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Fenwick Employment Brief

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Fabrication Plant Workers Entitled to Wages for Donning and Doffing Clean Room Uniforms

In the latest of a series of court decisions across the nation addressing the compensability of time spent donning and doffing uniforms, the Ninth Circuit Court of Appeals (encompassing California and other western states) held that workers at an Oregon silicon fabrication plant were entitled to wages for such activity.

The federal Fair Labor Standards Act ("FLSA") requires employers to compensate employees for all activities that are "integral and indispensable" to the job. In *Ballaris v. Wacker Siltronic Corp.,* plaintiff Michael Ballaris alleged that he and all other Wacker employees who worked in the company's clean room environments at its Oregon fabs were entitled to compensation under the "integral and indispensable" standard for time spent donning and doffing their highly specialized suits. A trial court dismissed Wacker's claim, but the Ninth Circuit reversed, holding that Wacker required employees to wear the protective suits and don the gear before the start of their shift, and that the suits benefited Wacker's fab processes. Thus, the time spent donning and doffing such gear was compensable under the FLSA.

Employers in California (especially in Silicon Valley) which require employees to wear such protective gear in clean rooms and other similar work environments should closely examine their pay practices with respect to time spent donning and doffing such gear, and consult counsel if this time is not compensated.

Employer Successfully Defeats ADA "Association" Claim

The Seventh Circuit Court of Appeal (encompassing Illinois and other Midwestern states) recently clarified the proof needed to assert a cognizable claim under the Americans with Disabilities Act ("ADA") association prong, which prohibits discrimination against an employee who has a family, business, social or other association with a person who has a known disability.

In *Larimer v. IBM,* the plaintiff sued IBM under the association prong after IBM terminated his employment. Prior to Larimer's termination, his wife gave birth to premature twins, whose early birth led to serious medical problems and a two month, $200,000 hospitalization (covered under IBM's employee health plan). The precise nature of Larimer's claim is unclear, but he apparently contended that IBM terminated him because his daughters were disabled and/or that their future disability would interfere with Larimer's ability to fulfill his job duties.

The court identified the elements of proof for an association claim: (1) the plaintiff was qualified for his job; (2) the plaintiff was subjected to an adverse employment action; (3) the employer knew the plaintiff had a relative or associate with a disability; and (4) a reasonable inference exists that the disability was a determining factor in the employer's decision to carry out the adverse action.

The court held that an association claim will typically be based on one or more of three scenarios: (1) the disability is costly to the employer (because the relative or associate is covered under the employer's health plan); (2) the employer fears that the employee may become afflicted with the relative or associate's disability (for example, HIV); or (3) the employee is inattentive to work because of the disability, which inattentiveness the employer can reasonably accommodate.

The court found insufficient evidence that Larimer's claim fell within any of the three scenarios. For example, Larimer proffered no evidence that the health care costs adversely impacted the budget of the IBM department responsible for his termination. Nor did Larimer proffer evidence that he was absent or distracted from work during or after his children's hospital ordeal. Ultimately, Larimer could not establish that his children's afflictions were a determining factor in IBM's decision to terminate him.

This case highlights a seldom-used but nevertheless potent ADA claim in an employee's arsenal. Employers should proceed cautiously with terminations and other adverse employment actions when they become aware that the at-issue employee has a disabled relative or other covered associate.

Employers Must Promptly Reinstate Employees Returning from FMLA Leave

A recent decision from the Sixth Circuit Court of Appeals (encompassing Ohio and other Central U.S. states) sheds important light on the timing of an employer's duty to reinstate an employee returning from a Family and Medical Leave Act ("FMLA") leave. In *Hoge v. Honda of America,* plaintiff Lori Hoge alleged that Honda violated the FMLA when it reinstated her to an equivalent position one month after she notified the company she was ready to return to work. Honda argued that employers are entitled to a "reasonable" amount of time to reinstate employees returning from FMLA leave, an interpretation the court of appeals rejected.

Hoge took an FMLA leave for abdominal surgery in early May 2000, with an unclear anticipated return to work date. On June 27, 2000, Hoge reported to work, armed with an appropriate certification from her physician. However, Honda did not reinstate her for another month due to numerous changes to the assembly line on which Hoge worked and Honda's (claimed) ignorance of her intended return date.

The Sixth Circuit held that the FMLA does not grant employers a reasonable time to reinstate employees returning from an FMLA leave after they notify the employer they are able to work. Rather, they must reinstate "promptly." To the extent an employee returns from an FMLA leave earlier than expected, she must give the employer reasonable notice (usually two business days) of the revised return date. However, if employer and employee clearly establish a return date, and the employee reports to duty on that date, the employer must reinstate the employee on the established date.

This case reinforces the need for employers to communicate with employees at the commencement of (and indeed, throughout) an FMLA leave about their anticipated return to work date.

State Minimum Wage Proposal Dies on Governor's Desk

California employers and business groups were pleased to learn that Governor Schwarzenegger vetoed late last month a bill to increase the state's minimum wage by $1.50 per hour over two years. The bill would have raised the current $6.25 hourly minimum to $7.25 on July 1, 2005, and $7.75 one year later. Schwarzenegger cited the high cost of doing business in California and attendant loss of jobs and relocation of businesses as clear barriers to a minimum wage increase.