BARKER KOUMAS & OLMSTED
A PROFESSIONAL LAW CORPORATION

Legal Update

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FAILURE TO PROVIDE NOTICE OF LEAVE RIGHTS LEADS TO WRONGFUL TERMINATION LAWSUIT

By Christopher W. Olmsted

An employer covered by the federal Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) must remain ever vigilant when it is known that an employee takes time off on account of illness or to care for ill family members. The recent California case *Faust v. California Portland Cement Company* reveals that even trained HR professionals may misapply these technical, complex laws.

After reporting his co-workers for theft and misconduct, Mr. Faust perceived that his co-workers began treating him poorly. Fearing for his safety, he experienced anxiety and left the workplace. Soon after, he filed a workers' compensation claim and also sought psychiatric care.

Faust's psychiatric medical provider issued documentation of the impairment and recommended a 30 day treatment plan. Mr. Faust also experienced debilitating back pain. He delivered to his employer a note from his chiropractor note which recommended physiotherapy, chiropractic therapy and rest, and stated "[t]he patient is unable to perform regular job duties from 3-31-03 to 5-1-03."

An HR representative from California Portland Cement contacted Mr. Faust and informed him that the

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*"The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice **requirement."***

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note was incomplete. The rep wanted documentation from a medical doctor instead of the chiropractor, and also wanted documentation justifying the work absence. The section entitled "Authorization for Absence" was left blank and the section entitled "Work Status Report" stated that he was "unable to perform *regular* job duties from 3/31/03 to 5/1/03," but listed no restrictions or modified duties.

Mr. Faust declined to speak to the HR rep, but he did leave messages suggesting that she contact his attorney or doctor.

The HR rep did not provide any information regarding FMLA or CFRA leave. Two weeks later, having received no further information from Mr. Faust, the HR rep terminated his employment.

Mr. Faust subsequently sued, alleging, among other things, that he had taken a protected leave of absence and that his termination violated the CFRA. Trial court dismissed the case following Portland Cement's motion for summary judgment. The trial court agreed with Portland's argument that because Faust's chiropractor was not a certified health care provider, Faust did not give Portland proper notice of a CFRA qualifying leave prior to his termination, and Faust was properly terminated for refusing to cooperate with Portland's legitimate good faith requests for additional medical information necessary to evaluate his fitness for work.

The appellate court disagreed with the trial court. The appellate court determined that Portland Cement should have known that Mr. Faust was requesting a protected leave of absence, and therefore it should have complied with certain regulatory mandates.

The court relied upon the California Code of Regulations. Title 2, section 7297.4, at subdivision (a)(1), which sets forth the notice requirements of a request by an employee for CFRA leave as follows: "An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. ***The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement***; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. ***The employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken.***"

Further, noted the court, the implementing regulations impose an obligation on the employer to inform employees of its notice requirements, and set forth the consequences if an employer does not duly advise the employee. California Code of Regulations, title 2, section 7297.4 provides at subdivision (a)(5): "Employer Obligation to Inform Employees of Notice Requirement. An employer shall give its employees reasonable advance notice of any notice requirements which it adopts. The employer may incorporate its notice requirements in the general notice requirements in section 7297.9 and such incorporation shall constitute 'reasonable advance notice.' ***Failure of the employer to give or post such notice shall preclude the employer from taking any adverse action against the employee***, including denying CFRA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave."

The court concluded that the Portland Cement HR rep had sufficient information suggesting that Mr. Faust might be covered by CFRA. She knew that he was receiving psychiatric treatment for anxiety, that he had filed a workers' compensation claim, and that his chiropractor had deemed him unfit for regular duty. The court faulted the representative for failing to follow up with Mr. Faust in order to obtain sufficient information about whether Mr. Faust may be covered by CFRA. Further, the representative failed to warn Mr. Faust that his leave

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would be denied and he would be terminated if he failed to comply.

