KOUMAS LAW GROUP

Employment Law Legal Update

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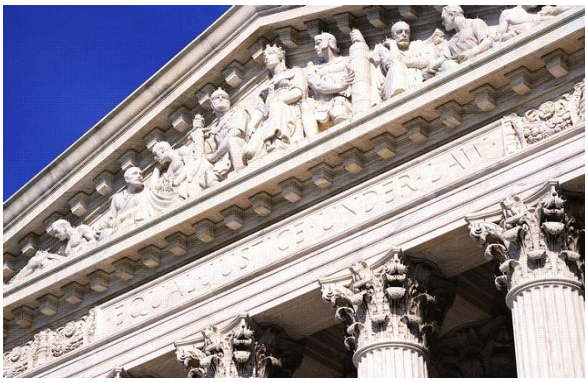


INSIDE THIS ISSUE:

CALIFORNIA'S HIGH COURT FINALLY ISSUES RULING STRIKING DOWN NON-COMPETE AGREEMENTS

The California Supreme Court has issued an important decision in the case of *Edwards v Arthur Anderson LLP,* making it clear that employers cannot restrain an employee's ability to compete, regardless of how reasonable or narrow the restrictions.

The high court granted review to address the validity of noncompetition agreements in California and the permissible scope of employment release agreements. The court limited its review to the following issues: (1) To what extent does Business and Professions Code section 16600 prohibit employee noncompetition agreements; and (2) is a contract provision requiring an employee to release "any and all" claims unlawful because it encompasses nonwaivable statutory protections, such as the employee indemnity protection of Labor Code section 2802?

A tax manager (Edwards), in Arthur Anderson's Los Angeles tax office, complained that a noncompetition agreement precluding him from performing services for or soliciting certain Anderson clients for a period of 18 months after separation of employment, was illegal under California law. The manager further claimed that Anderson unlawfully required him to execute a "Termination of Non-Compete Agreement" (TNC) when Anderson sold its L.A. tax division and as a condition to work for the new owner. The TNC released the tax manager from the original non-compete, in exchange for a general release "of any and all claims" against Anderson. The manager further claimed that the demand that he release Anderson

(Continued on page 2)

from all claim, in exchange for being released from the unlawful non-compete violated public policy, as well as being void since it implicitly waived his nonwaivable statutory rights under Labor Code §2802 (indemnification statute).

In its decision, the Supreme Court ruled that California Business & Professions Code §16600 "flatly prohibits" employee noncompete agreements, *unless* it falls into one of the narrow exceptions set forth in the Unfair Competition Law statutes (*e.g.,* sale or dissolution of a business.) The ruling did not upset prior case law upholding non-compete agreements that are essential to safeguard trade secrets. Further, the court upheld the general release, finding that it did not mention section 2802, and as such the court would not read into the release a waiver of such non-waivable statutory rights.

Take Away Tip: As a result of the ruling, employers should do a review of all severance, separation and other employment agreements to ensure they do not contain such unlawful noncompetition clauses.

BACK TO SCHOOL! EMPLOYERS, ARE YOU READY FOR SCHOOL-RELATED LEAVE FOR PARENTS?

Many children are heading back to school over the next few weeks. So, California employers need to familiarize themselves with the rules concerning when parents are allowed to take a protected leave of absence relating to their children's school activities. Labor Code section 230.7 provides parents to take protected leave relating to a child's school or day care activities.

A California employer with 25 or more employees, must permit an employee who is a parent, guardian, or grandparent having custody of a child in grades K through 12, or attending a licensed day care facility, to take off up to 40 hours each year (no more than 8 hours each month) to participate in the activities of the school or day care. This is also known as the "Small Necessities Law." Generally, this protected absence is without pay.

The employer is entitled to be given reasonable advance notice and can require the employee to use accrued vacation, personal, or comp time for the time off. The employee can also use unpaid time off, to the extent made available by the employer. At the employer's request, the employee must provide documentation from the school or daycare as verification that the employee participated in the facility's activities on a specific date and at a particular time. "Documentation" means whatever written verification of parental participation the school or licensed child day care facility deems appropriate and reasonable.

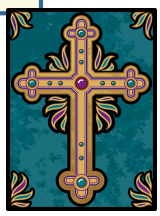
If both parents are employed by the same employer at the same workplace, the leave entitle-

ment applies only to the parent who first gives the employer notice. The other parent may take a planned absence only with the employer's approval. It is a violation of the law to discharge or otherwise discriminate against an employee for taking leave under this law.

Another law, which applies to all employers regardless of the number of employees, prohibits terminating or discriminating against an employee who is a parent or guardian for taking time off from work to appear at the child's school because of a suspension or expulsion. Again, the employer is entitled to be given reasonable notice from the employee before taking the leave.

Take Away Tip: Covered employers are reminded to consider the protections afforded by the labor statute in responding to an employee's request to participate in a child's school related activity. before denying such a request.

NEW EEOC GUIDANCE ON AVOIDING RELIGIOUS DISCRIMINATION IN THE WORKPLACE



Believe it or not, claims of religious discrimination in the workplace are all too common. According to the U.S. Equal Employment Opportunity Commissions , religious-based charge filings were at their highest level last year. Recently, a software developer (Lynn Noyes) at a temporary agency (Kelly Services) located in Northern California, was awarded $6.5 million dollars after a jury found that her manager failed to select her for a promotion due to her lack of certain religious beliefs held by the manager. The evidence also revealed that the manager favored other employees who were members of the same religious association as the manager.

