KOUMAS LAW GROUP

Employment Law Update

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Termination Meeting and Final Check: Are You Required to Include Reporting-Time Pay?

You have decided to terminate an employee, but you are not sure when you are going to convey the bad news. Your options for scheduling the termination meeting may include any of the following scenarios:

1. At the end of the same workday (*i.e,* scheduled Monday, works Monday and termed Monday);
2. At the start of the employee's next scheduled day of work (*i.e.,* scheduled next Tuesday and termed on next Tuesday);
3. Upon the employee's return to work from a leave of absence (*i.e.,* last worked two months ago, received return to work medical document on Friday, scheduled to work next Monday, and termed on Monday);
4. On a non-workday that the employer has chosen to ask the employee to come into the office to discuss status of employment (*i.e.,* not scheduled or expected to work Friday, but called in for termination).

As an employer, if a termination meeting is going to be conducted under any of the above scenarios, or a variation therein, you had better be taking into consideration the rules for Reporting-Time Pay (aka "Show-Up Pay") and, where applicable, compensating terminated employees properly at time of separation.

In order to encourage proper scheduling and notice to employees when changes in hours are necessary, each of the California Wage Orders requires covered employers to pay nonexempt employees for certain unworked, but regularly scheduled time.

<u>Reporting Time Rules</u>

- Where an employee is required to work, reports to work, and

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is not put to work or does not work *at least half* of the employee's usual or scheduled day's work, the employee must be paid *half* of the shift reporting time wages not to exceed four hours.

- If an employee is not scheduled to work or does not expect to work his usual shift, but must report to work for a meeting, training, etc. the employee falls into the regulatory category of those employees called to work on their day off for a scheduled meeting. In that case, the employee is entitled to receive the *minimum reporting time payment* of 2 hours at the employee's regular rate of pay.

The two-hour minimum is to address the situation when the employee has no usual work day, or is *not* scheduled to work on a given day, but is called in for an unspecified number of hours. It is not applicable if an employee works part-time and the scheduled workday is less than two hours by agreement. There are *exceptions to the reporting time pay requirements* when an employer's ability or failure to provide the employee with their scheduled amount of work results from some cause beyond the employer's control. Such exceptions include:

(a) an inability of its operations to commence or continue because of threats to employees or to property, or because of the recommendations of civil authorities;
(b) a failure of the sewer system or of public utilities to supply electricity, water, or gas;
(c) an interruption of work caused by an act of God or other cause outside of the employer's control;
(d) instances where an employee makes a request to leave work early for personal reasons; or
(e) where an employee reports to work unfit.

Reporting time pay rules do not apply:

- To employees on paid standby status and who are called to perform stand-by work on nonscheduled time (*e.g.,* a relief cashier);
- To an employee who is sent home early or discharged as a disciplinary measure since unsatisfactory performance is not an exception.

In the event that an employer pays an employee reporting time pay, only the time the employee *actually worked* need be counted as hours worked. Any amount of compensation which exceeds the compensation payable for the hours *actually worked* is considered payment for other than hours worked. This issue would impact determining the employee's regular rate of pay in a given pay period, such as for calculating the overtime rate for that employee.

Based on the rules, under Scenario #4, where the employee was not scheduled to work on the particular day that the employer chose to have the employee to come into work for purpose of conducting the termination meeting, the employee does not have an expectation of working his or her usual shift on that day. In that case, the employee is *entitled to be compensated at least two hours for reporting time pay* at his or her regular rate of pay in effect at that time. If the meeting takes longer than two hours, the em-

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ployee should be compensated for all of the hours reported at the employee's regular rate of pay.

Under either Scenario #1, 2, or 3, where the employee is scheduled to work on the day the employer conducts the termination, the employee shows up to work, but is not permitted to actually work *at least half* of the employee's usual or scheduled day's shift, the employee is entitled to be compensated half of employee's scheduled shift up to a maximum of four (4) hours. Examples:

- If an employee was usually scheduled to work only six (6) hours, and shows up to work on the day he is terminated, but is prevented from working at least three (3) hours of his scheduled shift (due to the termination), that employee must be paid reporting time wages for coming to work that day equivalent to at least three (3) hours at the employee's regular rate of pay.
- If an employee was usually scheduled to work eight (8) hours, and shows up to work on the day he is terminated, and is terminated any time after the employee has worked at least four (4) hours of the scheduled shift until he was terminated, that employee is not entitled to reporting time wages for coming to work that day, and need only be compensated for his actual hours worked at the employee's regular rate of pay.

