Fenwick Employment Brief

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PANDEMIC PREPAREDNESS – DEALING WITH THE SWINE FLU

Although the swine flu outbreak appears to have peaked (for the time being), employers should nevertheless remain vigilant and take the following proactive steps to deal with a potential full blown pandemic:

- Monitor updates from the U.S. Centers for Disease Control ("CDC") and follow the CDC's guidance;
- Advise employees that the company is dedicated to providing a safe and healthy work environment;
- Require employees suffering from flu-like symptoms and employees who care for or reside with others suffering from flu-like symptoms not to report to work until the symptoms subside;
- Consider whether to require medical clearance before employees return to work after an absence triggered by their or someone else's illness due to flu-like symptoms;
- Implement restrictions, consistent with CDC recommendations, on non-essential travel to Mexico; and
- Consider requiring employees who travel to Mexico to work from home for up to seven days, the approximate incubation period for the swine flu, after their return from Mexico.

This outbreak provides a timely reminder that employers should also implement a disaster preparedness plan for responding to a pandemic or, more generally, a natural disaster (such as an earthquake). Through such a plan, employers can identify those functions critical for the business that must continue even if most employees are absent from work, provide a contingency plan to maintain those critical functions, and establish protocols to facilitate communication between the employer and its employees.

EMPLOYER'S ALLEGED FAILURE TO ENGAGE IN INTERACTIVE PROCESS NOT MATERIAL, NOT ACTIONABLE

A California appellate court recently held that an employee must identify an available reasonable accommodation to succeed on a claim that his employer failed to engage in the interactive process, resolving an apparent split on the obligation. In *Scotch v. The Art Institute of California-Orange County, Inc.*, Carmine Scotch, an instructor at the Art Institute of California ("AIC"), claimed AIC failed to undertake a thorough interactive process in connection with Scotch's disability. AIC reasonably accommodated Scotch's health limitations by allowing him to obtain an advanced degree through a part-time program, and Scotch further requested AIC consider alternatives to a newly-assigned part-time schedule to allow him to retain his health benefits; AIC did not. The trial court dismissed Scotch's claim.

On appeal, the court concluded a reasonable jury could find that AIC failed to continue the interactive process, but nonetheless affirmed summary judgment for the employer because the alleged failure was not material. Although AIC had a continuous obligation to engage in the interactive process, in opposing AIC's motion for summary judgment, Scotch failed to identify a reasonable accommodation that could have resulted from the continued interactive process. In finding the failure immaterial and affirming summary judgment, the court recognized the remedial purpose of the California Fair Employment Housing Act and its interactive process requirement, and observed that an employee suffers no injury from a failed interactive process when no reasonable accommodation otherwise existed.

In reaching its conclusion, the court distinguished between the employee's obligation during employment and during litigation: "An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself[,]" but "once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the

interactive process should have produced . . . ." While this decision is a victory for employers in the courtroom, it is not a "free pass" for employers that believe an employee's limitation cannot be accommodated. Rather, it underscores the importance of keeping communications with disabled employees open and exploring potential accommodations with such employees in good faith – because it is *both* the right thing to do and the best way to avoid the courtroom in the first instance.

EEOC ISSUES "BEST PRACTICES" GUIDANCE FOR EMPLOYEE-CAREGIVERS

On April 22, 2009, the Equal Employment Opportunity Commission ("EEOC") issued its "Employer Best Practices for Workers with Caregiving Responsibilities." This guidance supplements the 2007 guidance regarding disparate treatment of employee-caregivers by identifying suggested practices employers should consider to reduce the risk of equal employment opportunity violations against, and remove barriers to equal employment opportunities for, workers with caregiving responsibilities.

The guidance, which admittedly goes "beyond federal nondiscrimination requirements," adds a new twist to commonly known best employment practices, including as follows:

- Train managers about how applicable law affects managerial decisions impacting workers with caregiving responsibilities;
- Develop, disseminate, and enforce a strong Equal Employment Opportunity Policy that (a) identifies common stereotypes or biases about caregivers and examples of unlawful conduct flowing from those biases and (b) prohibits retaliation against those who report discrimination or harassment based on caregiving responsibilities;
- Educate managers at all levels about and ensure compliance with the company's work-life policies;
- Promptly and appropriately respond to complaints of caregiver discrimination;
- Audit the company's recruitment, hiring, promotion, compensation, performance evaluation, and separation practices to ensure decisions and assessments are based on specific, job-related factors and not on caregiving responsibilities;
- Ensure that job opportunities are communicated to all eligible employees, including those with caregiving responsibilities;
- Review workplace policies that restrict flexibility for business necessity and consider modifications to requirements such as mandatory overtime and fixed hours of work;
- Provide reasonable personal or sick leave to allow employees to attend to caregiving responsibilities, even if not required to do so by law; and
- Professionally develop the potential of employees, supervisors, and executives without regard to caregiving responsibilities, including providing training, equal opportunities to participate in complex work, and equal access to workplace networks to all employees.

