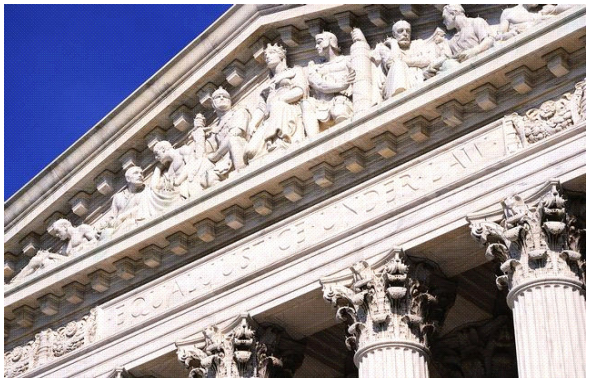
KOUMAS LAW GROUP

Legal Update

Firm Newsletter May 2008

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



INSIDE THIS ISSUE:

SUBSCRIBE NOW!

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

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:

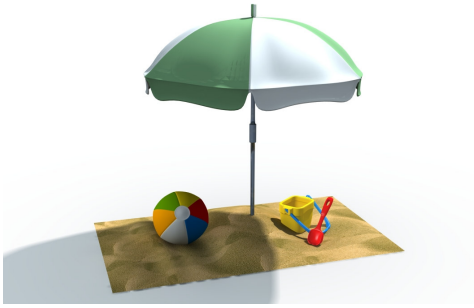
Impose a cap. Even though "use it or lose it" vacation policies are illegal in California, an employer can limit vacation accrual with a policy that caps the number of vacation days an employee can accrue at any given point in time. An employer can implement a policy that once an employee's accrued vacation 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.

(Continued on page 2)

(Continued from page 1)

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) 398-8301 or ejk@koumaslaw.com.

THE COUNTDOWN IS ON: ONLY 60 DAYS LEFT UNTIL THE BAN ON HANDHELD CELL PHONES WHILE DRIVING

July 1, 2008, marks the long anticipated effective date for the limitation on use of cellular phones while driving. The California Vehicle Code has been amended, by SB 1613, such that it will be illegal to operate a motor vehicle while using a wireless phone unless it is being used with a hands-free device. New York, New Jersey and Connecticut all have similar laws already in effect. Another new law, Senate Bill 33, imposes a *more stringent* restriction on teenagers, effective this same date. On July 1, 2008, individuals under the age of eighteen, will be prohibited from driving a vehicle while using a mobile phone, *even if it is being used with a hands-free device.* This law also makes it illegal for teenagers to use any other type of mobile service, such as two-way messaging,

pagers, broadband personal communication devices, or laptop computers with mobile data access.

Similar to one of the exceptions afforded under SB 1613, the prohibition under SB 33 does not apply where the teenager requires the use of the cell phone in order to place a call for emergency reasons, such as to health care providers, law enforcement personnel. Violators will risk an initial fine of $20, and $50 for each subsequent violation, but tickets are not supposed to impact a driver's insurance. Looks like Bluetooth's or other similar devices will quickly become popular gifts.

Take Away Tip

Employers should make sure they have a policy setting forth the legal rules of using cell phones while driving for business reasons. Such a policy **should** prohibit employees from using (personal or company-issued) hand held cell phones while driving in company vehicles or during company time entirely, or at a minimum, only with a hands-free device. For assistance with drafting and implementing such policy, contact Elizabeth Koumas at ejk@koumas.lawcom or (619) 398-8301.

PRE-EMPLOYMENT DRUG TESTING BY MUNICIPALITY FOUND UNCONSTITUTIONAL BY HIGH COURT

Drug and alcohol testing policies have been the subject of legal debate for many years. The latitude for implementing such policies in California are determined partly by applicable state law, court decisions, and whether the employer is in the public or private sector.

In *Lanier v. City of Woodside*, an Oregon municipality required <u>all</u> job applicants to submit to drug testing. Ms. Lanier applied for a job as a part-time page at the city library. The position would require her to staff the youth services desk, as well as reshelf books. She refused the drug test, and was not hired. Lanier sued, alleging the drug test was unconstitutional under the Fourth Amendment. The high court of our nation agreed. While drug testing might be appropriate for some job positions, the suspicionless pre-hire test was not justified for the position for which Lanier applied . The municipality argued that an employer's interest in providing a safe, drug-free environment, coupled with the fact that the page would be in contact with children, justified the test. The Supreme Court disagreed, finding there were no safety issues involved. Although the position involved contact with children, it not did require responsibility over children. The court concluded the city had no right to test Ms. Lanier for illegal drug use, absent a reasonable suspicion that she was an abuser.

In California, private sector drug testing of *applicants*, if properly administered, is lawful. In 1997, the California Supreme Court held that an employer did not violate the privacy rights of an applicant by requiring an applicant to submit to post-offer, pre-employment drug and alcohol testing as a condition of hire. The court reasoned that, in applying for a job, an applicant gives up privacy rights by revealing information (such as work history, education, experience and references), and the employer has the right to test an employee to make a hiring decision. Notably, applicants' privacy rights are viewed differently from those of employees. While the *Lanier* decision may invalidate some public sector drug testing policies, currently this decision has no effect on the private sector in California.

STARBUCKS GETS BURNED FOR ILLEGAL TIP POOLING

Labor Code § 351 prohibits employers (and agents) from taking, collecting, or receiving any portion of a gratuity left for or given to or left for an employee by a patron. It is also illegal for employers to make wage deductions or credits on account of any gratuities. The statute states that gratuities are the sole property of the employee or employees to whom they are given. "Gratuity" is defined in the Labor Code (§ 350) as a tip, gratuity, or money that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due for services rendered or for goods, food, drink, articles sold or served to patrons. It also includes any amount paid directly by a patron to a dancer covered by IWC Wage Order 5 or 10. Although previously disallowed, the DLSE now allows involuntary tip pooling under certain circumstances. Although the employer may not share in the tips, employers can mandate that tips be pooled for more than one employee so long as the policy is reasonable.

However, under California law, managers and supervisors may **not** share tips, the issue addressed in this recent court decision. In its defense, Starbucks sought to prove that the shift supervisors were not really supervisors. "Although the class action paints shift supervisors as part of the Starbucks' management team, Starbucks contends that they are not part of management and perform essentially the same jobs as baristas." In a ruling issued in February , the court rejected Starbucks' defense. The court held the shift supervisors "both supervise and direct the acts of the baristas." After concluding that Starbucks violated California law, the court awarded over $105.7 million in damages and interest to the class.

TIP: Employers in the hospitality industry are cautioned to audit any tip pooling policies in effect to ensure permissible participants.

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
* Overview of Family Medical Leaves
* Performance, Discipline, Termination and Recommended Documents
* Essential Wage and Hour Practices and Benefits
* Hiring Policies and Practices
* Harassment Training Rules

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
* FMLA
* PDL
* Workers Compensation Leaves
* Disability Related Leaves
* Other Statutory Leaves of Absence

These seminars will be presented through Lorman Educational Service. For more information, contact Elizabeth J. Koumas.