FENWICK & WEST LLP

Fenwick Employment Brief

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Labor Commissioner Reconsiders Position on Deductions for Partial Day Vacations

For many years, the California Division of Labor Standards Enforcement ("DLSE") has enforced a prohibition on vacation/paid time off ("PTO") deductions for partial day absences by exempt employees. The DLSE has also taken the position that an employer must give nine (9) months notice to its employees before imposing mandatory vacation/PTO usage (for example in connection with a week-long shutdown of operations). Historically, the DLSE viewed such partial day deductions and forced usage of PTO without sufficient notice as improper wage deductions that are inconsistent with exempt status.

However, a recent internal memorandum by the new DLSE Labor Commissioner suggests that the DLSE will no longer enforce these policies. The Labor Commissioner withdrew a prior DLSE Opinion Letter upholding the ban on partial day deductions and clarifying the nine-month notice rule. She expressed her intent to formally adopt federal regulations that permit partial day use of vacation or paid time off and require only a reasonable (generally, about three months) amount of notice before imposing mandatory vacation usage.

This internal memorandum represents a promising shift by the DLSE. However, we caution readers that the memorandum remains "internal" and subject to change before an official pronouncement is issued.

Trivial Criticisms of Employee's Performance do not Support FEHA Retaliation Claim

In *Pinero v. Specialty Restaurants Corp*., Alberto Pinero sued his former employer for retaliation under California's Fair Employment Housing Act ("FEHA"). Pinero claimed that when his employer, Specialty Restaurants Corp. ("SRC"), discovered that Pinero had sued his former employer for age discrimination, Pinero's supervisor retaliated by unfairly and repeatedly criticizing Pinero's work. Pinero admitted, however, that his supervisor's criticisms did not rise above the level of "nitpicking." Further, SRC did not terminate, demote or transfer Pinero, disrupt his benefits or compensation or change his job duties. The trial court dismissed Pinero's retaliation claim and a California court of appeals affirmed, finding that Pinero failed to prove that he suffered an adverse employment action.

California courts consistently have held that an "adverse employment action" for purposes of a FEHA retaliation claim is not limited to ultimate employment decisions (*e.g.*, firing, demotion, reduction in pay), but can include decisions or actions that "materially and detrimentally" affect the terms and conditions of a plaintiff's employment. *See* Summary of *McRae v. Dep't of Corrections* from April 14, 2005 FEB. Some federal courts, including the Ninth Circuit (which covers California and other western states), adhere to a broader "deterrence test," whereby an adverse employment action is "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."

The court in *Pinero v. SRC* did not specifically adopt either test, but found that Pinero's complaints were insufficiently adverse under either the "materiality" or "deterrence" tests. The court emphasized that the purpose of FEHA was not to remedy "any possible slight resulting from the filing of a discrimination complaint." Thus, the court concluded that the supervisor's criticisms did not rise to the level of an adverse employment action.

The *Pinero* decision clarifies the meaning of an adverse employment action and provides helpful language for employers regarding the scope of a FEHA retaliation claim. Nevertheless, employers should always ensure that criticisms about performance are objective and made in good faith, especially when the criticism closely follows an employee complaint or other protected activity.

NLRB Strikes Down Handbook Provision Limiting Employee Complaints, but Upholds Anti-Fraternization Provision

The National Labor Relations Board ("the Board") (the federal agency charged to administer the National Labor Relations Act) recently addressed the types of conduct employers may permissibly prohibit between employees and customers. In *Guardsmark, LLP & SEIU, Local 24/7*, the Board considered whether two provisions in an employee handbook unlawfully prohibited employees from fraternizing and complaining to customers about work conditions.

Guardsmark provides uniformed guard services to businesses. Guardsmark's employee handbook required all guards to "follow the chain of command" and report only to their immediate supervisor, and it prohibits guards from registering complaints with Guardsmark's customers. The Board held that this "chain of command" policy violates an employee's right to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment.

The employee handbook also stated that guards must not "fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees." The Board found that this provision did not violate the NLRA. Specifically, the Board found that guards would reasonably understand this provision to prohibit personal entanglements, not discussions about the terms and conditions of employment. Further, the Board concluded it would be unreasonable to infer that speaking to others about terms and conditions of employment constitutes a prohibited "fraternization." Finally, the Board found that Guardsmark's anti-fraternization rule was fairly designed to ensure that security is not compromised by interpersonal relationships between guards or between guards and the clients' employees.

In light of this decision, employers should take a fresh look at their handbooks to ensure they do not directly or indirectly interfere with an employee's right to complain about work conditions. Further, despite the favorable ruling for Guardsmark, anti-fraternization policies are subject to great scrutiny, especially under California law, and should be carefully drafted to avoid interference with employees' lawful conduct during non-working hours.

Employer's Failure to Post Workplace Rights Notice May Excuse Late Filing of EEOC Charges

A decision from the First Circuit Court of Appeals (covering Massachusetts and other Northeastern states) highlights the risk associated with failing to post Equal Employment Opportunity notices in the workplace. In *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, a group of plaintiffs sued their employer for unlawful discrimination under Title VII. To pursue such an action, a plaintiff must file a charge with the Equal Employment Opportunity Commission ("EEOC") within a specific time period — 180 or 300 days (depending on the jurisdiction) — after the alleged discrimination. The trial court dismissed the plaintiffs' claim on the ground that they failed to file their charges with the EEOC within the statutory period.

On appeal, plaintiffs argued that the court should forgive their untimely filing because the employer failed to post statutorily mandated notices of their employment rights. The First Circuit held that an employer's violation of the EEOC posting requirement may provide a basis to extend the charge filing deadline if the complainant did not have other actual or constructive knowledge of the complaint procedure. The court then reversed the lower court's dismissal and remanded the case for further proceedings to explore whether and to what extent the plaintiffs were aware of the EEOC complaint procedure.

The court's ruling highlights the importance of complying with workplace posting requirements. Indeed, although the employer ultimately may prevail, it will spend substantial time and money to defend claims that likely would have been barred but for the posting violation.

Abercrombie & Fitch Agrees to Pay Over $800,000 to Settle Class Action for Clothing Reimbursement

Abercrombie & Fitch Stores agreed to a nearly $1 million settlement of a class-action lawsuit filed earlier this year on behalf of approximately 8000 former and current employees in Washington state. The named plaintiffs alleged that Abercrombie & Fitch violated state law by requiring employees, as a condition of their continued employment, to purchase and wear Abercrombie & Fitch clothing every three months to promote "the look" of the season. The plaintiffs alleged that the clothing requirement caused wages to fall below the state's minimum wage laws. A Washington state superior court has given preliminary approval to the proposed settlement, which, if confirmed, will provide cash reimbursements to the class plaintiffs. The Washington state settlement follows the $2.2 million settlement of a similar action against Abercrombie in California two years ago.

Employers have a clear right to require employees to dress appropriately in the workplace. However, as these settlements reveal, requiring that employees maintain a certain look or style at their own expense can be risky and costly.

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