

LEGAL UPDATE
A Review of 2007
Looking Forward to 2008
Kristine E. Kwong, Esq.

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AGENDA

- Looking forward to 2008
- Sexual Harassment Laws
- Disability issues

LOOKING FORWARD TO 2008

- AB 392 Military Spouse Leave
 - Must provide qualified employees whose spouse is in the armed forces up to 10 unpaid days off when spouse is on leave.
 - Employer qualifications
 - 25 or more employees
 - Employee qualifications
 - Works more than 20 hours/week

LOOKING FORWARD TO 2008

■ AB 392 Military Spouse Leave

□ Notice requirements

- Must give two business days' notice
- Provide written documentation of spouse on leave from deployment

□ Unsettled questions

- Is it ten consecutive days?
- Can leave be denied?
- Are domestic partners protected?

LOOKING FORWARD TO 2008

- AB 392 Military Spouse Leave
 - What should you do?
 - Update employee handbook
 - Provide a copy of the new policy
 - Have a military leave request form available to employees.

LOOKING FORWARD TO 2008

- SB 869 – Workers' Comp
- Authorizes Labor Commission to identify unlawfully insured employers.
- Bill authorizes a report to be posted on DLSE website
- Bill directs Director of EDD to share information with the DLSE

LOOKING FORWARD TO 2008

- AB 632 Health Care/Whistleblower Protection
- Reporting to any agency
 - Quality of care
 - Services of care
 - Conditions at the facility
- Who's Protected
 - Employee
 - Patient
 - Member of medical staff

LOOKING FORWARD TO 2008

- AB 632 Health Care/Whistleblower
- What should you do?
 - Update employee handbooks
 - Notify employees of new policy
 - Train all managers and supervisors to recognize protected activity

LOOKING FORWARD TO 2008

- AB 1302 Health Insurance Portability and Accountability Act
 - Law extended to July 1, 2010

CLASS ACTION WAIVERS

- Waivers Still Unenforceable
 - Waivers unconscionable and unenforceable
 - Impartial arbitrator?
 - Fair discovery?
 - Fees must be fair
 - Genty v Superior Court

DISCIPLINE

- Employee's termination was reversed where there was no substantial evidence that he was on notice that prescription drugs could result in positive drug results and arbitrator did not consider whether the drugs had a legitimate medical use
 - Valenzuela v. Ca. State Personnel Board
 - (2007) 63 Cal.Rptr.3d 529

WRONGFUL TERMINATION

- Firing employee because he complained about co-employee threatening his life is a violation of public policy.
 - Franklin v. Monadnock (2007) 151 Cal.App.4th 252
- Safe workplace is fundamental public policy
- Lab. C. 6400
 - Employer obligated to keep workplace safe

PRIVACY

- Third party cannot sue an employer when an employee uses the company computer to send threatening email.
 - *Delfino v. Agilent Tech.* (2006) 145 Cal.App.4th 790.

SEXUAL HARASSMENT

- Employer can be liable for supervisor's harassment of employee outside of work hours and away from the workplace.
 - Myers v. Trendwest (2007) 147 Cal.App.4th 1403

SEX DISCRIMINATION

- Pregnancy Discrimination Act requires employers to include pregnancy leave in calculating service time if the employers give credit for other types of temporary disability leave.
 - *Multeen v. AT&T* (9th Cir. 2007) 2007 WL 2332071

RACE DISCRIMINATION

- Denial of lateral transfer not adverse employment action
 - Momah v. Dominguez (6th Cir. 2007)

DISABILITY DISCRIMINATION

- Plaintiff must prove that he/she is a qualified individual, i.e., he/she can perform the essential functions of the job with or without reasonable accommodation in a FEHA disability discrimination case.
 - Green v. State of Ca. (2007)2007 WL 2388920

DISABILITY DISCRIMINATION

- An employer may be liable for disability discrimination if it terminates an employee based on disability-related conduct.
 - *Gambini v. Total Renal Care* (9th Cir. 2007) 480 F.3d 950.