The appellate court further noted that the HR rep unjustifiably required a medical doctor's note rather than the chiropractor's note. "Contrary to the view expressed by [the HR rep], a physician is not the only health care provider who can certify a serious health condition under the CFRA. . . . [F]or purposes of the CFRA, a chiropractor is a health care provider 'limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist.' (§ 12945.2, subd. (c)(6)(B); 29 C.F.R. § 825.118(b)(1)(2007).) Therefore, Dr. Andalib, as a chiropractor, was not necessarily precluded from certifying a serious health condition."

Accordingly, the appellate court reinstated the case and returned it to the superior court for trial on the merits.

Take Away Tips

For Employee Leaves

- Employers covered by FMLA and CFRA should provide all covered employees with notice of their rights and the procedures for taking leave. If properly drafted, posters, employee handbooks and leave request/response forms meet the minimum requirement.
- Supervisors, managers and human resources personnel should be trained to identify employee absences that could potentially constitute protected leave.
- When in doubt, obtain sufficient information from the employee to determine whether coverage exists, and provide notice of leave rights and certification obligations, along with the consequences for failing to comply.

"Supervisors, managers and human resources personnel should be trained to identify employee absences that could potentially constitute protected leave."

LEARN MORE ABOUT PROTECTED LEAVES

This fall, Chris Olmsted and Elizabeth Koumas will present a day long training seminar on FMLA, CFRA, and other protected employee leaves.

Date: October 25, 2007
Time: 8:30 a.m. to 4:30 p.m.
Location: TBA downtown San Diego

Topics Include:

- Federal Family And Medical Leave Act (FMLA) And California Family Rights Act (CFRA)
- California Pregnancy-Related Disability Law Length Of Leave Entitlement
- Interaction Between Family Leave Laws And Disability Laws
- Workers' Compensation
- Strategies For Handling Employee Leaves
- Other Protected Leaves

The seminar will be presented through Lorman Educational Service. For a complete agenda, and for registration information, contact Christy Corpuz at (619) 682-(619) 682-4040 or cgc@barkerkoumas.com.

DEDUCTIONS FROM BONUS PAYMENTS DO NOT NEGATE EXEMPT STATUS

By Elizabeth J. Koumas

"Deductions made from bona fide bonus payments are permissible and do not affect the employees' otherwise exempt status."

The U.S Department of Labor ("DOL") concluded, in an opinion letter, that deductions made from bona fide *bonus* payments were permissible and did not affect the employees' otherwise exempt status. An opinion letter is an official ruling or interpretation by the Division for purposes of the Portal-to-Portal Act. The letters are the Division's interpretation of the requirements discussed, in the context of a specific factual situation. These rulings can serve employers as a good faith defense for violations of the FLSA.

The DOL's assessment was limited to the specific compensation plan described by the employer requesting the opinion relating to managers treated as exempt executives under the Fair Labor Standards Act ("FLSA".) In the instant scenario, the managers received a weekly salary in excess of $455. They also received bonuses in accordance with a written bonus plan. The plan provided that bonuses could be reduced by the amount of bad checks or other cash shortages attributable to an individual manager. These shortages were *never* deducted from the manager's weekly salary.

In order to qualify for either the federal or state white collar exemptions, an employer must satisfy a two part test: (1) a salary basis test and (2) a duties test. Both the DOL and the California Department of Labor Standards and Enforcement ("DLSE") find that an employer will satisfy the salary basis standard the employee is paid a minimum salary each pay period, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to certain exceptions, an exempt employee must receive his or her full salary for a work week in which the employee performs any work, without regard to the numbers of days or hours worked.

Based on the foregoing, the DOL concluded that the deductions for cash shortages and bad checks from the bonuses did not undermine the exempt status, since the employee's weekly salary was not affected. An employer may provide an exempt employee with *additional* compensation without losing the exemption status or violating the salary basis requirement, so long as the compensation arrangement includes a guarantee of at least the minimum required salary amount. In general, the DOL noted additional compensation above the required salary amount paid to an exempt employee may be left to the agreement between the employer and the employee, without jeopardizing the exempt classification, so long as the payment arrangement is not made to facilitate otherwise prohibited deductions from a guaranteed salary.

For more information about proper implementation of any compensation package which includes a bonus or commission payment, or to have your bonus or commission plans reviewed to ensure that they do not jeopardize the exempt status of an employee affected by such a plan, please contact Elizabeth Koumas, at either (619)682-4811 or ejk@barkerkoumas.com.

