KOUMAS LAW GROUP

Legal Update

Newsletter April 2008

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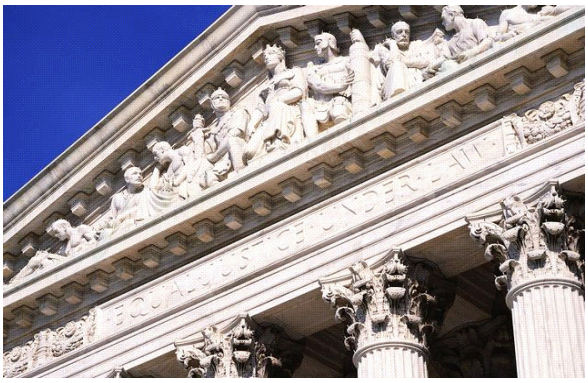

INSIDE THIS ISSUE:

Supreme Court Case Update: Several Employment-Related Issues

In *Reno v. Baird* (1998) 18 Cal.4th 640 (*Reno*), the California Supreme Court held that, although an employer may be held liable for discrimination under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), *individuals* are not personally liable for that discrimination. In *Jones v Lodge at Torrey Pines*, this state's high court had to decide whether the FEHA makes individuals personally liable for *retaliation*. Recently, in a 4-3 decision, the court concluded that the same rule applies to actions for retaliation that applies to actions for discrimination: **Individuals may not be held personally liable for retaliation, only employers.**

In an important new development, the U.S. Supreme Court has unanimously ruled that when fiduciary misconduct diminishes the value of *an individual account* in a defined contribution plan, such as a 401(k), the harmed employee can sue for damages. In the past, courts have taken the contrary position that the federal employee benefits law only permitted suits for harm to the plan as a whole. **Individuals may now file suit for damages sustained as a result of mishandling the individual's retirement account.** As a result of this new ruling, employers that offer defined contribution plans could now see many employee claims arising from losses in individual accounts.

Still to be decided…..The California Supreme Court granted review in the case of *Edwards v Arthur Anderson*, to address the following issues: (1) Is a non-compete agreement between an employer and an employee that prohibits the employee from performing services for former clients invalid under California Business & Professions Code § 6600, unless it falls within the statutorily or judicially created trade secret exceptions? (2) Does a contract provision releasing "any and all" claims the employee might have against the employer encompass non-waivable statutory protections, such as the employee-indemnity protection of California Labor Code section 2802? How the high court will rule is yet to be seen.

GOVERNMENT RAISES EMPLOYER FINES FOR IMMIGRATION VIOLATIONS

As of March 27, 2008, employers that violate federal immigration laws must pay heftier penalties. The minimum penalty for knowing employment of an undocumented worker will increase by $100. Under the new regulation, the minimum penalty for knowing employment of an undocumented worker will increase from $275 to $375. Some of the higher civil penalties will increase by $1,000. Under the current law, for knowingly hiring or continuing to employ an undocumented worker, an employer can face fines of: (1) $275-$2,200 for each undocumented individual; (2) $2,200-$5,500 for each undocumented individual, if the employer has previously been in violation; and (3) $3,300-$11,000 for each undocumented individual, if the employer was subject to more than one cease and desist order. These penalties are assessed on a *per-alien* basis.

A frequent problem, document fraud, occurs when persons knowingly use fraudulent identification documents either identity documents that were issued to persons other than themselves or false attestations for the purpose of satisfying the employment eligibility verification requirements. Civil penalties for document fraud violations include fines of: (1) $275-$2,200 for each document used, accepted or created and each instance of use, acceptance or creation and (2) $2,200-$5,500 for each document that is the subject of a violation where the person or entity was previously subject to a cease and desist order.

For each of these violations, the employer has the right to a hearing before an administrative law judge in the Executive Office for Immigration Review. In this firm's December newsletter, employers were advised about the new I-9 form that must be used in the hiring process. The new form is accessible on the firm's website, at www.koumaslaw.com.

Employers are using the E-Verify system more and more. The system allows participating employers to electronically verify the employment eligibility of their newly hired employees. According to Secretary of Homeland Security Michael Chertoff, E-Verify has over 53,000 users with 1800 new users being added each week.