Reporting time pay can be deemed "wages" where any portion of it is compensation for hours actually worked. Such wages are therefore due and owing at the time of termination, or the employer exposes itself to waiting time penalties, recoverable pursuant to Labor Code section 203.

Do Your Skillful Interviewing Techniques Pass Legal Muster?

After you've screened résumés and applications, conducting face-to-face interviews is the next essential step to help you determine which of the candidates is actually the best person for the job. When you make good hiring decisions, you and the organization benefit. When poor choices are made, everyone suffers. That makes interviewing an important responsibility in the workplace. Everyone that interviews needs to know how to plan and conduct effective and legal interviews in order to learn all they possibly can about job candidates so that the best hiring decisions can be made.

Make sure you conduct interviews in compliance with the law (and company policy):

- California and federal fair employment laws prohibit discrimination in hiring based on any protected characteristic, including race, color, national origin, religion, age, sex, sexual orientation, marital status, or disability. The laws apply to all job interviews.
- Your organizations should be expressly committed to equal employment opportunity, or EEO. Applications and handbooks should state that your company's EEO policy prohibits discrimination in the hiring process, including in job interviews.
- Applicants who feel that they have been discriminated against during an interview can file a complaint with the state Department of Fair Employment and Housing (DFEH) or the federal Equal Em-

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ployment Opportunity Commission (EEOC).

- If the DFEH or EEOC believes an applicant has been discriminated against during an interview, they will help the applicant file a lawsuit against your organization. When that happens, there is the potential for liability and costly damages. Regardless of the outcome, there will be costly legal fees.
- Make sure you know your organization's EEO policy, especially the provisions that apply to interviewing. *Review your organization's EEO policy, highlighting provisions that apply specifically to interviewing.*

Develop effective interview questions.

- Ask only job related information- use a current accurate job description to develop these questions.

When you ask a question, be mindful that it will be difficult to defend the practice of seeking information that is not related to the applicant's position.

- Interviewing "do's":
  - Review applications and resumes to identify areas needing further clarification.
  - Ask supervisor(s) or trainees for the position for which you are conducting interviews to draft 5-10 interview questions.
  - Appropriate areas of conversation during the interview include the job itself, its duties, and responsibilities. You can also talk about the organization, its missions, programs, and achievements. It is appropriate to talk about career possibilities and opportunities for growth, development, and advancement relating to the position sought. Other proper topics can include where the job is located, any required travel, company equipment, and available facilities.
  - The candidate's qualifications, abilities, experience, education, and interests are all suitable topics. Ask only for the information you intend to use in making a hiring decision. Know how you will use the information to make that decision.
- Review the permissible and impermissible inquiries identified by the Department of Fair Employment and Housing. See Form *DFEH 161*, available in pdf format.
  - You can't ask, "Do you own or rent your home?" . . . But you can ask, "How long have you lived at this address?"
  - You can't ask, "How did you learn to speak Spanish?" . . . But you can ask, "Do you know any foreign languages?"
  - You can't ask, "Where were you born?" . . . But you can ask, "Are you legally authorized to work in the United States?"
  - You can't ask, "Will child care affect your schedule?" . . . But you can ask, "Will you be able to work 5 days a week?"
  - You can't ask, "Can I see your military records?" . . . But you can ask, "Have you ever been in the U.S. armed forces?"
- Remember these important interviewing "don'ts":
  - Don't ask discriminatory questions. Any questions about protected groups (including race, relig-

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ion, age, ethnic group, national origin or ancestry, political beliefs or affiliations, sexual orientation, or disability) may be discriminatory.

