KOUMAS LAW GROUP

Legal Update

Newsletter February 2008

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INSIDE THIS ISSUE:

DON'T BE A POLITICALLY INCORRECT EMPLOYER: VOTING LEAVE RIGHTS AND POSTING OBLIGATIONS

On February 5, 2008, Californians will go to the polls to vote in the presidential primary election. Therefore, California employers need to brush up on their voting leave and posting compliance duties. California Elections Code section 14000 affords rights to employees and imposes duties on employers relative to *certain* elections. The rights only extend to state-wide elections and the obligations are imposed on all employers, regardless of size. Further, the rights only extend to those employees who lack sufficient time to vote outside normal work hours.

Here is a reminder checklist relating to voting rights for the upcoming elections:

- At least **10 days** prior to the election, information concerning employee voting rights must be posted by the employer;
- At least **two days** prior notice must be given by an employee to the employer if voting leave is needed;
- An employer must provide a maximum of **two hours** of **paid** voting leave time;
- Employees must be advised that the leave must be at the start or end of a work shift, if needed; and
- If verification of the employee's participation in voting is going to be required by an employer, advance notice must be provided by the employer.

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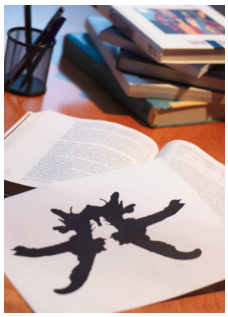
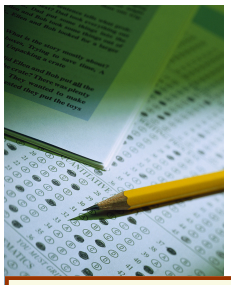
NEW GUIDANCE ON TESTS AND SELECTION PROCEDURES ISSUED BY THE EEOC





Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks. The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on protected characteristics.

The U.S. Equal Employment Opportunity Commission (EEOC) has issued a new fact sheet explaining how federal nondiscrimination laws—including Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act—apply to employer tests and other selection procedures used to screen applicants for hire and employees for promotion. The fact sheet describes common types of employer-administered tests and selection procedures, such as cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks. The document also spotlights "best practices" employers can follow to avoid bias issues when using these tests and other screening devices. Employers can access the EEOC fact sheet on the EEOC website.

Take Away Tip: Businesses can expose themselves to liability from the very start of the employment process, including recruiting and advertising. Elizabeth Koumas conducts customized training on methods for reducing liability in the hiring process. Call (619) 398-8301 or ejk@koumaslaw.com, for more information on the aspects of such training or to schedule training.

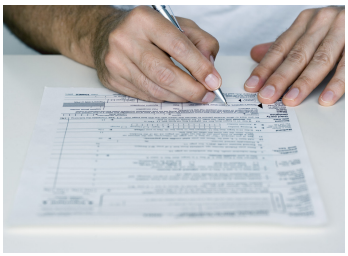
EMPLOYERS CANNOT FORCE EMPLOYEES TO PARTICIPATE IN DIRECT PAYROLL DEPOSIT

Direct payroll deposit can be a real timesaver for employers and employees. But California law prohibits employers from requiring employees to use direct deposit for their paychecks. Specifically, Labor Code Section 213 makes it clear that employers can use direct deposit, but *only* when the employee permits it. Labor Code section 213 states that an employer is not prohibited from making a deposit in a bank account for "wages due or to become due or an advance on wages to be earned" *provided that* the employee voluntary authorizes such deposit. There are various reasons an individual may not maintain a bank account. And an employer cannot force an individual to do so, just to receive the wages the individual has lawfully earned. Many employers inquire whether final wages can be paid to an employee terminating employment through use of direct deposit. Section 213 answers that question in the affirmative and states as follows: "If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment." For more information on the rules relating to final payment of wages, or forms to implement a voluntary direct deposit payroll policy, please contact Elizabeth Koumas.

DEADLINE REMINDER TO POST CAL /OSHA 300 A FORM

February 1 is the deadline for posting the Cal/OSHA Form 300A, annual summary log of injuries and illnesses that occurred in 2007. The form must remain posted until April 30, 2008.