DISABILITY DISCRIMINATION

- Reassignment of a fire captain from a 24-hour shift to an 8-hour shift because of his disability was not discrimination even though he objected to the 8 hour shift
 - Leg amputated and wanted 24 hr shift.
 - Not getting the shift not adverse empl.
 - Malais v. LA Fir Dept (2007) 150 Cal.App.4th 350

DISABILITY DISCRIMINATION

- Employee's discrimination claim fails because he could not prove that his employer did not have a good faith belief that the employee violated its policy and fired him for that reason.
 - King v. UPS, Inc (2007) 152 Cal.App.4th 426
- Plaintiff fired for violating integrity rule
- Employer didn't have to prove that he violated the rule – good faith enough

EEOC NOTICE RULES

- Ninth Circuit uses three-day mailing presumption to determinate notice of a right to sue letter
 - *Payan v. Aramark Management Services* (9th Cir. 2007)

FAMILY MEDICAL LEAVE ACT

- Employer is not excused from advising employee of availability of FMLA or CFRA leave just because the employee refuses to answer medical questions
 - Faust v. Ca Portland Cement (2007) 150 Cal.App.3d 864
- Employee fired because he didn't fill out the proper documentation.
- Employer knew he had a serious health condition and should have provided employee with the forms.

RETALIATION

■ Portland v. Chertoff

- If supervisor with retaliatory motives influences a disciplinary investigation, then the otherwise independent investigation may be found to be retaliatory
- Anger is natural reaction

■ Burlington Northern v. White

- Female forklift operator complained of sexual harassment and was subsequently removed from forklift duties.
- Adverse Employment Action: reassignment of duties is actionable

Due Process

- Employee's termination reversed where there was no evidence that he was on notice that his prescription drugs could result in positive drug test and arbitrator did not consider if drugs had medical use.
- Valenzuela v. Ca State Personnel Board (2007)

BROWN ACT UPDATE

- District cannot prohibit employee from attending and speaking at a public school board meeting about his proposed demotion
 - Attorney General Opinion, No. 07-106

AB 1825 – Sexual Harassment Training

- New Regulations effective 8/17/07
 - Employers with 50 or more employees or contractors, including full time, part time and temporary workers in any 20 consecutive weeks.
 - Employers must provide training once every two years
 - New supervisors hired after July 1, 2005 in California must be trained within six months of assuming their supervisory position

AB 1825

- Frequency of training
 - Once every two years
 - Individual tracking allowed
 - Effective Interactive Training
 - Classroom
 - E-learning
 - Link for student to contact the instructor with questions.
 - Must respond within 2 business days
 - Webinar
 - Must have opportunity to ask questions
 - Other “effective interactive training”

AB 1825

- Qualifications of the trainer
 - Attorney admitted for 2 or more years
 - HR Professional with 2 or more years experience
 - Law school or university professors

SB 929 COMPUTER PROFESSIONAL

- Provides an exemption for computer professionals
- Must be primarily engaged in work that is intellectual or creative

SB 929 COMPUTER PROFESSIONAL

- Effective January 1, 2009
 - Hourly minimum could be from \$41.00 – \$36.00
 - 2008 – not set yet
 - Wait for DLSE to set the rate

WAGE AND HOUR UPDATE

- Lump Sum Business Expenses
 - Must reimburse expenses – Lab. 515.5
 - Lump sum car expenses approves
 - Gattuso v. Harte–Hank
 - Increased salaries or commissions

- Minimum wages
 - Increased from \$7.50 – \$8.00
 - Effective January 1, 2008

WAGE AND HOUR UPDATE

- Penalty for Missed Meal/Break Periods
 - Wages and not a penalty
 - 3 years statute of limitations
 - Murphy v. Kenneth Cole

Kristine E. Kwong
kkwong@hinshawlaw.com

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