PRACTICAL TIP: The FLSA differs from California exemption laws. Additionally, the ability to deduct cash shortages from an exempt employee's bonus does not authorize a similar deduction from a non-exempt employee's wage. Therefore, employers should not try to make deductions from any employee's pay, based on this opinion letter, without first having the payment plan reviewed by legal counsel.

CALIFORNIA LEGISLATURE MAY SOON ADD FAMILIAL STATUS TO FAIR EMPLOYMENT AND HOUSING LAW

By Christopher W. Olmsted

The demands of work and family create a constant juggling act for men and woman alike. Enter the California legislature, ever yearning to establish new statutory frontiers, with the latest fulfillment of its regulatory Manifest Destiny. A bill currently moving through the California legislature aims to create "familial status" as a new category protected from discrimination under the state's Fair Employment and Housing Act ("FEHA").

"An increase in litigation regarding family responsibility discrimination (FRD) has occurred over the last decade. The increase is closely linked to the creation of Family and Medical Leave statutes both on the federal and state level. As states continue to adopt additional job protection provisions within their Family and Medical Leave Laws, employers have been defending themselves from a variety of cases surrounding FRD," laments the California Manufacturers and Technology Association in a recent press release.

Employees have met barriers in litigation based on family responsibility. For example, in a 2002 unpublished appellate case, *Tisinger v. City of Bakersfield*, a fire fighter who was passed over for promotion to chief filed a lawsuit claiming that he was unlawfully denied the promotion because he worked fewer hours to spend time with his children. The single father alleged marital discrimination (already a protected status under FEHA). At trial, the jury found in his favor and awarded him $75,000. However, on appeal, the court reversed the decision, noting in part that the man was not treated differently based on his marital status, but rather because of his familial devotion, which is not protected under FEHA.

The new bill, SB 836, would allow employees who spend time caring for or supporting family members to sue the employer in the event of discrimination.

The bill broadly defines family care. It would include "providing supervision or transportation," "providing psychological or emotional comfort and support," "addressing medical, educational, nutritional, hygienic, or safety needs," and "attending to an illness, injury, or mental or physical disability."

Business advocates believe that the bill is too broad and unfairly burdens employers. "SB 836 appears to open the door to new mandates on employers to provide modified schedules or leave to accommodate baby-sitting or driving children to soccer practice," says Marti Fisher, a lobbyist for the California Chamber of Commerce.

On April 31st, the legislation has passed in the Senate by a 25-14 vote along party lines. The Assembly will now consider the bill, and if passed there it may end up with the governor by the end of this year.

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FEDERAL MINIMUM WAGE INCREASE

Congress passed the first increase in the federal minimum wage in 10 years, attaching the provision to the latest Iraq spending bill. President Bush signed the bill into law on May 25th.

The law will increase the national minimum wage from $5.15 an hour to $7.25 an hour by July 2009. The first increase, from $5.15 to $5.85 an hour, will take place in late July 2007. A second increase to $6.55 an hour will take place in July 2008, and a third increase, to $7.25 an hour, will take place in 2009.

The last federal minimum wage increase came in 1997, raising the rate to $5.15 from $4.75. According to the Washington Post, "in the past decade, inflation has depleted the value of the minimum wage to the lowest level in more than 50 years."

For California employers, this increase is largely irrelevant. Under California law, employers already pay a minimum of $7.50 per hour, and are headed to $8.00 on January 1, 2008.

STATE AND FEDERAL REGULATION OF SUMMER JOBS FOR TEENAGERS

By Christopher Olmsted

"Work permits must be obtained before work begins, and the employer must keep the permit on file at all times during the minor's employment."

Summer is here (almost) and many teenagers will be hitting the workforce to earn a few extra dollars. Companies who hire teenagers should be aware that state and federal law restricts the use of minors or "child labor."

The laws apply to "minors." The California Labor Code defines "minors" as people under the age of 18 who are required to attend school. The definition also includes people under age 18 who are not required to attend school because they are not California residents. The definition also covers any child under the age of six.

