FENWICK & WEST LLP

Weekly Employment Brief

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Labor Commissioner Allows Salary Deduction For Full-Week Shutdown, but Limits Forced Use of Vacation

With the holidays approaching amid a continued economic slowdown, some employers may shut down facilities as a means of reducing salary expenses and vacation accruals. In a recent opinion letter, the California Labor Commissioner advised that although companies may institute a full-week shutdown without jeopardizing their exempt employees' exempt status, they cannot force employees to use accrued vacation unless they have given nine-months' prior notice of the shutdown. In other words, if a company shuts down its operations for a full workweek (seven consecutive days), it may deduct a full week's pay from an exempt employee's salary without destroying his or her exempt status, so long as the employee performed no work during that week and the reduced salary does not fall below the state minimum monthly salary for exempt workers (presently $2,340/month). However, before requiring any employees (exempt or nonexempt) to use vacation or PTO during the shutdown period, the Labor Commissioner stated that employer must give at least nine months' prior notice of such forced use. The Labor Commissioner reasoned that advance notice is needed to give employees enough time to have the option to use their accrued vacation or PTO for personal reasons beforehand. Employers should note, however, that Labor Commissioner opinion letters are not law, and, although a court might find them persuasive, they are not binding on the courts. At the very least, companies who plan to have shutdowns and want to require use of vacation should make efforts to provide reasonable notice to satisfy the policy concerns identified by the Labor Commissioner. A better course of action might be to give employees the choice between using PTO or taking unpaid leave.

The Fenwick & West Employment and Labor Group will present a breakfast briefing on Tuesday, December 3, 2002 in our Palo Alto office and Thursday, December 5, 2002 in our San Francisco office on this and other issues related to temporary shutdowns. To register for this free briefing, please send an email to registration@fenwick.com with your name and company information.

FMLA Suit Results in $11.65 Million Verdict, Including $900,000 Against Supervisors

In what may be the start of a future trend in employment law as the baby boom generation is faced with caring for their aging parents, an Illinois jury awarded a hospital maintenance employee $10.75 million against the hospital and $450,000 against two of his supervisors for violations of the Family and Medical Leave Act (FMLA). In *Schultz v. Advocate Health & Hospitals Corp.,* Chris Schultz had over 25 years of excellent service and was the esteemed "MVP Employee" whose picture hung in the hospital lobby. In the year 2000, however, Schultz needed to take 12 weeks of intermittent FMLA leave to care for his father, who suffered from Alzheimer's disease, and his mother, who was ill and died that year. During his leave, the hospital instituted a new performance policy that graded maintenance employees by the amount of work they had completed within a set period of time. The hospital terminated Schultz for failing to make the grade under this new system. Schultz sued and successfully argued that the grading system improperly punished employees who took legitimate time off. This case serves as a harsh reminder that employers should not count time off for FMLA or other protected leaves against an employee when granting benefits or measuring performance.

Labor Commissioner Claims Firing Employee For Moonlighting With Direct Competitor May Violate Labor Code

Under the California Labor Code, an employer cannot discharge an employee or applicant, or discriminate against him or her in any way, because he or she engaged in "lawful, off-duty conduct." The California Labor Commissioner, who is in charge of enforcing this law, recently has taken the position that the law protects a moonlighting employee-even an employee who is working for a direct competitor. The Labor Commissioner's office indicated that although an exception will be made when the employee's conduct is in direct conflict with the employers' business interests, it would narrowly construe that exception. One example of when the exception would apply is when the employee actually possesses some of the company's trade secrets. Many companies' employment policies and employment contracts may contain anti-moonlighting clauses. Although Labor Commissioner opinion letters are not binding interpretations of the law, companies may want to revisit the language used in their policies and contracts to minimize potential risk.

Second Round of OFCCP Pay Surveys Expected Soon

Federal government contractors should expect a second round of OFCCP Equal Opportunity Surveys in the near future. The agency recently has announced that the surveys may be sent by the end of the year to randomly selected federal contractors. Selected companies will need to submit a detailed report of the their pay practices. While these new surveys are going out, the OFCCP is "still studying" responses to the first round of surveys that the agency sent in January 2001 to about 49,000 contractors. The agency hopes to use the data to target more effectively its resources in enforcing discrimination laws.

DID YOU KNOW??

Effective January 1, 2003, the new minimum hourly rate employers must pay software engineers to qualify them for California's computer professionals exemption from overtime is $43.58/hour.