- Don't ask an applicant's age or date of birth. Don't even ask questions that hint at age, such as what year an applicant graduated from high school or college.
- Don't ask about citizenship or country of birth. Also, be careful not to ask any questions that could be construed as implying discrimination. For example, questioning an applicant about the origin of an unusual surname could be misconstrued. You should tell all applicants, however, that they will be asked to verify eligibility to work in this country upon being hired.
- Don't ask about disabilities or illness. If a disability is obvious, or if an applicant brings the issue up during the interview, you can explain essential functions of the job and ask the applicant if he or she can perform those functions, with or without accommodation.
- Don't ask about marital status, children, or childcare arrangements. You can ask whether the applicant understands and has any problems with complying with the scheduled work hours of a position, including any need for overtime work as needed.
- Don't ask about an applicant's religion. That includes not asking if an applicant can work certain days of the week or certain holidays. You can, however, inform an applicant of the work schedule and ask if the applicant has any problem with the schedule. If the applicant does have a problem for religious reasons, you cannot automatically eliminate this candidate. You would be required to make a reasonable accommodation should you hire the individual.

- Don't ask about affiliations—clubs, social organizations, and other groups that could indicate membership in a legally protected minority group.
- Don't ask any questions about an applicant's personal life, including personal finances, sexual orientation, intention to marry and/or to have children. Be especially wary of this during the first few moments of the interview when you and the applicant are establishing rapport.
- Don't ask about arrest records. You may, however, ask about criminal convictions, but only insofar as they are job related. For example, if a job involves handling money, you can ask about convictions for theft.

Your notes should be factual.

- Document your questions and the key elements of the applicant's responses.
- Avoid any opinions or personal biases in your note-taking. If your notes are ever subpoenaed in a lawsuit, this kind of information could be cast in a bad light and put forth as evidence of discriminatory intentions on your part.
- Make sure that you note only job-related information. For example, there is no need to note information about the way the applicant is dressed or groomed unless these matters are directly related to the job, such as in the case of a customer service employee or someone who is being hired to work in reception and will be the face of the organization to the public.

U.S. Supreme Court Approves Class Arbitration Waivers

Our California Supreme Court held in 2007 that state law prohibits enforcement of arbitration agreements containing a clause precluding class certification as an unenforceable "exculpatory clause." A U.S. Supreme Court opinion in 2009, however, held that arbitrators may *not* conduct a class-wide arbitration where the parties' agreement fails to address the issue of class actions at all. In a recent U.S. Supreme Court decision (6/4/11), plaintiffs entered into a *consumer agreement* providing for arbitration of all disputes, and required that claims be brought in the parties' individual capacity, not as class members. The trial court denied enforcement based on the basis the agreement was unconscionable under state law, because it disallowed class-wide proceedings, which the Ninth Circuit appellate court affirmed. But after a trip to the U.S. Supreme Court, it was held that the Federal Arbitration Act (9 U.S.C. § 2) makes an agreement to arbitrate valid, irrevocable, and enforceable except upon such grounds as exist in law or equity for the revocation of any contract. When state law prohibits outright the arbitration of a particular claim, the FAA displaces the conflicting rule. Thus, the consumer agreement at issue should have been enforced to prohibit class-wide treatment of the claims. Although this case did not involve an employment agreement, the rationale for permitting enforcement of the agreement should apply to arbitration agreements between employer and employees, to help limit class-wide claims.

Summer Is Here! Are Dress Code Violations Heating Up?

With the recent rise in temperatures, the arrival of summer may create an increase in dress code policy violations as a result of inappropriately dressed or scantily clad employees. With warm weather comes more employee skin, tattoos, and piercings than many employers want to see. Such attire can lead to flirtatious behavior and sometimes a general decline in office professionalism.

Many employers who have implemented the dress code policy of "casual Friday," believed that loosening the rigid standards of the past would improve morale, and that workers would have the good judgment to replace coats and ties, skirts and blouses, with equally tasteful (though less formal) attire. However, due to mini-skirts, halters, T-shirts with controversial messages, and ripped jeans, (not to mention potential legal disputes over disciplining employees who wore them), some companies have backed off this trend.

Labor laws are fairly silent about dress codes but not about avoiding discrimination in how you treat employees, especially in protected groups. Your dress policy must respect health needs and the customs of religion and national origin, must not burden one gender more than the other, and must both be consistently applied and based on reasonable business needs. Many dress codes merely insist that employees appear professional, but there seems to be no generally accepted agreement on what professional is.

