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Fenwick Employment Brief

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CORPORATE OFFICER NOT PERSONALLY LIABLE FOR UNPAID WAGES

In August 2005, we reported on the California Supreme Court's ruling in *Reynolds v. Bement*, where the court held that corporate officers and directors were **not** personally liable under state wage/hour laws for overtime obligations. http://www.fenwick.com/docstore/Publications/Employment/ELA_08-12-05.pdf.

In *Jones v. Gregory*, a California court of appeal recently extended the *Reynolds* holding to claims brought by the California Division of Labor Standards Enforcement (DLSE) on behalf of unpaid workers. In *Jones*, the DLSE sued the CEO of a faltering company for wages owed to scores of employees, on the theory that *Reynolds* does not apply to actions prosecuted by the DLSE (vs. actions filed by the aggrieved workers). The court rejected the DLSE's argument and held that *Reynolds* extends to claims filed by or on behalf of aggrieved workers.

Notwithstanding its holding, the court observed that officers and directors may be personally liable where corporate formalities are not maintained (*i.e.* where the individuals are the alter ego of the company). Further, even where corporate formalities are observed, officers and directors may be personally liable for penalties that attend to the failure to pay wages. Finally, as we reported last August, officer and directors may be personally liable under federal law for minimum wage and overtime obligations.

Although this decision provides some comfort to officers and directors, the issue of personal liability for wage violations remains a complicated one in California.

EMPLOYEE'S ERASURE OF LAPTOP CONTENTS TRIGGERS LIABILITY UNDER FEDERAL COMPUTER HACKER LAW

When departing, disgruntled employees sabotage their employer's computer systems on the way out the door, employers have recourse under both criminal and civil laws. The federal Computer Fraud and Abuse Act (18 U.S.C. §1030) permits injured parties to sue for economic damages and injunctive relief for the unauthorized "transmission" of disk erasure programs and the like with the intent to cause damage to a protected computer. In *International Airport Centers v. Citrin*, the Seventh Circuit Court of Appeals (covering Illinois and other Midwestern states) revived an employer's CFAA claim against a former employee who installed a computer program that cleansed his laptop hard drive and prevented the recovery of both company data and evidence of the employee's disloyalty. The court held that the installation and use of the disk-erasure program constituted an unlawful "transmission" under the Act.

This case highlights the importance of employers taking control, at the earliest possible moment, of computer equipment and other company property used by terminated employees, so as to avoid sabotage.

MAJOR LIFE ACTIVITIES UNDER ADA INCLUDE CONCENTRATION

A United Parcel Service manager, who suffered from depression, anxiety and other afflictions as a result of being required to memorize work reports, successfully sued his employer under the Americans with Disabilities Act. In *Battle v. UPS*, the manager sought accommodations from UPS to help him deal with his difficulty concentrating, which UPS declined to provide. The ADA requires employer to provide reasonable accommodations to workers who

are substantially limited in their ability to perform "major life activities." In upholding a jury verdict in Battle's favor, the Eighth Circuit Court of Appeals (covering Missouri and other Midwestern states), confirmed that thinking and concentration, like many other cognitive actions, constitute major life activities under the ADA.

MORGAN STANLEY SETTLES OVERTIME CLASS ACTION FOR $42.5 MILLION

Morgan Stanley agreed to pay $42.5 million to settle overtime claims brought on behalf of 5,000 of its California-based financial advisors. The plaintiffs alleged that Morgan Stanley misclassified its financial advisers as exempt from overtime. Morgan Stanley is the latest financial services giant to settle a class action overtime dispute (UBS and Merrill Lynch recently signed off on multi-million dollar settlements). These settlements confirm that overtime exemptions continue to represent a prominent source of risk for employers in all industries, including high tech, retail, insurance and financial services.

EMPLOYER'S FAILURE TO PROFFER CREDIBLE EVIDENCE OF ESSENTIAL JOB FUNCTIONS REVIVES ADA FAILURE TO ACCOMMODATE CLAIM

The Third Circuit Court of Appeals (covering several mid-Atlantic states) revived an employee's ADA claim against Hershey Chocolate, when Hershey failed to present sufficient evidence that certain duties the plaintiff could not perform were "essential" to her job. In *Turner v. Hershey*, the plaintiff sought accommodations to her work routine as a Hershey factory line worker because of various back injuries. Hershey refused Turner's request to bypass certain positions on the factory line rotation on the basis that participation in the rotation was essential to her job. A trial court dismissed Turner's ADA claim, but the Third Circuit reversed, holding that the employer failed to present sufficient evidence to rebut Turner's contention that the at-issue line rotation was not essential to her job. The court relied, among other facts, on the absence of any reference in Turner's job description to the rotation.

This case confirms that ADA failure to accommodate cases often turn on evidence of what is and is not essential (*i.e.* "fundamental") to the job. Managers should be clear on what is essential before rejecting accommodation requests.

POST-EMPLOYMENT HEALTH CARE COVERAGE OPTIONS BEYOND COBRA

Most people know that a terminated employee who was covered by her employer's group health insurance plan may receive continued health care coverage for a limited period after employment through COBRA. However, COBRA coverage may expire before the terminated employee can obtain substitute coverage with a new employer. It is often assumed that such a person has no alternative but to apply for an individual, medically underwritten policy—which may be prohibitively expensive or even unavailable, if the applicant is not in perfect health. This is a misconception. There are often other options.

Employees may potentially avail themselves of a number of health insurance sources, including Cal-COBRA, HIPAA, California's Major Risk Medical Insurance Program, and small employer group health insurance programs. What will be practical for and available to the worker depends on many different factors.