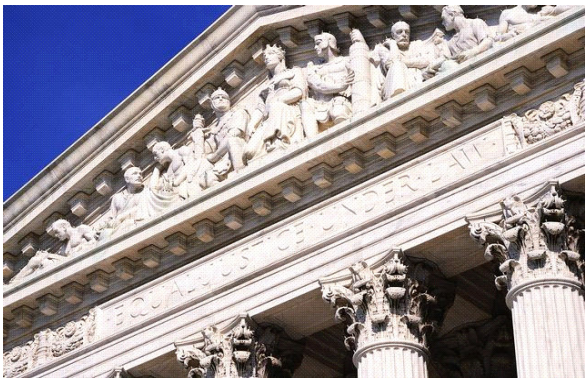
KOUMAS LAW GROUP

Employment Law Update

January 2009

110 West "C" Street, Suite 1810, San Diego, CA 92101/ (619) 682-4811/ www.koumaslaw.com



INSIDE THIS ISSUE:

DON'T START OFF THE NEW YEAR OR THE HIRING PROCESS WITH A STALE JOB APPLICATION

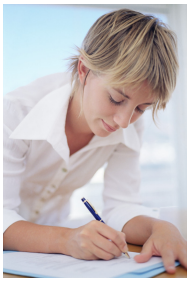
Three plaintiffs represent a class of some 135,000 unsuccessful Starbucks' job applicants. The plaintiffs allege that the Starbucks' employment application contained an "illegal question" about prior marijuana convictions that were more than two years old.

The application's first page includes a question which asks: "Have you been convicted of a crime in the last seven (7) years?" It further explains: "If Yes, list convictions that are a matter of public record (arrests are not convictions). A conviction will not necessarily disqualify you for employment." The reverse side of the Starbucks application contains various disclaimers for United States applicants, as well as Maryland, Massachusetts, and California applicants. These disclaimers are located in a 346-word paragraph directly above the signature line. The California portion of the disclaimer provides: "***CALIFORNIA APPLICANTS ONLY: Applicant may omit any convictions for the possession of marijuana (except for convictions for the possessions of marijuana on school grounds or possession of concentrated cannabis) that are more than two (2) years old, and any information concerning a referral to, and participation in, any pretrial or post trial diversion program.***

Plaintiffs seek to recover actual damages or $200 each, whichever is greater, pursuant to California Labor Code §§ 432.7, subd. (c), 432.8, damages which Starbucks' estimates could total $26 million.

However, nothing in the California Labor Code statutes at issue authorizes job applicants to *automatically* recover $200 per person without proof they were aggrieved persons with an injury the statute was designed to remedy. Although the trial court denied Starbucks request for summary judgment, the company has now filed a petition seeking a writ of mandate from a higher court directing the trial court to vacate its order denying the prior motion and to

enter a new order granting the motion. Plaintiffs' lawsuit suffers from two critical flaws. First, Starbucks attempted to disclaim an interest in the prohibited marijuana conviction information, and two of the plaintiffs understood Starbucks not to be seeking it. Second, no plaintiff had any marijuana-related convictions to reveal.



Practice Tip: Employers should review current applications to ensure that unlawful questions pertaining to drug convictions are not included in the document. To ensure valid and lawful applications are being used in your hiring process, contact Elizabeth Koumas at (619) 398-8301 to schedule a flat rate fee review of your current job application. For more information about these services see firm website at www.koumaslaw.com

IRS Lowers Standard Mileage Rate for 2009

Employers are receiving some economic relief. Effective January, 1, 2009, the IRS standard-mileage-reimbursement rate will be 55 cents per mile for all business related driving. This is a reduction from the rate of 58.5 cents per mile that was in effect in the second half of 2008. As employers may recall, the IRS had made a special adjustment for the second half of 2008 in response to the radical increase in gas prices. The reimbursement rate that was in effect for the first six months of 2008 was 50.5 cents per mile. Although gasoline is a significant factor in the IRS determination of mileage rate reimbursement, other fixed and variable costs, such as depreciation, enter the calculation.

Beginning on January 1, 2009, the standard mileage rates for the use of a car, van, pickup, or panel truck will be:

- 55 cents per mile driven for business
- 24 cents per mile driven for medical or moving purposes
- 14 cents per mile driven in service of charitable organizations

Modified Compensation Levels for Computer Software Employee Exemption

In September, 2008, Assembly Bill 10 amended the Labor Code, to extend the overtime exemption for computer software employees who satisfy the applicable duties standards, to those individuals whose salaries meet the minimum standards.