Take Away Tip: For more information about E-Verify or the changes to the employment eligibility form that must be used in association with the hiring of all new employees, contact Elizabeth Koumas at (619) 398-8301 or ejk@koumaslaw.com.

NEW WAGE AND HOUR DIVISION OPINION LETTERS

The Division recently posted new opinion letters. Three of the Non-Administrator signed opinion letters are designated as FLSA2008-1NA , FLSA2008-2NA and FLSA2008-3NA. Please click on the following link to access these letters: http://www.dol.gov/esa/whd/opinion/opinion.htm

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FLSA2008-1NA, pertains to the issue of whether an employer may prorate a part-time employee's salary and satisfy the salary requirement under section 13(a)(1) of the FLSA. The exemption is not available if the reduced salary falls below the minimum required by law. The question is whether an employer can prorate the minimum salary required under the FLSA exemption to reflect part time status of an employee. **Answer:** There is no provision to prorate the salary requirement per week when an employee's hours are reduced. Under the FLSA, the employee must receive a salary of at least $455 in each week in which he or she performs any work regardless of the number of days or hours worked to qualify for the exemption in section 13(a)(1). The DOL found the salary requirement may not be prorated to reflect reduced hours, and the employee paid a reduced salary per week does not qualify for the exemption. A *non-exempt employee,* however, may be paid a reduced salary to work 20 hours per week without violating the provisions of the FLSA, since non-exempt employees are paid only for the actual time worked. (Whether an employee is paid hourly or salary is up to the employer, so long as the minimum wage and overtime requirements are met.)

FLSA2008-2NA, pertains to a proposed policy by an employer who conducts mandatory on-line computer based training performed at the employee's home. The question is whether the policy is an acceptable method for recording time. The proposed time sheet provided requires such information as the type of training taken, completion date, start and end times, and the employee's and manager's signatures. **Answer:** The FLSA, like California, requires employers to pay for all hours employees are suffered or permitted to work, including work done at home, if "the employer knows or has reason to believe that the work is being performed." Both state and federal laws require an employer to maintain accurate records of "[h]ours worked each workday." No particular method of keeping required records is prescribed, provided that the relevant information is maintained and preserved. The DOL found the employer's timekeeping policy provides an acceptable method of capturing the employee's hours worked.

Finally, FLSA2008-3NA, pertains to whether a paid fire truck driver can perform *volunteer* firefighting services for the same fire department. The agency advised the DOL that the driver in question is a trained firefighter and that his primary duty is driving fire trucks. In addition to driving fire trucks, the driver fights fires, responds to emergencies, maintains the fire equipment, and also maintains the Fire Company's building. The key question was "Is a paid employee (paid driver) also permitted to be an active firefighter in the organization?" In general, an employee of a religious, charitable, or non-profit organization who donates services as a volunteer to such an organization in a capacity different from that in which the employee is employed is not considered engaged in compensable work under the FLSA. **Answer:** An employee cannot volunteer to perform the same services he is paid to perform for the same employer. Therefore, the DOL found that the driver *cannot volunteer* as a firefighter after his regular 40-hour week of work; all time spent as a driver or firefighter is compensable hours worked. All hours worked, including overtime, must be paid in accordance with the FLSA.

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Take Away Tip: Employers should use caution in allowing employees to volunteer their services, making sure the employee does not engage in any task which is usually done for pay by that employee. Employers should also ensure that minimum salary requirements are being met for exempt employees, and proper daily time keeping records are being maintained by all non-exempt employees. For any questions, please contact Elizabeth Koumas.

POSTER REQUIRED FOR NEW FMLA LEAVE RIGHTS FOR MILITARY FAMILIES

The new National Defense Authorization Act, which expands the Family and Medical Leave Act (FMLA) to permit two new types of workplace leave (1) for family members of injured military personnel and (2) military reservists called to active duty, now imposes a *new* posting obligation on covered employers.

The DOL has prepared an insert regarding the new military leave provisions that employers must **immediately display** along with the existing FMLA poster. Access the new poster insert on the DOL website. For more information about this new leave regulation, please visit the November newsletter, which is accessible on the firm's website.

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**: Horton Grand Hotel, 311 Island Avenue

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.

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