KOUMAS LAW GROUP

Employment Law Update

January 2011

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EMPLOYER RESOLUTIONS

The new year is a perfect opportunity for employers to implement changes in policies, procedures (and benefits) in order to reduce potential exposure to legal claims, make the company more competitive, and improve your bottom line.

1. Implement a Good Employee Handbook

An employee handbook is akin to the Employer's Constitution, or the Employee's Bill of Rights. It sets the rules of the employment relationship. Don't have an employee handbook? No time like the new year to develop one and distribute it to all new and current employees. Already have an existing manual? Then have it reviewed to ensure it is up to date and includes any additional policies to reflect changes in the law. Well written policies that are consistently applied help effectively communicate at will employment, establish acceptable standards of conduct and minimize workplace claims, such as harassment and discrimination.

2. Review Exempt Classifications

It is better to be safe than sorry, by reclassifying an exempt employee, whose status is questionable, to non-exempt at the start of a new year. Job descriptions for those employees who are reclassified should be reviewed and revamped, as necessary, to reflect actual job duties.

3. Review and Revise The Vacation Policy

There are three ways to make a vacation policy more economical. First, employers who have a Paid Time Off ("PTO") policy, which combines sick and vacation benefits, could separate the benefits into two distinct policies. Although California employers

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have to pay out accrued unused vacation benefits upon separation, they need not payout unused sick benefits unless they are combined with vacation benefits in a "PTO" policy. Second, a waiting time can be imposed on the starting date to accrue benefits for new employees. This would eliminate the need to payout benefits to short term employees that do not work out. Third, placing a cap (or maximum limit) on the total amount of benefits that can be accrued by an employee in any given year, rather than permitting annual roll over of benefits, will minimize the amount of continuing financial liability to payout unused benefits at separation.

4. Review Company Health Benefits

Employers who offer group health insurance benefits and pay one hundred percent of the employee's monthly premiums may want to re-think cost sharing with the employee. Even shifting a small percentage of the monthly costs associated with the employee's premiums to the employee could make a significant difference to the yearly budget. Offering an incentive such as a stipend to employees who decline participation in any group plan which could be used to participate in a spouse's plan, would also decrease insurance costs. Employers should also review whether the coverage available under the current plan(s) offered are worth the expense paid, or whether another plan might provide better coverage at a lower price.

5. Review and Revise Any Paid Holiday Policy

Even though there is no legal requirement to offer any, how many paid holidays do you offer each year? Martin Luther King Day, President's Day, Memorial Day– what about the employee's birthday? Could you eliminate one of those days on a rotating basis each year? What about setting eligibility criteria—Do you impose any conditions which must be satisfied before employees are entitled to receive such paid benefits? By way of example only, do you require that employees work both the work day immediately before and immediately after the holiday is recognized by the company, in order to be eligible to receive holiday pay? Implementing either one of the foregoing practices would increase productivity and decrease costs.

6. Consider Performance Bonuses

Instead of granting automatic annual wage increases at year end or on an employee's anniversary date, tie an employee's year end compensation to either the employee's performance or the overall performance of the business.

7. Conduct Training

Many employers promote employees to managerial positions, some due to a demonstration of supervisory abilities, others simply because of the passage of time. It is essential that employers equip these managers with the proper tools necessary to be effective and efficient supervisors. Conduct training on supervisory communication techniques is equally as important as anti-harassment training, to reduce potential legal risk for discrimination claims. Have you conducted your training yet?

PRACTICE TIP: Changes introduced at the start of a new year seem less abrupt to employees, and, in turn, less disruptive to the workplace. Therefore, employers should review their policies and practices and decide which ones need modification to start the year off on the right foot. For assistance with implementing any of the foregoing policies and/or practices, or to conduct workplace training, contact Elizabeth Koumas at (619) 398-8301 or ejk@koumaslaw.com.

Effective January 1, 2011- there will be no change to the computer software exemption minimum hourly rates - the computer software exemption minimum hourly rate of pay will remain at $37.94/hour or a minimum annual salary of $79,050.

THE LIMITED RIGHT TO *REQUIRE* USE OF PAID BENEFITS DURING FMLA LEAVE

When it comes to the issue of whether an employer can mandate that an employee use accrued time off benefits while on a FMLA leave of absence, there is somewhat conflicting information found in the FMLA regulations. In Title 29 of the Code of Federal Regulations, section 825.207 (a) sets forth what has generally been considered the basic rule about *requiring* employees to use accrued time off during FMLA: "FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave." However, section (d), which pertains to employees covered by a disability leave plan, states otherwise. *All* California employees are considered covered under a disability leave plan because, if eligible, they are entitled to California State Disability benefits ("SDI").

Section (d) states: "Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth in Sections 825.112-825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. *However*, employers and employees *may agree*, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case

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where a plan only provides replacement income for two-thirds of an employee's salary."

