or deleted. Perhaps the best possible deterrent is the ability to tell employees that your software retains information about what they do and when they do it. ✤

PERSONNEL POLICIES

BYOD? Avoiding the pitfalls of employee use of personal devices

Bring your own . . . device (BYOD)? A majority of businesses now allow employees to bring their own electronic devices to use at work. With the rapid evolution of technology, this policy has quickly become the go-to standard in most workplaces. However, commingling personal and professional usage, data, and ownership of electronic devices creates challenging legal and security implications. Who owns work-related data on employee-owned devices? The harsh truth is that courts and legislatures have yet to decide that complicated issue.

Whether driven by the younger generation's need to have the most recent and technologically advanced devices or employers' attempt to save corporate money, BYOD is the new norm. However, as the line between business and personal ownership begins to blur, corporate security concerns grow. A recent survey by YouGov and Research Now found that 67 percent of surveyed companies had no policies or procedures to manage employees' use of personal devices for work purposes. If you are one of the 67 percent, you may be headed for trouble. Here's why.

Real-world concerns

An employee leaves your company but still has sensitive company data on a dual-use device. A hacker preys on the unsecure smartphone carried by your employee and gains sensitive information. Your employees store company trade secrets on their personal devices, which leads to the information "leaving" your control. Your company is involved in a lawsuit and as part of e-discovery (the exchange of information relevant to the lawsuit before trial), normally purged information is found stored on an employee's personal device.

All of those scenarios can occur when you allow your employees to use their own electronic devices at work. Gale Gruman, the executive editor of InfoWorld, has observed that companies have adopted three types of BYOD policies to address these concerns:

- **Shared management:** Company policy states that an employee accessing business resources from a personal device gives the company the right to manage, lock, and wipe that device. The policy is normally put into a written agreement.
- **Corporate ownership:** The company owns and buys the device. If an employee doesn't like the company-issued device, he can buy his own personal device that has no corporate access.
- **Legal transfer:** The company buys the device from the employee. Normally, the company will purchase the device for some nominal amount (*e.g.*, $5) and give the employee the right to use it for personal purposes. The employee has the right to buy the device back for the same price when he leaves the company.

None of these policies is "right" or "wrong." Which type of policy you choose to implement will depend on your business needs.

Legality of accessing personal devices

Your company can manage the risks associated with BYOD by adopting policies and agreements that fit your risk tolerance, trust assessment, and regulatory context. However, the only way to guarantee your right to access all information on a device is to own the device.

In 2010, the U.S. Supreme Court held that employers have the right to access all communications on corporate-issued devices. The Court didn't address a company's right to access information on personal devices. Therefore, if you want to have access to all communications and data on personal devices used by your employees, you should be aware of the inherent risk in adopting a BYOD policy.

Mitigating security risks

The content of your BYOD policy (or your choice to forgo a policy) should be decided by thoroughly analyzing the sensitivity of the information your employees handle, the inherent security concerns in your industry, the legal regulations you face, and your ability to oversee and manage the use of such devices. If you decide to implement a BYOD policy, here are some important things to consider:

✓ **Initiate a "wipe" policy.** Require your employees to download software that allows you to remotely access and wipe devices. That provides protection if devices are lost or stolen. Additionally, there are software programs that can sequester work-related information into a software "sandbox," creating a virtual folder in the personal device.

✓ **Require written agreements.** Once you locate software that fits your needs, have your employees sign a written agreement that discloses all risks associated with the software (such as information loss) and requires them to download it onto any device that will be used to access work-related information.

✓ **Make the privilege exclusive.** Allow only certain employees to have the privilege of using personal devices (exclude personnel who frequently handle sensitive data or personally identifiable information). Further, limit the type of information that's accessible from a personal device (e.g., e-mail).

✓ **Make device inspection a part of the exit interview.** Have employees consent in writing to have their devices inspected at exit interviews. Also, obtain permission to remotely wipe the device of any terminated employee.

✓ **Don't allow employees to store corporate information on personal devices.** Have them sign a written agreement that they will not store any corporate information on their personal devices.

✓ **Require employees to produce their devices for inspection.** Have them sign a written agreement that they will turn over their personal devices for inspection upon a legitimate request.

Bottom line

Although dual-use devices have resulted in difficult legal and security issues for employers, you can mitigate the risks by implementing a properly crafted policy and using privacy software. Because the law on this issue is not settled, you should contact an attorney before creating a BYOD policy so that you fully understand all risks involved in such a policy. In the meantime, we will continue to keep you updated on any changes to this murky area of law. ✤

ELECTRONIC WORKPLACE

Pirated software creates substantial risk for employers

Ignorance of pirated software on company-owned computer networks is not bliss. Given the widespread use of the Internet, your employees may be downloading unlicensed, pirated software without your knowledge, and they may not even realize that what they're doing is illegal. Although you may find it burdensome and costly to monitor what your employees are downloading, it's imperative to put controls in place to protect yourself from the liability of having pirated software on your computer network.

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Looting the Internet's treasures

As litigation over software piracy claims increases, you should be aware of the consequences of using pirated software. Groups like the Business Software Alliance (BSA) that work with companies like Microsoft have initiated reward programs offering up to $1 million to employees who "turn in" their employers for software piracy. Being in possession of pirated software can lead to both civil and criminal charges resulting in copyright infringement fines of up to $150,000 per violation and even prison time for company executives. In addition to the legal ramifications, pirated software can expose your computer network to viruses and other corruption.

Consider taking the following steps to prevent the introduction of pirated software onto your network:

- Retain a knowledgeable IT person or department to ensure compliance with software-licensing requirements and to formalize your software policies.
- Distribute written software policies to all employees, and set forth substantial consequences for downloading unauthorized software.
- Have your IT personnel monitor employees' Internet usage, and use filtering software to block workers' access to specific content and websites.
- Restrict employees' ability to download to the network so that only designated people like IT personnel have the right to purchase, install, or download software.
- Audit your computer network periodically to ensure that all software is properly licensed. Immediately delete any unlicensed software.
- Maintain detailed records for all software that's purchased so if a question ever arises, you can provide the proper license information.

More information, to boot!

For more information on how to protect your company from liability for software piracy, visit the BSA website at www.bsa.org. The website offers many helpful tools, including free software audit programs, sample policies and memos to distribute to employees, antipiracy posters to hang in the workplace, and tips on how to prevent software piracy. In addition, the Software & Information Industry Association website, located at www.siia.net/piracy/, offers detailed information on what exactly constitutes piracy, the different types of liability involved with piracy, and the applicable laws governing software usage. ✤

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