KOUMAS LAW GROUP

Employment Law Update

September 2009

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INSIDE THIS ISSUE:

Financially Stressed Employees– How to Help Them and Improve Productivity

Most of us recognize that businesses are facing economically difficult times, but they are not alone. Many employees are equally feeling the effects as a result of very serious financial problems such as burdensome debt, lost income, bankruptcies, and foreclosures. Employees experiencing the increased financial pressures at home are likely to have trouble keeping their problems out of the workplace, causing them to be less focused or productive, and less able to handle routine stress. One way in which employers can acknowledge this dilemma is to offer employees some time off to seek consumer credit counseling. Offering employees such opportunity can go a long way toward reducing stress and gaining employee loyalty, and potentially increased productivity.

Employees can be offered a set amount of unpaid time off (*e.g.*, a couple of hours) to seek credit counseling. Alternatively, to avoid employees from losing income, paid time off can be offered. So long as the policy is implemented properly, the paid time off would not have to be counted as earned vacation or PTO, and would not have to be carried over from year to year or paid out when the employee separates from the company. To eliminate abuse, employees can also be required to provide verification from the credit

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counselor that the counseling appointment was attended (without asking the employee to disclose any personal financial details).

The key to offering paid time off for credit counseling is making sure that you are clear that the time can be used only for credit counseling purposes.

Qualified credit counselors can help employees avoid a financial crisis, or assist in finding a solution for existing financial challenges. The national non-profit organization Consumer Credit Counseling Service (CCCS) can assist employees with finding a qualified credit counselor near their home, and can be reached at (800) 251-CCCS or http://www.cccsatl.org/index.jsp.

Giving employees this inexpensive benefit can help motivate them to take action on personal financial issues by sending the message that it's better to seek help than suffer in silence. The gesture can also help reduce (or eliminate) the stressors that are currently causing many employees to lose focus, and hopefully place them back on track to increased productivity in the workplace.

Practice Tips:

- Verifications of counseling appointments should be submitted confidentially to HR personnel only.
- Whether paid or unpaid time off is offered, employees should also be reassured that they will not be subject to retaliation (*e.g.,* no adverse actions will be taken if they seek credit assistance, and that getting help will not affect their status with the company.)

For assistance with implementing such a policy, feel free to contact Ms. Koumas for guidance.

Michelle's Law—New Health Benefits Law

What has come to be known as "Michelle's Law" originated in New Hampshire in response to the death of a college student named Michelle Morse. Michelle was a full-time student at Plymouth State University when she was diagnosed with colon cancer. Michelle's doctors recommended that she reduce her course load to undergo chemotherapy treatment. Michelle's health benefits coverage, however, was based on her parent's employer-sponsored group health plan which only covered dependent children who were enrolled in school full-time. Thus, Michelle's coverage would have terminated (when she needed it most) had she taken a medical leave of absence to undergo treatment. Against her doctor's advice, Michelle maintained a full course load in order to maintain coverage.

The federal government and the State of California have passed their own versions of Michelle's

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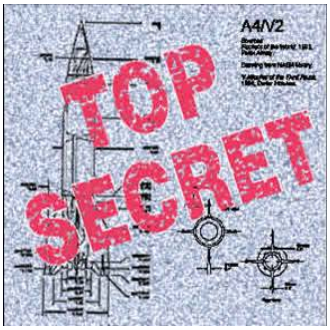
Do You Have a *Real* Secret Which is Protectable? Part 2



Trade secrets are protected under California law even without a written confidentiality agreement under the Uniform Trade Secrets Act. The common question debated by employers is whether a written confidentiality agreement is necessary? In many instances, access to confidential data simply may not otherwise be obtained. Advantages to a **confidentiality agreement** include: (i) the law of a particular jurisdiction may be selected; (ii) specific remedies may be selected such as specific performance and injunctive relief, and it may require attorneys fees be awarded to the prevailing party; (iii) identification of what is confidential; (iv) identifying which persons may view the information and how it must be treated and returned; (v) binding arbitration may be chosen; and (vi) it shows the claiming parties' effort to maintain confidentiality. Disadvantages of such agreements include: (i) it may be found as an unreasonable restraint on trade, especially when required as a condition of employment (time and geographic limitations must be included to avoid prohibiting highly trained individuals from being able to practice their trade); (ii) it may chill negotiations for employment.

In this electronic age, most companies have taken reasonable measures to protect trade secret information. Reasonable electronic measures may include having secured networks, limited employee access to certain directories, firewalls, multi-character passwords, or other ways to limit access or to track employee network activity.

Many cases concerning the acquisition of trade secrets by improper means involve the saving or transferring of data to an electronic storage medium like a Zip disk, CD-rom or other storage device containing a USB port. As a result, forensic evidence can be crucial for proving such cases. When companies confront such a problem, they should *never* have their own information technology ("IT") professionals conduct any type of forensic work. While a company's in-house IT staff may be good at updating software and making sure that its network runs smoothly, they are generally not adequately equipped to handle the forensic work. Further, a company's in-house IT professionals may complicate the chain of evidence and will be viewed as biased. Companies should make certain that they take measures to safeguard trade secret information.

Non-competition agreements in most states are enforceable if they are necessary to protect legitimate business interests, contain reasonable restrictions and are supported by consideration. Enforcement against an employee can be both by damages and by an injunction that prohibits the employee from engaging in conduct that violates a non-compete clause. Contrary to common misperceptions, courts outside of California will uphold non-compete clauses if they comply with acceptable standards.

