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CALIFORNIA BECOMES SECOND STATE TO MANDATE PAID SICK LEAVE

On September 10, 2014, Governor Brown signed into law AB 1522 (Healthy Workplaces, Healthy Families Act of 2014), which requires all California employers, large or small, to provide employees paid sick leave (with limited exceptions for certain industries and employees under particular collective bargaining agreements). The Act will become effective on July 1, 2015, and it provides for the following:

- Employees must accrue paid sick time at a rate of one hour for every thirty (30) hours worked. Exempt employees accrue based on a presumed forty (40) hour workweek, or their normal scheduled workweek, whichever is less.
- Accrued, unused sick time must be carried over to the following year, but employers can limit the number of sick days taken in a calendar year to three days. In addition, they can limit or cap maximum accrual of sick time to six days. Alternatively, employers need not track accrual or carry over accrued time if they provide the full three days at the beginning of each year.
- Although employees begin accruing sick time on the date of hire, accrued time can only be used starting on the ninetieth (90th) day of employment.
- Sick time can be used for the employee's own illness, or to take time off to care for ill family members or for victims of domestic violence, sexual assault, or stalking.
- Employers are not required to pay out accrued, unused sick time upon separation of employment.
- Employers that already provide paid sick time, or paid time off policies that can be used for sick leave, need not provide additional leave under the Act if their plans provide at least the same amount of leave and under the same or more favorable conditions as provided for under the Act.
- Employers subject to more favorable local paid sick leave ordinances (e.g., San Francisco) must continue to comply with such ordinances.

The Act has additional notice and recordkeeping requirements. Failure to comply with the Act can result in various penalties and the Act prohibits retaliation against employees for taking accrued sick time (including a rebuttable presumption of retaliation within thirty days of an employee exercising protected rights under the Act).

EMPLOYEE LAWFULLY TERMINATED FOR FAILURE TO UNDERGO PSYCHOLOGICAL EXAM

In *Kao v. University of San Francisco,* a California appellate court upheld a jury's verdict that the University of San Francisco ("USF") lawfully terminated a professor who refused to undergo a fitness-for-duty examination.

Kao was a math professor at USF. In 2008, he began exhibiting strange and intimidating behavior. He glared and stared at colleagues; clenched his fists; had a "wild cackling laugh"; stood inappropriately close to colleagues' faces when speaking to them; lashed out at others when they asked how his ill mother was doing; clenched his jaw; yelled and screamed at his co-workers; and forcefully hit colleagues on the shoulder. This behavior followed Kao complaining to USF about the lack of faculty diversity among the math and computer science departments.

After receiving various complaints about Kao's behavior, USF launched an investigation, interviewing many of Kao's colleagues. They described his behavior as terrifying and intimidating, and claimed that they would not be surprised if he hurt himself or others. Disturbed by this feedback, USF contacted a forensic psychologist skilled in identifying workplace threats. He recommended that Kao undergo an independent medical examination to determine whether he was fit for duty (including whether he posed a danger to

himself or others). USF engaged another psychologist to perform the examination and instructed him not to provide USF with any medical diagnosis or clinical information – he would simply assess Kao and report back to USF whether he was fit for duty. But Kao refused to cooperate, claiming that USF had no legal basis to require the exam. Following several unsuccessful attempts to have Kao examined, USF terminated his employment.

Kao sued USF for various causes of action, including violation of California's Fair Employment and Housing Act ("FEHA"), for terminating him for his refusal to undergo the examination. A jury ruled in USF's favor and Kao appealed. The appellate court affirmed the decision, holding that, under FEHA, USF had the right to require a fitness-for-duty examination of Kao since it was "job related and consistent with business necessity" and tailored to assess whether he could perform the essential functions of the job or whether he posed a danger to himself or others. Given how frightened Kao's colleagues and other school administrators were of him, and USF's duty to maintain a safe campus, USF could require that Kao undergo such an examination.

News Bites

NLRB Weighs in on "Like" Button

In two consolidated decisions involving Three D, LLC d/b/a Triple Play Sports Bar and Grille (the *Sanzone* and *Spinella* decisions), the National Labor Relations Board (the "Board") determined that an employee's use of the "Like" button on Facebook constituted protected activity under the National Labor Relations Act ("NLRA").

