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Weekly Employment Brief

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Workers' Vacation Time May Count Toward FMLA Eligibility

In *Ruder v. Maine General Medical Center,* an employee was one week away from qualifying for FMLA leave when he commenced vacation for unspecified medical reasons. Thereafter, he was placed on medical leave. When he attempted to return to work, his employer refused to reinstate him on the basis that he was not FMLA covered and therefore ineligible for guaranteed reinstatement. After he sued, the employer argued that he was not protected by the FMLA because he was not an eligible employee when he commenced the medical leave. The U.S. District Court for the District of Maine disagreed, ruling that time an employee spends on vacation during his or her first year on the job counts toward the required year of employment. It should be noted that this ruling is contrary to three previous federal district court opinions that have considered the issue. Employers should exercise caution and seek advice of counsel before refusing to afford FMLA rights to employees who are on the cusp of FMLA eligibility.

California Supreme Court Allows Catholic Health Clinic to Prohibit An Employee's Religious Proselytizing

In *Silo v. CHW Medical Foundation,* the California Supreme Court concluded that a health clinic properly terminated an employee for religious proselytizing. Catholic Healthcare West (CHW) operated a Sacramento clinic affiliated with the Roman Catholic Church. The clinic treated patients regardless of religious affiliation. Plaintiff Silo admitted that he proselytized co-workers and patients about his Christian religious faith. However, several individuals complained to management that Silo's religious efforts were unwelcome. CHW eventually discharged Silo for continuing to proselytize despite warnings to stop. In response to Silo's lawsuit, CHW claimed that under the First Amendment it had the right as a religious organization to choose employees who would further its religious mission. In this instance, CHW urged that the clinic's religious mission was to appear as secular as possible in furtherance of its mission of providing health care regardless of the patient's religious affiliation. The court agreed and found that CHW was not liable for the termination. In most respects, this decision is unique to religious employers. In general, employers should exercise caution before restricting employee religious speech, especially where such discussion occurs during nonwork time, such as breaks. However, lawful disciplinary action may be taken against an employee who engages in religious harassment.

Tyson Indicted For Conspiracy to Hire Illegal Aliens

It has been widely reported that the federal government has indicted and is actively investigating Tyson Foods, the world's largest poultry producer, for systematically recruiting and hiring illegal aliens. In addition, four Tyson ex-employees have filed a class action lawsuit alleging that the company conspired to hire illegal aliens in violation of the Racketeer-Influenced & Corrupt Organizations Act (RICO). They allege that Tyson depressed the wages of lawful workers at 15 plants through an "illegal-immigrant hiring scheme" of smuggling illegal workers into the U.S. to work at its plants. It was reported that Tyson has consistently experienced difficulty hiring and retaining workers at its largely remote, rural plants where the wages are low and the work is difficult. The government offered a $100 million settlement of the criminal matter, which Tyson rejected. In the RICO suit, the company faces penalties and possible triple damage awards. Especially in light of heightened security concerns following the events of September 11, these proceedings against Tyson further underscore the risk of recruiting and hiring illegal workers.

Homeowners Who Hire Unlicensed Contractors May Be Liable As Employers

A homeowner hired an unlicensed contractor for tree trimming because the contractor was less expensive than a licensed tree trimmer. After the contractor's worker fell while trimming the homeowner's 50 ft. palm tree, the California Supreme Court found that if the homeowner knew the contractor's worker was unlicensed, he could be deemed an "employer" liable for violations of Cal-OSHA safety regulations, worker's compensation and other employment laws. Under California Labor Code section 2750.5, an unlicensed contractor is presumed to be an "employee" of the hirer unless the hirer was misled by the contractor regarding his or her license. The case is *Fernandez v. Lawson,* which reversed summary judgment in favor of the employer and sent the case back to the trial court for a finding of fact based on this new legal determination.