Effective January 1, 2009, the computer software minimum hourly rate of pay for the exemption will increase from $36 (in 2008) to $37.94. This, in turn, will result in an increase in the minimum annual salary that will be needed to qualify for the exemption from $75,000 (in 2008) to $ 79,050. The increase reflects the 5.4% increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers over the past year.

(Continued on page 3)

(Continued from page 2)

TIP: Employers should review their payroll practices to ensure that the proper hourly rate or salary is being paid to employees that are being characterized as exempt.

New Timesheet Acknowledgment Rule

In August, 2008, Assembly Bill 2075 amended Labor Code section 206.5, which currently prohibits an employer from requiring an employee to execute a release of a claim or right concerning wages due or becoming due, unless payment of those wages has been made.

Effective January 1, 2009, the amendment will regulate employers who ask employees to sign time record statements, including statements referring to hours of work, as well as meal and rest periods. The amendment added section 206.5(b) to define the term "execution of a release" to include "requiring an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period which the employer knows to be false." Violation of the statute is a misdemeanor, and renders the "release" null and void.

Unemployment Compensation Rights Extended

At the end of November, 2008, President Bush signed the Unemployment Compensation Extension Act of 2008, which became effective immediately, to provide relief to those individuals whose current unemployment benefits were about to be exhausted. The Act provides an additional seven (7) weeks of unemployment insurance to out-of-work employees. Coupled with prior legislation, a total of 20 weeks of extended benefits *beyond* the 26-week regular benefit period have been authorized. Notably, in states where the unemployment rate is 6.0% or higher, the new legislation resulted in 13 weeks of additional benefits (for a total of 33 weeks of extended benefits.)

A Brief Synopsis of Significant FMLA Changes

As briefly discussed in the firm's December 2008 legal update, the FMLA revisions are here. Here is a summary of some of the new regulatory changes that will **take effect January 16, 2009.**

Employer Notice Requirements

The DOL has consolidated all employer notice requirements under one section, § 825.300. Under the current regulations, there are two notices – the FMLA poster (Form WH-1420) and the Employer Response form (Form WH-381). Under the revised regulations, there are three employer notices: (1) a new poster, replacing the one issued in 1995; (2) a new Notice of Eligibility and Rights and Responsibilities form, which along with portions of new Form WH-382, replaces the current Form WH-381, and (3) a new form called Designation Notice, which is Form WH-382.

(Continued on page 4)

(Continued from page 3)

- *Form WH-1420 - Poster/General Notice* . A covered employer is required to post and distribute a general notice, even if its employees are not eligible to take FMLA leave. The general notice must also be provided to each employee by including the notice in employee handbooks or other policy guides, or if employers do not maintain handbooks or policy guides, by providing the notice to new employees at the time of hire.
- *Form WH-381 - Notice of Eligibility & Rights and Responsibilities.* An employer is required to provide an eligibility notice within five business days (absent extenuating circumstances) of being advised by the employee that he/she needs to take FMLA leave or has been made otherwise aware of the employee's need for such leave. The new form differs from the current form; notably, if an employer advises the employee that he/she is not eligible for FMLA leave, the employer has to provide at least one reason why the employee is not currently eligible for such leave.
- *Form WH-382 - Designation Notice.* Once an employer has sufficient information to determine whether an employee's leave is FMLA qualifying, an employer has five business days (absent extenuating circumstances) to provide the employee with a notice stating that the leave (specifying the amount) has been designated as FMLA qualifying or that additional information is needed in order to determine whether the leave is FMLA qualifying, and setting forth what additional information is needed.
- *Penalties.* In the event an employer fails to comply with the notice requirements set forth in § 825.300, it may be found liable for monetary losses sustained as a direct result of employer's failure to comply. In § 825.301, the regulations address an employer's liability for failure to designate an employee's leave as FMLA qualifying, which now requires a showing that the employee suffered an actual injury due to the employer's failure to designate the leave as FMLA qualifying.

Employee Eligibility

Clarifies that the 12 months of employment need not be consecutive, but employers need not count a break-in-service of seven years or more in determining whether an employee has been employed for at least 12 months. Provides two exceptions to the seven-year break-in-service rule: 1) an employee's fulfillment of his/her military obligations, and 2) a period of approved absences or unpaid leave, such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. Clarifies that an employee who is not eligible for FMLA protection at the beginning of his or her leave, may begin FMLA once he/she has met eligibility requirements. The revised regulation does not eliminate the requirement that an employee may apply time spent on vacation or sick leave towards the 12-month requirement, provided that he/she remains on the employer's payroll and is receiving other benefits. The revised regulation is contrary to several court cases that have held that eligibility is determined as of the date the initial leave commences.

