Fenwick Employment Brief

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Starbucks Prevails in Claim of Unlawful Criminal History Question in Application

Although Starbucks has been the target of numerous class action lawsuits in the U.S., the company defeated plaintiffs in one recent class action arising out of the criminal background question in its job application. The application asked: "Have you been convicted of a crime in the last seven (7) years? If Yes, list convictions that are a matter of public records (arrests are not convictions). A conviction will not necessarily disqualify you for employment." On a **separate** page, the application contained disclaimers for various states, including one for California, which provided: "CALIFORNIA APPLICANTS ONLY: Applicant may omit any convictions for the possession of marijuana (except for convictions for the possessions of marijuana on school grounds or possession of concentrated cannabis) that are more than two (2) years old, and any information concerning a referral to, and participation in, any pretrial or post trial diversion program." Plaintiffs, a group of rejected applicants, alleged that the criminal history question was unlawful. A California court of appeal found that the disclaimer was lawful, but that its placement on the application was troubling. Had Starbucks included the California disclaimer immediately following the convictions question, the court would have upheld the dismissal of the lawsuit on that ground alone. Instead, the court dismissed the lawsuit on the grounds that, of the four plaintiffs, two admitted in discovery that they understood Starbucks was not seeking information about proscribed marijuana-related offenses, and none had any marijuana-related convictions to disclose. The court may have ruled differently had one or more of the applicants possessed a different understanding and/or disclosed such convictions because of confusion over the form. Employers are urged to compare their application language regarding convictions with that approved by the court, and to place the disclaimer on the same page as the conviction inquiry.

Costco Defeats Challenge to Bonus Overtime Calculation

In a favorable decision for employers, a California court of appeal reversed an Alameda County trial court's decision in favor of Costco employees and upheld the company's method of calculating overtime pay for a bonus. In *Marin v. Costco*, a class action brought on behalf of Costco's hourly nonexempt employees, plaintiffs challenged Costco's semi-annual bonus paid to hourly employees. Costco applied a standard formula to calculate the bonus based upon the employee's number of hours paid (including vacation and other non-work hours). Recognizing the requirement under both federal and California laws to pay overtime pay on top of the bonus amount, Costco calculated the overtime on the bonus by dividing the employee's bonus by the number of paid hours to determine a regular hourly bonus rate, and then multiplied the number of overtime hours worked during the bonus period by one-half of that regular bonus rate (*i.e.*, regular hourly bonus rate X overtime hours X .5 = overtime pay). Plaintiffs contended that California's DLSE Manual required Costco to calculate the regular bonus rate by dividing the bonus amount by the number of straight time hours worked during the bonus period, and then multiplying the number of overtime hours by 1.5 times that regular bonus rate (*i.e.*, regular bonus rate X 1.5 times the number of overtime hours = overtime pay), a calculation that would have yielded more overtime compensation. The court rejected plaintiffs' argument, ruling that the DLSE Manual has no force of law, and held that Costco's formula complied with California and federal overtime laws. This is a complex decision based upon the specifics of Costco's bonus formula, and employers are cautioned to consult counsel about their own overtime calculation on bonuses for nonexempt employees.

Hospital Lawfully Discharged Janitor For Not Calling in Daily During FMLA Leave

In *Bacon v. Hennipin County Medical Center*, the federal Eighth Circuit Court of Appeals (covering Midwestern states including Minnesota) ruled that a Minneapolis hospital properly discharged a janitor while she was on FMLA leave because she violated a policy that required employees to call in daily to report an absence. Bacon submitted a medical certification for intermittent leave related to a serious chronic allergy condition. The hospital's employee handbook and the collective bargaining agreement included a call-in policy that required employees on FMLA leave either to submit medical documentation with a definite return-to-work date or to call in daily to report absences. The hospital's FMLA request form required employees to acknowledge that an FMLA leave did not change the employer's leave of absence procedures. For a month following a July illness, Bacon called in every day she was scheduled to work to report that she would be absent. However, starting in August, Bacon failed to call in. After three consecutive workdays without a call, the employer notified her that she was discharged for job abandonment. Affirming a dismissal in the employer's favor, the court held that the hospital's call-in policy was lawful, and that the employee handbook and FMLA leave request form provided employees with sufficient notice of the call-in requirement. The court rejected Bacon's argument, raised for the first time in her deposition, that her supervisor gave her permission to stop calling in on a daily basis.

