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Fenwick Employment Brief

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California Issues Newly Revised Meal Break Rules

On April 6, the California Division of Labor Standards Enforcement ("DLSE") issued new proposed regulations regarding lunch breaks for employees. In December, the DLSE withdrew regulations after a storm of protests from labor. The regulations clarify when and how employers must provide meal breaks. A meal period of not less than 30 minutes must be afforded after five hours of work and before six hours. If the total workday is no more than six hours, the meal period may be waived by mutual consent. After ten hours, the employees must be afforded a second meal break. If the total workday is no more than 12 hours, then the second meal break may be waived by mutual consent but only if the first meal break was not waived. The employer must also inform employees of their right to take a meal break, and that the employees will not suffer retaliation for taking the breaks. In addition, the employer must afford employees the opportunity to take meal breaks, and maintain accurate time records. The employer may be required to pay a penalty equivalent to one hour of pay for each failure to provide employees with a meal break. The new regulations are still opposed by the California Labor Federation which has filed a lawsuit challenging their legality. With increased awareness about these rules, and significant new "class action" litigation in this area, companies are well advised to assure compliance with the new regulations.

No Strict Liability Under FMLA for Employee Engaged in Disruptive Workplace Behavior

In a favorable decision for employers, the Eighth Circuit Court of Appeals covering mid-west states held that the federal Family and Medical Leave Act ("FMLA") does not impose strict liability for interfering with an employee's FMLA rights, regardless of the employer's good motives or legitimate business reasons for its actions. In *Throneberry v. McGehee Deash County*, plaintiff was a nurse working for the county hospital in Arkansas. Her performance was above average until her mental health gradually deteriorated to the point that her agitated and bizarre conduct affected her work performance. Hospital management recommended that plaintiff take a leave and she agreed. During her leave, plaintiff showed up at the workplace and engaged in disruptive conduct. The hospital asked her to resign, effective at the end of her leave of absence. Plaintiff submitted her resignation and thereafter sued alleging, among other claims, that the employer interfered with her FMLA rights. On appeal, the court held that an employer is permitted to defend its actions on the ground that it had a lawful reason for the employee's discharge, unrelated to the employee's exercise of her FMLA rights. This case underscores the importance of documenting lawful business reasons supporting adverse employment decisions which impact statutory rights.

Employer Liable for Discharging Returning Veteran

A decision by a federal district court judge in Colorado offers a cautionary message to employers who must increasingly accommodate veterans returning from military service. In *Duarte v. Agilent Technologies, Inc.*, plaintiff was a 19-year employee of Agilent and its predecessor Hewlett Packard. A member of the Marine Corp Reserves, he was called up for active duty on two occasions. On the first occasion in 2002, he returned to work without incident. After a second call up from November 2002 to July 2003, he was reinstated to a temporary assignment with the same pay and benefits. After four months, management mandated a reduction in force, and plaintiff's new supervisor selected plaintiff and a co-worker for lay off based upon their most recent performance. Plaintiff sued alleging the termination violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). Under USERRA, a returning veteran is protected from discharge for one year "except for cause." Rejecting the employer's argument that plaintiff was terminated for good cause, the court ruled that it was "problematic" that a new supervisor evaluated and ranked plaintiff against other employees based upon his most recent performance in a temporary assignment. Accordingly, the court awarded plaintiff $384,000 plus interest and attorneys' fees. The court, however, rejected plaintiff's request for punitive damages finding that the employer did not act willfully. Employers should exercise caution to properly reinstate and, if necessary, to lawfully discipline returning veterans during the protected one-year period.

San Jose Jury Awards Over $2 Million in Co-worker Sex Harassment Case

In an adverse result for employers, a San Jose jury awarded $2,328,000 to two women for alleged sex harassment by a co-worker. In *Hettick v. Federal Express Corporation*, the plaintiffs worked at a FedEx distribution center in Sunnyvale. Plaintiff Hettick alleged that a co-worker sexually harassed and stalked her. Plaintiff Bryant, a female co-worker, alleged that the same co-worker harassed her when she encouraged Hettick not to date the harasser. Both plaintiffs made numerous complaints to management, resulting in "minor" discipline against the harasser. Hettick resigned and both sued for sexual harassment. The employer defended, arguing that it took immediate action by transferring the alleged harasser, and giving him a warning letter and five-day suspension. Unconvinced, the jury decided in plaintiffs' favor, awarding them damages, including $2 million in punitives. This case underscores that, after receiving a complaint and concluding that sexual harassment has occurred, a company must ensure that the harassment is stopped by taking all appropriate remedial steps to prevent future harassment from occurring.