KOUMAS LAW GROUP

Legal Update

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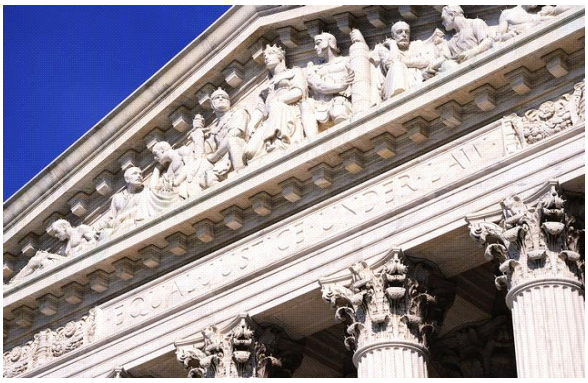


INSIDE THIS ISSUE:

NATIONAL DISABILITY EMPLOYMENT AWARENESS MONTH

The Department of Fair Employment and Housing enforces the Fair Employment and Housing Act, which prohibits disability discrimination in employment and housing. In 1945, Congress enacted a law declaring the first week in October each year "National Employ the Physically Handicapped Week" to educate the American public about issues related to disability and employment. In 1962, the word "physically" was removed to acknowledge the employment needs and contributions of individuals with all types of disabilities. In 1988, Congress expanded the week to a month and changed the name to "National Disability Employment Awareness Month."

EMPLOYERS BEWARE OF *TRICKY* EMPLOYEE ATTIRE

Most HR professionals dread those uncomfortable discussions with workers about their clothing choices. A recent national survey found that almost a third of workers intend to wear a costume to work on Halloween - which this year falls on a Friday. Review your current dress code policy. Striking the proper balance between requiring appropriate dress in the workplace and respecting employee rights can be challenging, particularly when concerns like religious expression and gender discrimination come into play. **PRACTICE TIP:** To prevent Halloween costumes that cross the line, audit, possibly revise and redistribute your dress code policy to provide familiarity with your company expectations and encourage compliance from your work force.

THE IMPORTANCE OF JOB DESCRIPTIONS IN ECONOMIC DECISIONS

If anyone questions an employer's decision to layoff certain personnel these days— and they will—the employee's attorney will undoubtedly request a copy of and scrutinize that employee's job description which was probably relied upon, directly or indirectly, to arrive at the employer's decision. What will such review reveal? The three most common mistakes made by employers with respect to job descriptions are allowing them to be:

- Inaccurate,
- Incomplete, and
- Out of Date

As a company changes over time, so should its job descriptions in order to remain accurate. Even minor modifications in a company's systems, processes, or structural organization can warrant changes in descriptions. Also, creating job descriptions "on the fly" often results in the omission of important information. A job description should be complete, such that it includes enough detail to be useful and identify the essential duties. Finally, in theory job descriptions are reflective of the position itself, not the person holding the position. However, in reality, when different individuals perform the same job, each brings to the position varying backgrounds and experience. Therefore, each individual sometimes carries out the duties of the position differently than another. Inevitably, the differences in implementing the duties may be passed on to successors in a position.

Accurate and well crafted job descriptions are essential since they provide a basis for evaluation, and wage structure. The may serve as a valuable tool to help employers explore reasonable accommodations as required by both federal and state disability discrimination laws. They will also inform applicants and employees of the expected duties of a position.

Take Away Tip: Employers should create or update job descriptions by gathering detailed data about each position from the persons in the company most familiar with each position, usually someone who has actually held the position and performed the duties can be a valuable resource. For assistance with drafting effective descriptions, contact Elizabeth Koumas.

WORKERS COMP PREMIUMS MAY BE ON THE RISE....AGAIN

Since the workers' compensation reforms of 2003, most California employers have seen a steady and welcome decline in their workers' comp insurance premiums. However, those rates may be on the rise, again, in 2009. Apparently, the Workers' Compensation Insurance Rating Bureau (WCIRB) has recommended to California Insurance Commissioner Steve Poizner that workers' comp insurance pure premium rates increase by 16 percent for new and renewing policies, effective January 1, 2009. The WCIRB justifies its proposal largely on data confirming a significant rise in medical costs related to comp claims. Also, another 3.7% increase is recommended if workers' comp disability payment lev-

els are increased (a topic of discussion as well in Northern California.)

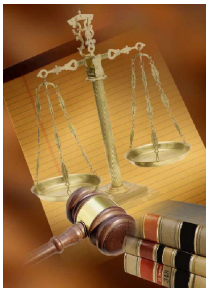
Employers should bear in mind that the WCIRB's recommendation is advisory and must be approved by the insurance commissioner. If the increase is approved, it is not binding on insurance carriers although many use it as a benchmark. Based on available information at this time, if the increase goes into effect, the average pure premium rate in 2009—$1.95 per $100 of payroll—will still be well below the average premium rate just before the 2003 reforms ($4.81.)