Consequently, where an employee takes FMLA due to the employee's own serious health condition, the employer can't *require* the employee to use his or her accrued paid time off because the employee would have SDI income. The employer and employee can *agree* to have paid time off supplement the SDI, but the employer can't *require* it nor can the employee demand its use under the same circumstances. Therefore, appropriate interpretation of section (a), in conjunction with section (d), indicates that an employer can require the use of the paid time benefits under the limited circumstances where an employee does not elect to use accrued paid benefits while taking an FMLA qualifying leave *other than a leave due to the employee's own serious health condition*.

PRACTICE TIP: Covered employers should review FMLA leave *policies* to see if they contain a written statement about an employee's right to use accrued time off benefits which does not run afoul of the regulations. If no policy exists, serious consideration should be given to drafting and implementing one. Also, employers should make sure any *existing custom and practice* regarding the use of accrued paid benefits during family and medical leaves is in compliance with the law. Elizabeth Koumas has experience and can assist with drafting such policy language. (619) 398.8301.

EMPLOYMENT LAW COMPLIANCE AND RISK REDUCTION SERVICES

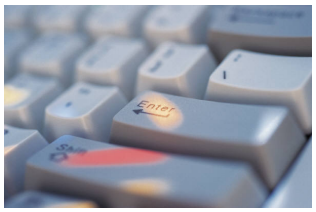
Annual Audit of Employee Handbook

"When was the last time an audit was conducted of your written policies, to ensure compliance with current labor laws?"

It is critical to the success of any business operations to learn how to protect your company's interests while conveying your employees' rights and obligations in a handbook. Periodic review of your policies and practices will help ensure compliance with the ever changing labor laws. By way of example only, if you are a covered employer, do your leaves of absence policies contain the new protections for leave relating to active duty reservists (enacted in October 2008), or to care for injured military personnel (effective January 2009)? To prevent your written policies from being used against you, including but not limited to, your discipline policy creating an implied contract to discharge employees only for good cause, and granting leave of absence rights where you are not otherwise obligated to provide them, schedule an audit of your employee handbook immediately.

~Contact Elizabeth Koumas to obtain a flat fee quote to conduct an audit of your handbook policies.~

EMPLOYEE-ATTORNEY COMMUNICATIONS VIA COMPANY EMAIL NOT PRIVILEGED



In the case *Holmes v. Petrovich Development (1/13/2011)*, a California Court of Appeal held that e-mails sent by employee Holmes to her attorney regarding possible legal action against employer-defendants did not constitute "'confidential communication between client and lawyer'" within the meaning of California's Evidence Code section 952. This is because Holmes used a computer of employer-defendant to send the e-mails even though (1) she had been informed of the company's policy that its computers were to be used only for company business and that employees were prohibited from using them to send or receive personal e-mail, (2) she had been warned that the company reserved its right to monitor its computers for compliance with this company policy and thus might "inspect all files and messages . . . at any time," and (3) she had been explicitly advised that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message."

An attorney-client communication "does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication." (Evid. Code, § 917, subd. (b).) However, the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him. By using the company's computer to communicate with her lawyer, knowing the communications violated company computer policy and could be discovered by her employer due to company monitoring of e-mail usage, Holmes did not communicate "in confidence by means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (Evid. Code, § 952.) Consequently, the communications were not privileged.

The foregoing case demonstrates the practical and legal importance of having an explicit policy regarding the use of company property relating to electronic communications. An effective policy should, *at a minimum*:

- Cover Internet, intranet, extranet, and email usage;
- Provide guidelines for use of company electronic communication systems;
- Reserve right to monitor and review electronic communications transmitted via company property;
- Prohibit or limit use of company computers for personal purposes; and
- Advise employees to have no expectation of privacy concerning communications via company property.

FUTURE SEMINARS

Time Off:
State and Federal Laws on Employee Leaves

Date: March 23, 2011 **Time:** 8:30am-4:30pm
Location: Hilton Garden Inn San Diego Del Mar,
3939 Ocean Bluff Avenue
Sponsor: Lorman Education Services
Cost: $329 (20% KLG client discount)
Continuing education credits available, AIPB, HRCI, HRPD, CPE

Effective Discipline and Termination Techniques

Date: April 14, 2011 **Time**: 11:30am-1:00pm
Location: 5575 Ruffin Road, Suite 250, San Diego, CA 92123
Sponsor: San Diego County Medical Society
Cost: TBD

What you will learn:

- The importance of a written disciplinary policy
- Guidance on properly conducting internal investigations and confidentiality
- Proper implementation of discipline
- The value of effective performance appraisals
- Recommended steps in the termination and layoff process

CA Employment Law From A to Z

Date: June 17, 2011 **Time:** 8:30am-4:30pm
Location: TBD
Sponsor: Lorman Education Services
Cost: TBD
Continuing education credits available, AIPB, HRCI, HRPD, CPE

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