Even if a business had no recordable injuries or illnesses in 2007, covered employers must still post a summary with zeros in the total line. This posting requirement **applies to most employers that had 10 or more employees** in 2007, and it is designed to alert workers to hazards that may exist in their workplace. Employers are directed to post the summary in a conspicuous place where it normally post notices to employees, such as a break room. Further, during the posting period, the employer is responsible for making sure employees do not deface the posting or cover it up with other material.



Cal/OSHA also requires employers to mail or provide the annual summary to employees who don't normally report at least weekly to a location where the annual summary for their workplace is posted.

MEDICINAL MARIJUANA IS NO CURE FOR EMPLOYEE DISCHARGED FROM EMPLOYMENT

On January 24, 2008, the California Supreme Court reaffirmed its position on the issue of whether an employer is liable for disability discrimination with respect to its treatment of employees or applicants found to be using medical marijuana.

In 1996, the Compassionate Use Act was passed, creating Health and Safety Code section 11362.5. This statute gives a person who whose uses marijuana for medicinal purposes at the recommendation of a physician, a defense to certain state criminal charges involving the drug, including possession. However, Federal law still prohibits possession of the drug, even by medical users.

In the case *Ross v Raginwire Tel.*, the plaintiff, whose doctor had recommended use of marijuana to treat his chronic pain, was fired following the employer's receipt of positive pre-employment test results. Both the trial court and appellate court held that plaintiff could not state claims for either disability-based discrimination under the California Fair Employment and Housing Act (Cal. Gov't Code section 12900 et seq.) or wrongful termination in violation of public policy (*Tameny v Atlantic Richfield Co*. (1980) 27 Cal.3d 166-170.) The Supreme Court agreed, holding that nothing in the text of the Compassionate Use Act reveals that voters intended the act to address the rights of employees or duties of employers. Under California law, an employer may require pre-employment drug testing, and take illegal drug use into consideration in making its employment related decisions. Consequently, employers **can** and **should** prohibit employment of individuals found to be using or in possession of such drugs, without fear of legal liability.

Take Away Tip: If you implement a substance abuse testing policy, be sure to apply it consistently. For assistance with drafting a lawful drug testing policy, contact Elizabeth Koumas (619) 398-8301 or

GET A HEAD START– IMPLEMENT A HANDS-FREE CELLULAR PHONE POLICY NOW!

Employers need not wait until July 1, 2008, before implementing a legally permissible policy *prohibiting* employee use of cellular phones unless a hands-free device is used. In fact, employers are encouraged to draft, distribute and enforce such a policy sooner rather than later, to eliminate direct or indirect exposure to legal liability for accidents that may result from an employee's use of a cell phone while operating a vehicle in the course and scope of employment for that business. Such a policy **should** prohibit employees from using (personal or company-issued) hand held cell phones while driving in company vehicles or during company time entirely, or at a minimum, only with a hands-free device. For assistance with drafting and implementing such policy, contact Elizabeth Koumas at ejk@koumas.lawcom or (619) 398-8301.

FUTURE SEMINARS

EMPLOYMENT LAW: FROM A TO Z

Elizabeth Koumas, along with another knowledgeable attorney, will present a day long training seminar on Employment Law, covering topics from recruiting to termination.

Date: June 24, 2008 Time: 8:30 a.m. to 4:30 p.m. Location: TBD

Topics Include:

- Human Resource Records and Documents
- Hiring Policies and Practices
- Overview of Family Medical Leaves
- Harassment Training Rules
- Performance, Discipline, Termination and Recommended Documents
- Essential Wage and Hour Practices and Benefits

LEAVES OF ABSENCE

Elizabeth Koumas has presented this valuable seminar for the past 5 years, and continuing.

Date: November 13, 2008 Time: 8:30 a.m. to 4:30 p.m. Location: TBD

Topics Include:

*	CFRA	*	Workers Compensation Leaves
*	FMLA	*	Disability Related Leaves
*	PDL	*	Other Statutory Leaves of Absence

These seminars will be presented through Lorman Educational Service. For complete agenda, and for registration information, contact Elizabeth J. Koumas at (619) 398-8301 or ejk@koumaslaw.com.

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