Employees of Triple Play discovered that they owed more in income tax, allegedly attributable to Triple Play's failure to withhold sufficient payroll taxes. When employees complained, the company scheduled a staff meeting to discuss the issue. Before the meeting, a former employee posted on her Facebook page: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money … Wtf!!!!" Spinella (a current employee) "Liked" the posting. The posting elicited over a dozen comments from current employees (including Sanzone), former employees, and customers expressing outrage at the situation and discussing possibly reporting the incident to government agencies. One of the comments alleged that one of the owners of Triple Play likely pocketed some of the withholding from the affected employees' paychecks.

Triple Play's owners learned of the posting and terminated Sanzone for her comment "I owe too. Such an *sshole." Further, the owners confronted and interrogated Spinella about, and ultimately terminated his employment for, "Liking" the posting, which they considered "disparaging and defamatory" and in violation of Triple Play's "Internet/Blogging" policy banning "inappropriate discussions" about the company.

In defending its decision to terminate, Triple Play argued that by commenting on the posting and "Liking" it, Sanzone and Spinella's Facebook activities lost their NLRA protection because some of the comments to the posting contained potentially defamatory statements made by other individuals. The Board disagreed and held that the terminations of Sanzone and Spinella, as well as the company's policy, were unlawful. Further, Spinella's use of the "Like" button constituted protected activity under the NLRA since he was expressing his support for the concerns shared by others on Facebook about the tax withholding liability.

This latest Board ruling confirms that social media policies and employee usage contain many landmines for employers with respect to protective activity and retaliation. Employers are encouraged to review their social media policies, and their enforcement of violations of such policies, to make sure that they comply with the NLRA.

Employees Entitled to Reimbursement of Reasonable Percentage of Cell Phone Bills

A California appellate court recently held that employers must reimburse employees for a "reasonable percentage" of their cell phone bills if employees must use their phones for work-related calls, regardless of the details of their plans or who pays their bills.

In *Cochran v. Schwan's Home Services, Inc.,* plaintiff Cochran filed a putative class action on behalf of himself and other customer service mangers against

his employer (Schwan's Home Services, Inc.) for violation of California Labor Code Section 2802, unfair business practices, penalties under the Private Attorneys General Act, and related causes of action for failure to reimburse employees in the class for mandatory use of personal cell phones for business.

California Labor Code Section 2802 requires that employers reimburse employees for work-related expenses. However, Schwan's argued that it should not have to reimburse employees for any portion of their cell phone bills if they had unlimited plans because they were not incurring any additional expense for business calls. The court disagreed and reversed the lower court's denial of certification of a class of 1,500 customer service managers.

The court concluded that both the nature of the plans (e.g., unlimited minutes, limited minutes, etc.) and who pays (Schwan's maintained that Cochran's girlfriend paid his bill) are irrelevant. Ultimately, employers cannot pass on their operating expenses to employees and cannot dig into their personal lives to determine who pays for the bill.

Employers should carefully review their cell phone reimbursement policies and procedures in light of this decision.

Bay Area Commuter Benefits Program

A reminder that by September 30, 2014, employers with fifty (50) or more full-time employees within the jurisdiction of the Bay Area Air Quality Management District (encompassing Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara, and Napa county and portions of Solano and Sonoma counties) must provide their employees with one of four commuter benefits:

1. Allow employees to exclude their transit or vanpool costs from taxable income (up to the maximum allowed by federal law – currently $130 per month).
2. Provide a transit or vanpool subsidy to cover or reduce monthly expenses (up to a maximum of $75 per month).
3. Provide free or low-cost bus, shuttle, or vanpool service.
4. Provide an alternative benefit that is as effective as the other options in reducing single-occupant vehicle trips and/or vehicle emissions.

The program has various requirements for eligibility, participation, employee notice, registration and recordkeeping. Employers in cities that already impose commuter benefit programs (e.g., San Francisco) may be exempt from the local programs if they meet the requirements for the Bay Area Commuter Benefits Program.

Companies should revisit their commuter benefit plan offerings to ensure compliance with this new program.

Reminder: Notice Required Prior to Mandating Use of Accrued Vacation/PTO During Holiday Shutdown

The end of year holidays, when many companies shut down for one or even two full weeks, are just over three months away. California companies must provide no less than one full fiscal quarter or 90 days' (whichever is greater) notice of employer-mandated usage of vacation or paid time off, including for holiday shutdowns. If such notice is not provided, employers may permit employees to voluntarily draw down on their balances, but cannot require it.

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