The EEOC has released new guidance for employer s and employees on how to avoid religious bias in the workplace., as well as how to balance the needs of individuals in a diverse religious climate. The guidance, which includes questions and answers, addresses what is religion, what constitutes religious harassment, when an employer must accommodate an applicant or employee's religious beliefs, practices or observance, and common forms of accommodation. The following excerpts were adapted from the EEOC's Compliance Manual Section on Religious Discrimination:

Are there any exceptions to who is covered by Title VII's religion provisions?
Yes. Specially-defined "religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions, and a "ministerial exception" bars Title VII claims by employees who serve in clergy roles.

What is the scope of the Title VII prohibition on disparate treatment based on religion?
Title VII's prohibition generally functions like its prohibition against disparate treatment based on race, color, sex, or national origin. Disparate treatment violates the statute whether the difference is motivated by bias against or preference toward an applicant or employee due to his religious be-

liefs, practices, or observances – or lack thereof. The prohibition also applies to disparate treatment of religious expression in the workplace. For example, where an employee is upset by repeated mocking use of derogatory terms or comments about his religious beliefs or observance by a colleague, it may be evident that the conduct is unwelcome. In contrast, a consensual conversation about religious views, even if quite spirited, does not constitute harassment if it is not unwelcome.

What constitutes religious harassment under Title VII?

Religious harassment occurs when employees are: (1) required or coerced to abandon, alter, or adopt a religious practice as a condition of employment ("quid pro quo" harassment); or (2) subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable. For example, although it is conceivable that an employee may allege that he is offended by a colleague's wearing of religious garb, expressing one's religion by wearing religious garb is not religious harassment. It merely expresses an individual's religious affiliation and does not demean other religious views. As such, it is not objectively hostile. Nor is it directed at any particular individual. Similarly, workplace displays of religious artifacts or posters that do not demean other religious views generally would not constitute religious harassment.

When is an employer liable for religious harassment?

An employer is *always* liable for a supervisor's harassment *if* it results in *a tangible employment action*. However, if it does not, the employer may be able to avoid liability or limit damages by showing that: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. An employer is liable for harassment by co-workers where it *knew or should have known* about the harassment, and failed to take prompt and appropriate corrective action. An employer is liable for harassment by non-employees where it knew or should have known about the harassment, could control the harasser's conduct or otherwise protect the employee, and failed to take prompt and appropriate corrective action.

How does an employer learn that accommodation may be needed?

An applicant or employee must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. Cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. For example, if an employee has requested a schedule change to accommodate daily prayers, the employer may need to ask for information about the religious observance, such as time and duration of the daily prayers, in order to determine whether accommodation can be granted without posing an undue hardship on the operation of the employer's business. Moreover, even if the employer does not grant the employee's preferred accommodation, but instead provides an alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible.

Does an employer have to grant every request for accommodation of a religious belief or practice?

No. Title VII requires employers to accommodate only those religious beliefs that are religious and "sincerely held," and that can be accommodated without an undue hardship. If the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion.

When does an accommodation pose an "undue hardship"?

If it would cause more than de minimis cost on the operation of the employer's business. Factors relevant to undue hardship may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information. Although religious accommodations that infringe on co-workers' ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship, general disgruntlement, resentment, or jealousy of co-workers will not.

How might First Amendment constitutional issues arise in Title VII religion cases?

The First Amendment religion and speech clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech") protect individuals against restrictions imposed by the government, not by private entities, and therefore do not apply to rules imposed on private sector employees by their employers. The First Amendment, however, does protect private sector employers from government interference with their free exercise and speech rights. Moreover, government employees' religious expression is protected by both the First Amendment and Title VII.

Take Away Tip: Avoid religious and other types of workplace bias and harassment by having a well publicized and consistently applied anti-harassment policy and periodically training employees about the prohibited conduct. For assistance with drafting an anti-harassment policy or conducting training, please contact Elizabeth Koumas at ejk@koumaslaw.com.

EMPLOYERS BEWARE! KIN CARE LEAVE MUST BE HANDLED WITH CAUTION

The California Supreme Court has agreed to review the Court of Appeals' decision in the case of *McCarther v Pacific Telesis Group,* (2008) 163 Cal.App.4th 176, which involves the issue of discipline and kin care use. Specifically, the issues that will be presented on review include the following:

(1) Does Labor Code section 233, which requires an employer to allow an employee to use up to one-half of the employee's accrued and available sick leave benefits to care for sick family members, apply to employer plans in which employees do not acquire a certain number of paid sick days but are paid for qualifying absences due to illness; and

(2) Does labor Code section 234, which prohibits employers from disciplining employees for using sick leave to care for sick family members, prohibit an employer from disciplining an employee takes such "kin care" leave if the employer would have the right to discipline the employee for taking such time off for the employee's own illness or injury?

Please stay tuned for the outcome of this case review in a future firm newsletter.

FUTURE SEMINARS

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**: The Handlery Hotel * 950 Hotel Circle South, San Diego.

Topics Include:

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

This seminars will be presented through Lorman Educational Service. For complete agenda, and for registration information, contact Elizabeth J. Koumas.

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