Employers should review this guidance carefully as part of their ongoing EEO compliance efforts.

NEWS BITES

DOL Beefs Up Wage and Hour Forces by One-Third

The Department of Labor ("DOL") has shifted significant resources to agencies responsible for enforcing wage and hour compliance and health and safety laws. According to published reports, the DOL has already begun hiring 150 investigators and plans to add 100 more investigators to ensure compliance with wage and hour and health and safety compliance, including in connection with federal stimulus projects. Altogether, the additional 250 staff would increase the DOL workforce dedicated to such compliance by about one-third.

Employee Lost FMLA Rights for Altering Medical Certification

The Seventh Circuit Court of Appeals affirmed the dismissal of a lawsuit against a residential care provider for alleged Family and Medical Leave Act ("FMLA") interference. In *Smith v. Hope School*, Tanum Smith obtained a medical certification from her doctor to support her ongoing absence from work, added (without the doctor's knowledge or approval) the phrase "and previous depression" to the certification, and submitted it to the employer. The employer learned of the alteration, denied the FMLA leave and terminated Smith's employment for unexcused absences.

Smith asserted that the unaltered portions of the certification established her right to FMLA leave, so her termination was unlawful. The court rejected Smith's position: "We are convinced that Smith's proposed rule would have the effect of encouraging applicants to dress up an application for leave by adding non-existent conditions." Thus, Smith was not entitled to FMLA leave and the employer lawfully terminated her employment.

$3.4M Verdict Upheld for Pregnant Delivery Driver

In an unpublished decision, the California Court of Appeal recently upheld a $3.4 million verdict awarded to a delivery driver whose employer, less than one hour after notification of her pregnancy and lifting and climbing restrictions, sent her home and placed her on leave. In *Lopez v. Bimbo Bakeries USA Inc.*, Bimbo Bakeries' human relations manager determined Yaire Lopez could not work based on review of the physical requirements of her job. She did not, however, consult Lopez or her nurse practitioner and resisted Lopez's attempts to work as a store clerk. A San Francisco jury found that Bimbo Bakeries failed to accommodate Lopez's pregnancy in violation of the California Fair Employment and Housing Act. The jury award Lopez $340,700 for economic loss and emotional distress and $2 million in punitive damages, and the court awarded her over $1 million in attorneys' fees.

Applicants Obtain $10M Settlement for Unpaid "Sales Tryouts"

A class of applicants for sales positions at Victoria's Secret California stores sued the store chain for failure to pay wages and unfair competition. The applicants claimed the stores required them to participate in "sales tryouts," which involved unpaid job training and job previews, and that they should have been compensated for such training and services. The $10 million settlement includes a payout in the form of a $67.50 gift card to each applicant who submits a valid claim and $2.89 million in attorneys' fees.

President Obama Nominates Union Attorneys for NLRB Vacancies

On April 24, 2009, President Obama nominated Craig Becker and Mark G. Pearce, both Democrats with strong union and pro-employee backgrounds, to fill two of the three current vacancies on the National Labor Relations Board. If confirmed, they will join Chairperson Wilma Liebman (Democrat) and Peter Schaumber (Republican) on the Board, resulting in a Democratic working majority. By law, no more than three Board members may come from the same political party; thus, while President Obama has not announced a final nominee, the nominee will not be another Democrat.

Reminder: Revised Form I-9 In Effect Through June 30, 2009

The Form I-9 is a required part of the hiring process by which employers verify the identity of newly-hired employees and their eligibility to work in the United States. As of April 3, 2009, employers were required to start using the February 2, 2009 revised Form I-9. The revised form confirms that expired documents are no longer acceptable forms of identification; the Passport Card is now an acceptable List A document; and certain resident and employment authorization cards are no longer acceptable.