Serious Health Condition

The definition of a serious health condition still includes the list of conditions outlined in current section 825.114. In response to significant employer concerns, the DOL now provides greater clarity with respect to what is meant by "continuing treatment." In a new section, § 825.115, in order to satisfy the "continuing treatment" requirement, an employee:

- Must visit a health care provider two times within 30 days of the first day of incapacity, unless

(Continued on page 5)

(Continued from page 4)

extenuating circumstances exist that prevent a follow-up visit.

- Must see a health care provider within seven days of the first day of incapacity.
- With a chronic serious health condition, must visit a health care provider at least twice a year.

Substitution of Paid Leave

The DOL instituted the following additional changes or clarifications with respect to the substitution of paid leave in § 825.207:

- An employee who elects to take paid leave must follow the employer's paid leave policies with respect to use of that leave.
- An employer must make employees aware of any additional procedural requirements in conjunction with the use of paid leave. This information must be provided to employees in the rights and responsibilities notice.

These revisions were controversial. In the commentary accompanying the revised regulations, the DOL states that if an employee wants to use accrued vacation, but only needs two hours of leave, the employee can be required to take a full day of vacation if the employer's paid leave policies require, for example, that such leave be taken in increments of no less than a full day.

Leave to Care for an Injured Servicemember

The new regulations provide the first guidance on the new leave. Employees may take leave to care for an injured servicemember who is the employee's spouse, parent, child, and relatives for whom the employee is the "next of kin." Next of kin is defined in § 825.127 as the servicemember's nearest blood relative (aside from those individuals already named). The regulations prioritize who is considered next of kin but allow a servicemember to designate another blood relative as his or her nearest blood relative.

- Employees may take leave to care for an injured son or daughter who is 18 years of age or older. See § 825.122(g).
- The leave year is based on a single 12-month period and begins with the first day the employee takes leave. This differs from how a leave year is computed for all other forms of FMLA-qualifying leave, including exigency leave. See § 825.200.
- Leave is applied on a per covered-servicemember, per injury basis. See § 825.127.
- No more than 26 weeks of leave may be taken during any single 12-month period, regardless of the number of times such leave is sought. See § 825.127.
- A separate certification form, titled "Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave" (Form WH-385) has been drafted for employers to use if they wish. This form is located in Appendix H of the revised regulations.

Leave for a Qualifying Exigency

This leave does not apply to family members of military members who are in the regular armed forces. The revised regulations provide the following clarifications:

(Continued on page 6)

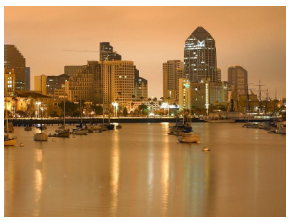
(Continued from page 5)

- A qualifying exigency includes: 1) short-notice deployment (limited to seven calendar days from date notified of deployment); 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation (limited to five days of FMLA leave); 7) post-deployment activities; and 8) additional activities (must be agreed to by both employer and employee). See § 825.126.
- Exigency leave applies to retired military members of the Regular Armed Forces, retired Reserve, Ready Reserve, Select Reserve, Individual Ready Reserve, or the National Guard. This provision does not apply to any retired member of a state Reserve or National Guard unit. See § 825.126.
- The leave year is based on a 12-month period and can be designated by the employer.
- A separate certification form, titled "Certification for Qualifying Exigency for Military Family Leave" (Form WH-384) has been drafted for employers to use.
- In connection with the certification process, an employer is permitted to ask for copies of the military member's duty orders or other military documentation.

Other changes include the following issues:

- ***Employee Notice Requirements***
- ***Medical Certification***
- ***Clarification and Authentication of Certifications***
- ***Second/Third Opinion Process***
- *Recertification*
- *Fitness-For-Duty Certification*
- *Computing FMLA Leave During a Holiday Week*
- ***Light Duty***
- ***Waiver of Rights***
- ***Perfect Attendance, Production Bonuses***.

Practice Tip: Employers should revise their FMLA policies as well as their procedures for administering FMLA leaves in light of the new regulations defining family military leaves and the new DOL recommended forms and processes. Human Resource personnel should be trained regarding the new changes. For more information about these revisions to the FMLA or any of the new forms, please contact Elizabeth Koumas at (619) 398-8301, or at ejk@koumaslaw.com.



SUBSCRIBE NOW!

If you know anyone who would like to receive our complimentary newsletter by e-mail, they should subscribe through the firm's website, at www.koumaslaw.com.