Any policy must include provision for the consequences for violations. It used to be a simple matter of sending an inappropriately dressed worker home to change, but these days home may be a 90-minute

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ride away. Consider also how to handle repeat violators, and what to do about employees whose intentions are innocent and who see their personal style as flattering, even as others are offended or embarrassed.

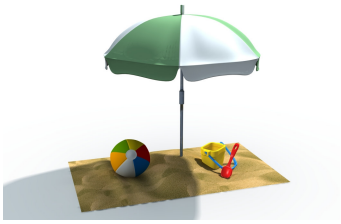
Here are some tips for employers to keep dress code standards up when the heat is climbing:

A written dress code. Be specific as to what is prohibited, but be sure to state the list of unacceptable clothing is not comprehensive. Emphasize the fact that every employee's attire will be reviewed for appropriateness on a case-by-case basis. Also, make sure your dress code does not discriminate against employees who wear certain clothing for religious reasons or who dress consistent with their intended gender.

Consider keeping sweaters available. Consider having the personnel manager keep sweaters or other cover-ups available for employees whose attire is not appropriate for work. Employees can also be instructed to go home to change into more professional clothing (without pay if a nonexempt employee).

Be specific but sensitive. When counseling an employee about a dress code violation, explain why the attire is objectively inappropriate without personally criticizing the employee's values or lifestyle. Focus on the attire rather than on the employee, in order to reduce the possibility of subjecting yourself up to a discrimination lawsuit.

Employers: Gear Up For Summer Vacations



Although the law does not require employers to provide vacation benefits to employees, this discretionary employee benefit can create many issues for business owners. By way of example, there is a risk to employers when exempt employees check work email or voice mail while vacationing. And there's another risk for employers whose employees are not taking all their vacation days: In California, vested vacation time cannot be lost, and will continue to add up—and it all has to be paid out as wages upon separation from employment. So if a motivated employee has foregone a few vacation days a year, you could be facing a big payout if the worker quits or is discharged after several years of employment.

As your employees are getting geared up for the summer vacation season, here are some strategies to minimize and manage your company's vacation liability and ensure employees get the rest and relaxation they need to be productive:

Impose a cap. Even though "use it or lose it" vacation policies are illegal in California, an employer can limit vacation accrual with a policy that caps the number of vacation days an employee can accrue

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at any given point in time. An employer can implement a policy that once an employee's accrued vacation reaches a specified amount or maximum, no additional vacation benefits will be earned until the accrued vacation falls below the cap. This enables an employer to control the extent of any financial liability that arises from employees not taking vacation time.

Require time off. Not only is this a good policy to increase employee morale and productivity but it can also help keep the vacation books clean, and the potential financial liability upon separation lower.

Simplify the process. If employees are overwhelmed with projects at work, more likely than not they feel that they just can not take time away from the office for that vacation. Employers can allay those concerns by establishing vacation coverage guidelines, such as figuring out the number of employees needed for support at different times of the year, ensuring employees are cross-trained to cover for others while out, and communicating coverage expectations to supervisors and employees. Managers should also be encouraged to work one-on-one with employees to plan for coverage of important tasks that might need to be done during an employee's absence.

Instruct employees to leave all work behind. Let employees know that vacation means that they should not be checking voice mail, email, etc. We all know that sometimes a work emergency arises during an employee's vacation that needs the employee's immediate attention—but this should be the exception rather than the rule.

Cash out regularly. An employer can implement a policy which allows the employer to pay out accrued, unused vacation benefits, either annually or on some other specified frequency. This allows employers to manage cash flow better than waiting for final payout, as required by law, upon separation.

Take Away Tips

Review your vacation policies to determine if your company's financial liability can be reduced by implementing some or all of the above strategies into your existing vacation policy. Audit your current status of accrued vacation benefits that current employees have on the books, and encourage employees with any significant amount of benefits to start taking vacation, or consider paying it out. Remember, no employee may lose any vacation benefits which have already been accrued but not yet used. For assistance with review of, drafting or revising any vacation policy, please contact Elizabeth Koumas at (619) 682.4811 or ejk@koumaslaw.com.

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