NEWS BITES

Wal-Mart Settles 63 Class Action Wage Suits For $640 Million

On December 23, 2008, Wal-Mart announced the settlement of 63 wage and hour lawsuits pending around the country for up to $640 million. If approved by the courts, the settlements would end the vast majority of 76 such cases against Wal-Mart alleging the company did not provide employees with proper rest and meal breaks and engaged in other wage and hour violations. One such California case, currently on appeal, resulted in a $172 million verdict in 2005.

Toy Maker Enjoined From Selling Bratz Dolls

A federal district court in Southern California issued a permanent injunction in *Bryant v. Mattel* against MGA Entertainment, Inc. prohibiting the sale of Bratz dolls and requiring MGA to remove the doll from store shelves starting in February. Mattel earlier obtained a jury award of $100 million for copyright infringement based on a finding that Bratz designer Carter Bryant created designs for the Bratz doll while still employed at Mattel. (Bryant settled with Mattel.)

Texas Employer Pays $20 Million to Resolve Criminal Probe of Immigration Violations

On December 19, 2008, the federal Immigration and Customs Enforcement agency announced that IFCO Systems North American, a Texas-based manufacturer, agreed to pay $20.7 million to resolve a criminal investigation relating to the hiring of over 1,200 undocumented workers. The amount included $2.6 million for FLSA overtime wage violations to workers who were paid a piece rate to manufacture wood pallets. The company also agreed to upgrade its Form I-9 procedures throughout more than 150 facilities across the country. The settlement did not address criminal charges against company managers and employees, nine of whom have pleaded guilty to criminal violations.

Rastafarian Allowed to Challenge Employer's Grooming Policy

In *Brown v. F.L. Roberts & Co.*, a lube technician, assigned to work exclusively in a cold and dangerous "lower bay" away from customer view after he refused to cut his hair on account of his Rastafarian religion, sued his employer – a Massachusetts Jiffy Lube operator – for religious discrimination. In reversing the lower court's dismissal of the complaint, the Massachusetts appellate court ruled that a jury must decide whether requiring the employee to work away from public view was a reasonable accommodation. The court opined that there was no discussion between management and employee about alternatives to working in the lower bay, and the employer offered no evidence that the plaintiff's Rastafarian hair style decreased sales or affected customer satisfaction.

No Right to Bear Arms at Work

In *Bruley v. Village Green Mgmt. Co.*, a federal district court in Florida ruled that an employer lawfully terminated an apartment manager who, armed with a loaded shotgun, investigated the shooting of a tenant. When he arrived at the scene, Bruley rendered first aid to the shooting victim until the ambulance arrived. The employer terminated Bruley for violating company policy against carrying weapons at work. Bruley alleged that his termination violated his right to bear arms. While finding his actions in helping the tenant commendable and the employer's response an overreaction, the court ruled that neither federal nor state laws afforded employees a right to possess firearms at work.

President Obama Appoints Solis to Head Labor Department

President-elect Obama nominated California Representative Hilda Solis to serve as Secretary of Labor. The president asserted the Labor Department needed to improve its advocacy for American workers and in mediating disputes between labor and management. Solis' parents were union workers and she attributed union wage scales for her family's rise into the middle class. Solis is a staunch union advocate.

San Francisco Minimum Wage Raised to $9.79 Per Hour

Effective January 1, 2009, the local minimum wage in San Francisco was raised to $9.79 per hour as a cost of living adjustment.