Under this definition, a person under the age of 18 who has graduated from high school, or the equivalent, is not a minor, because he or she is not required to attend school. Therefore child labor laws would not apply.

Work permits are required to employ "minors" under the age of 18. Generally, permits can be obtained from the student's school. Schools are not permitted to issue permits for children under age 12, but under federal law it is generally impermissible to employ an individual under age 14. The documents are usually issued from the superintendent's office, or by the superintendent's designated representative.

Work permits have a short duration, and therefore the employer must track the effective dates carefully. Permits issued during the school year expire at the start of the next school year. Therefore, if you hire a teenager for the summer, be sure to obtain a new permit if you intend to continue the employment into the fall session of school.

Work permits must be obtained before work begins, and the employer must keep the permit on file at all times during the minor's employment.

The school district's permit form, if completely filled out, ought to comply with Labor Code requirements. Be sure to include the minor's name, age, birth date, address, telephone number, and social security number. (For employment during the school year, the hours of school attendance must be included, along with the maximum number of hours per day and week that the student may work.) The permit must be signed by the issuing school representative and the student. The issuing representative will include an expiration date on the permit form.

The California Education Code limits the number of hours a minor may work while school is in session. This article covers summertime employment, so it skips those details.

Labor Code §1391 prohibits minors from working in excess of certain hours. The rules depend on the child's age. Minors under age 16 cannot work overtime—i.e., they cannot work more than 8 hours per day or 40 hours per week. Also, during the summer (June 1 through Labor Day) those under 16 cannot work before 7:00 a.m. or after 9:00 p.m. (Note: There is an exception for newspaper delivery jobs.)

Minors age 16 or 17 cannot work more than 8 hours per day or 48 hours per week. They may work as early as 5:00 a.m. or as late

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Now Available: Vacation Policy Checklist

When is the last time that you reviewed your employee vacation benefit policy for compliance with the Labor Code and other employment laws? To get started, request our complimentary Vacation Policy Checklist. Email Chris Olmsted at cwo@barkerkoumas.com.

EMPLOYER APPEALS FROM LABOR COMMISSIONER MUST BE HANDLED WITH CARE

By Tiffany Keith

When an employee files a claim with the California Labor Commissioner, unprepared employers are often caught off guard by the swiftness and informality of the proceedings. Facing an award in favor of the employee, employers are often inclined to appeal.

Employers do in fact have the right to appeal under Labor Code § 98.2. No time can be lost, because the deadline is 10 days after service of the Labor Commissioner's order.

On appeal, a superior court judge will review the case "de novo." This means that the Labor Commissioner's prior decision has no binding effect in superior court. The judge takes a fresh look at the case and the earlier adverse decision is supposed to be irrelevant.

Employers should keep in mind, however, that an appeal is not without some risk and cost. To begin with, in order to proceed with the appeal, the employer must post a bond or make a cash deposit in the amount of the Labor Commissioner's award. In the event that the superior court makes an award in favor of the employee, the employer must pay the award within ten days, or the money will be collected from the bond or cash deposit.

If the party seeking the appeal is unsuccessful on appeal, the court will award attorneys fees and costs to the other party. Thus, if the employer is not successful, it will pay the employees attorney fees (if he or she is represented) and court costs.

For the employer, being "successful" on appeal to the superior court is an all or nothing proposition. According to Labor Code § 98.2(c), the *employee* is successful if he or she receives an award *greater than zero*. Conversely then, the employer is successful only when the award is zero.

The issue of when the employer is successful on appeal has a storied past. Prior to 2002, a number of appellate courts had ruled that the employer was successful in a Labor Commissioner award appeal where the trial court completely eliminated the award. In 2002, the California Supreme Court in *Smith v. Rae-Venter Law Group* overruled these cases. It concluded instead that a party (either employee or employer) who seeks review of the commissioner's award is successful in the appeal (and not liable for the other party's fees and costs on appeal) when the resulting judgment is more favorable to the appealing party than the administrative award from which the appeal had been taken.