NEW FEDERAL EXPANDED DISABILITY BIAS PROTECTIONS

Last week, Congress approved legislation which amends the Americans with Disabilities Act, the ADA Amendments Act of 2008 (S. 3406), to provide broader protections for disabled employees and reverse the effects of Supreme Court rulings that Congress found too restrictive of disabled workers' rights. On September 25, 2008, President Bush signed the ADA Amendments Act of 2008. **The changes will take effect on Jan. 1, 2009.**

An overview of the highlights of the ADA Amendments Act: *Mitigating measures*. The Act provides that the determination of whether an impairment *substantially limits* a major life activity, such that it rises to the level of a disability, must be made *without* considering the ameliorative effects of mitigating measures. Note that the changes bring the ADA closer to the standards under California's disability bias law, the Fair Employment and Housing Act (FEHA), which broadly provides that mitigating measures cannot be considered in determining whether a major life activity is limited.

Recall that a major point which distinguishes the federal and state laws is that a person is considered disabled under state law if the disabling condition makes a major life activity *more difficult*, whereas the federal law requires the person's condition to *substantially limit* major life activities..



CASE LAW AND LEGISLATIVE UPDATE

Last month's *Brinker* meal and rest periods decision may not stand the test of time. As set forth in this firm's prior newsletter, a California appeals court issued an important decision in *Brinker Restaurant Corp. v. Superior Court*, interpreting the state's meal and rest period requirements and giving employers and employees flexibility in scheduling breaks. However, employers should not be so fast to modify their policies, if they wish to stay out of legal harms way. A petition for review of the case has been filed with the California Supreme Court. I f the court grants review (it has until late October to do so), the appellate court's decision will be removed from the law books, and employers will have to wait for the Supreme Court to render its decision on meal and rest breaks. Therefore, employers are strongly encouraged to continue to enforce that meal and rest periods are taken and comply with the specific break time requirements, even as frustrating as that may sound.

Last month, the budget impasse held up Governor Schwarzenegger execution of several bills which the Legislature passed. This could mean that few, if any, bills will become new laws this year. The governor pledged he would not sign any new laws until a budget has been passed. One of the two wage-hour bills that was able to sneak through and became law before the budget impasse began is bill, S.B. 940, which provides relief to "temporary services employers" from existing law requiring that final paychecks be issued immediately upon an employee's discharge. The law clarifies that the end of a temporary assignment is not a discharge, and temporary services employers must simply pay wages at least weekly to employees who are assigned to work for a client or customer, regardless of when an assignment ends. Work performed during a calendar week must be paid no later than the regular payday of the following calendar week. Similarly, an employee who completes an assignment must be paid by the regular payday of the next workweek. Please note, that a temporary worker who is involuntarily discharged must be paid immediately, and a temp who quits must be paid within 72 hours, in accordance with Labor Code sections 201 and 202.

In *Lee v. Dynamex* (CA2/7 B196235 8/26/08) , a Wage and Hour Class Certification action, a driver for Dynamex, Inc., a parcel delivery company, filed a lawsuit on behalf of himself and other drivers, alleging Dynamex had improperly reclassified the drivers from employees to independent contractors in violation of California law. After first denying Lee's motion to compel Dynamex to identify and provide contact information for potential putative class members, the trial court denied Lee's motion for class certification. Because the trial court's discovery ruling directly conflicted with the Supreme Court's subsequent decision in *Pioneer Electronics* (*USA*), *Inc. v. Superior Court* (2007) 40 Cal.4th 360 (*Pioneer*), as well as the California Appellate Court's decisions in *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554 and *Puerto v. Superior Court* (2008) 158

EMPLOYER PHONE, EMPLOYEE TEXT MESSAGES—IS THERE A RIGHT TO PRIVACY?

An important new court ruling has expanded employee privacy rights in electronic communication.

The ruling involved the Southern California city of Ontario, which had a standard electronics policy. The policy stated employees had no expectation of privacy or confidentiality when using city-owned computers, software, networks, Internet, e-mail, and other systems on the computers.

A city employee found to be sending sexually explicit text messages through the city-contracted text messaging service was fired, and later sued the city for violations of constitutional privacy. The Court of Appeals ruled in favor of the employee and gave new definition to employees' expectation of privacy when using employer-owned electronics.

A federal appeals court strengthened privacy rights for employees who send text messages from devices supplied by their employer, ruling that the companies transmitting those messages can not disclose their contents without the recipient's consent.

The Ninth U.S. Circuit Court of Appeals in San Francisco said the wireless company violated a Southern California police officer's rights by revealing the messages he sent to co-workers, and that the police department where the officer worked also violated his rights by reading them.

Text messages are not like emails. In this case, since they were stored over a third party's network, the employer did not have the right to monitor them without a warrant or either the sender or recipient's permission, The Ninth Circuit's decision suggests alternatives for those of you who want to monitor text messages. One includes revising Internet and electronic communications policies to specifically address access to text messages to minimize any expectation of privacy. Likewise, you should *either* include in the contract with any third-party vendor the term that text messages are stored for your benefit *or* consider using an employer-owned storage device.

Take Away Tip: For more information about electronic communications policies and assistance with drafting and implementing a legally compliant policy, contact Elizabeth Koumas at ejk@koumaslaw.com.

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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.

FUTURE SEMINARS

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**: The Handlery Hotel * 950 Hotel Circle South, San Diego.

Topics Include:

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

This seminars will be presented through Lorman Educational Service. For complete agenda, and for registration information, contact Elizabeth J. Koumas.