An employer also can be held liable for hiring an employee who violates a non-compete agreement with a previous employer. In some cases, employers can recover damages from both the former employees and their new employers who collaborate with them in the transgressions. The best approach

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for employees is to let their prospective new employer know about the non-compete so that the employer is not later "surprised" with a lawsuit by the old employer. The new employer may decide that the non-compete agreement is invalid, or may be willing to assist the employee, including payment of legal expenses, in the event of a lawsuit by the former employer. Under the *Rule of Reasonableness*, agreements are narrowly tailored to restrict truly competitive activities without forbidding an employee from working (earning a livelihood) in the same industry or profession in a way that is not competitive. Courts will generally require that the agreement only last for a limited amount of time. Generally, non-compete agreements one or two years in length will be valid, except in the sale of a business.

Practice Tips:

- Make certain that contractual measures are in place to protect confidential data and trade secrets. Given several recent decisions, companies doing business in California should seriously consider updating their confidentiality agreements, non-solicitation provisions and intellectual property assignment contracts.
- Promulgate policies regarding the use of electronic storage devices, Internet use, and use of the company's e-mail system to help prevent misappropriation.
- Remind employees of their contractual obligations to protect confidential information and not to use or disclose trade secrets. This may be done during exit or new-hire interviews.
- Have a legal plan of action in place in the event you learn that trade secrets have been misappropriated, or that you have hired an employee who may have misappropriated trade secrets.

For more information about confidentiality agreements and/or non-compete clauses, please contact Elizabeth Koumas at ejk@koumaslaw.com or (619) 398-8301.

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law, both of which take effect (at different times) this year. The federal law—H.R. 2851—will take effect for plan years beginning on or after October 9, 2009. The California law—SB1168—took effect on January 1, 2009.

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Summary of Michelle's Law

To be eligible, a student must already have been covered by their parent's health insurance policy. If so, the law requires insurance carriers to continue health coverage for the dependent student when they take a **medically necessary leave of absence from school**, when that leave would otherwise cause loss of eligibility under the plan. Seriously ill or injured full-time college students are covered, if their physician provides written documentation supporting the need for medical leave. The continuance of coverage is for 12 months. Documentation or certification of the medical necessity for a leave of absence from school is required.

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Summary of California Law— Cal. Ins. Code §§ 10277 and 10278

If a group (section 10277) or individual (section 10278) health insurance policy provides coverage for a dependent child who is over 18 years of age and enrolled as a full-time student at a secondary or postsecondary educational institution, the law requires insurance carriers to continue health coverage for the dependent student when they take a **medically necessary leave of absence from school**, when that leave would otherwise cause loss of eligibility under the plan. Other requirements include:

- The continuance of coverage is for 12 months.
- Documentation or certification of the medical necessity for a leave of absence from school is required.
- The period of coverage under this paragraph shall commence on the first day of the medical leave of absence from the school or on the date the physician determines the illness prevented the dependent child from attending school, whichever comes first.
- Any break in the school calendar shall not disqualify the dependent child from coverage.

Note: The state law does not apply to self-funded plans. Self-funded plans covering California employees will be required to comply with the federal law.

Summary of Federal Law

Michelle's Law prohibits a group health plan from terminating coverage of a dependent child due to a medically necessary leave of absence from, or any other change in enrollment at, a postsecondary education institution that commences while such child is suffering from a serious illness or injury and that causes such child to lose student status for purposes of coverage under the plan, before the earlier of: (1) one year after the first day of the medically necessary leave of absence; or (2) the date on which such coverage would otherwise terminate under the terms of the plan. Other requirements include:

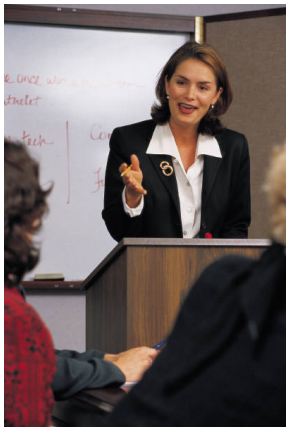
- **Written certification** by the child's treating physician is required.
- Group health plans must include **notice** of the terms of this Act with any notice regarding a requirement for certification of student status for coverage under the plan.
- Coverage under this Act must continue in the manner in which the participant or beneficiary is covered under any plan changes so long as the change of coverage continues to provide coverage of beneficiaries as dependent children.

PRACTICE TIPS:

To ensure compliance October 1st, employers should:

(1) Make sure that your plan terms are consistent with Michelle's Law.
(2) Update any student certification forms to include a description of Michelle's Law.
(3) Apprise HR or Benefits department of required changes to plan so they can adequately and accurately respond to any inquiries.
(4) Coordinate with your plan provider.

UPCOMING LUNCHEON SEMINAR



Surviving the Economic Times:
50 Tips For Avoiding Employment Lawsuits

This luncheon seminar will provide a 50-point self-audit checklist of important areas that should be reviewed at least annually by small and large employers. Periodic compliance of procedures is an essential preventative tool, especially in the current economic climate where many companies face daily challenges to remain in business. One lawsuit could decide that fate and close the doors. We will discuss practice tips for before, during and after employment, as well as 10 tips if you are sued.

Date: September 25 **Time**: 12:00 p.m. to 1:30 p.m. **Cost**: $35pp

Location: The Chamber Building, 110 West C Street,
7th Floor Conference Room A, San Diego, CA 92102

For more details about the agenda or registration information, contact Elizabeth J. Koumas at ejk@koumaslaw.com or Jordan Furrow (619) 234-5488. Registration with payment to Koumas Law Group no later than September 21st.
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