The California Legislature was quick to react to *Smith*. In 2003 it passed legislation overruling *Smith*. Governor Davis promptly signed the bill. Under Assembly Bill 223 an employee who appeals the Labor Commissioner's award to the superior court is entitled to attorneys' fees, courtesy of his employer, if the employee recovers any

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"Employers should keep in mind that an appeal from a Labor Commissioner award is not without risk and cost."

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as 12:30 a.m. as long as there is no school the following day.

Certain of the Wage Orders also contain provisions regarding child labor. Therefore, review the Order applicable to your industry before hiring minors.

California and federal law restricts child labor to a small number of occupations. Children of certain ages are prohibited from working in a number of hazardous jobs, including, for example, a number of manufacturing, industrial, and construction occupations, as well as driving a motor vehicle. Before hiring a minor, be sure to confirm that state and federal law permit the child to work the occupation in question. Further, if employment is permitted, check for any occupation-specific restrictions or limitations on working conditions.

State and federal law contain a number of exceptions and limitations on the general description provided in this article. Therefore, review the statutes and regulations, or seek legal advice, before hiring minors.

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amount of money. Thus, if the employer appeals an adverse Labor Commission result, even if the court awards the employee an amount less than what the employee was awarded by the Labor Commissioner, the employee has the right to demand attorneys' fees from the employer.

It is therefore prudent for employers to put their best case forward to the Labor Commissioner in order to minimize the need to file an appeal. Often it is wise to obtain legal advice before attending the hearing, and also retain employment law counsel for the hearing. Of course, there may be instances when an appeal is well worth the risk of paying fees and costs.

For more information, or for assistance with any Labor Commissioner hearing, please contact Chris Olmsted or Elizabeth Koumas at (619) 682-4040.

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UPCOMING SEMINARS

California Employment Law From "A to Z" June 21, 2007

Human Resources Records and Documents
- Mandated Workplace Postings
- Key Handbook Components
- Recordkeeping

Hiring Policies and Practices
- Proper Use of Applications, Interviews and References
- Background Checks and Credit Reporting
- New Hire Reporting Requirements
- Eligibility for Employment
- Overview of ADA/FEHA Disability laws and Rights of Disabled Applicants

Employee Relations
- Overview of FMLA and CFRA
- Harassment and Sexual Harassment Training
- Performance Improvement Plan
- Discipline Policies and Essential Documents
- Terminations

Compensation and Benefits
- Essential Wage and Hour Practices
- COBRA and HIPAA

Attendees receive a valuable overview of current employment law. Presented through Lorman Educational Services. Cost: $339. Hurry—Limited Space Still Available!

California Wage & Hour Law

Wage and Hour (Part 1) – July 12, 2007 @ 8:00 – 9:30 am
- State Wage Orders
- Notice Posting Requirements
- Computing Hours Worked
- Meal and Rest Periods
- Travel Time / Expenses
- Record Keeping

Wage and Hour (Part 2) – July 26, 2007 @ 12:00 – 1:30 pm
- Employee versus Independent Contractor
- Exempt versus Non-Exempt
- Deductions from Wages
- Overtime
- Enforcement and Penalties

Held at our offices.
$30 Registration Fee.

San Diego Business Resources Presents: Employee Retention Strategies: How To Keep Company Superstars

When: July 19th 2007. Registration 8:00 a.m.; Seminar runs from 8:30 – 10:00 a.m.
Where: Vortex Data Systems, 7480 Mission Valley Rd., Suite 100, San Diego, CA 92108

Come hear a panel of professionals discuss employee retention strategies. The panel will address:
o 401(k) plans and designs as a retention strategy
o Comprehensive health benefit plans and designs as a retention strategy
o Leveraging exit interviews as a retention tool
o Compensation package designs and strategies
o Human Resource strategies
o Employment law strategies
Panelists:
o Katherine Yeargain, Pension Manager, Means & Assoc., LLC
o Jerry Doran, Proprietor, Capital Benefits
o Marta Carlson, President, Carlson HR
o Chris Olmsted, Shareholder, Barker, Koumas & Olmsted

Registration is FREE, but space is limited!
RSVP (619) 501-2906 or by e-mail: scott.maichel@amcheck.com

Register Now! Contact Christy Corpuz at (619) 682-4040 or cgc@barkerkoumas.com