



FENWICK & WEST LLP

## Weekly Employment Brief

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### **Furlough Exempt Employees at Your Peril**

A popular employer cost saving measure, of requiring exempt salaried employees to take time off without pay or to use accrued vacation in order to be paid for such time off, has been thrown into question by an opinion letter written by the Chief Legal Counsel for the California Labor Commissioner. The opinion is a major departure from prior California law that allowed such forced furloughs of exempt employees. The Chief Counsel opined that in order to retain exempt status, an employee must be paid full salary no matter how many, or how few hours s/he works in a month. Accordingly, deducting from salary for days not worked during a furlough would be in violation. Further, Chief Counsel concluded that an employer may not compel an employee to use accrued vacation during a furlough to evade the obligation to pay salary. For such violations, the employee would be reclassified as nonexempt and entitled to overtime pay. The opinion letter is not a law, albeit the position of the state agency in any enforcement action. It also does not prohibit an employer from encouraging employees to voluntarily take vacation to draw down their accrual. In addition, the opinion does not apply to nonexempt employees. A more detailed analysis of the opinion letter will be forthcoming.

### **Seventh Circuit Holds Companies Not Required To Keep Every Single Piece Of Scrap Paper Used In Planning A RIF**

A manager fired by Illinois Bell Telephone Co. in a reduction in force could not establish age discrimination even though the company destroyed document used in planning the RIF. In *Rummery v. Illinois Bell Telephone Co.*, a former telephone

manager argued that regulations of the Equal Employment Opportunity Commission (EEOC) require employers to keep any record it makes “including but not necessarily limited to . . . records having to do with . . . lay-off or termination.” The employee further argued that the company’s intentional destruction of documents, should lead to an inference that the records favored the employee. The Seventh Circuit disagreed and ruled that: “Employers are not required to keep every single piece of scrap paper that various employees may create during the termination process.” The court went on to find that, “[i]t is sufficient that the employer retains only the actual employment record itself, not the rough drafts or processes which may lead up to it.”

### **New York Court Rules Against Lockheed On Claim That Its Workers Were “Raided”**

A poorly drafted confidentiality agreement recently led a New York court to dismiss a claim by Lockheed Martin Corp. that a competitor raided its workforce. In *Lockheed Martin Corp. v. Atlas Commerce Inc.*, a New York appeals court affirmed the dismissal of Lockheed’s claim that a former employee breached a confidentiality agreement and that Atlas Commerce tortuously interfered with Lockheed by hiring 13 former Lockheed software engineers. According to the court the Lockheed failed to allege wrongful conduct warranting legal relief because its confidentiality agreement did not cover the types of information allegedly disclosed. Specifically, the confidentiality agreement did not prohibit the former employee from revealing information about the company’s organizational structure and other employee’s experience, abilities and salaries. This case underlies

the importance of drafting quality, inclusive confidentiality agreements.

### **An Inability To Drive To Work Is Not An Impairment Limiting Major Activity**

An inability to drive to work does not qualify as an impairment substantially limiting a major life activity under the ADA, the U.S. Court of Appeals for the 11th Circuit recently ruled in *Chaenoweth v. Hillsberry County*. In *Chaenoweth*, a nurse working for a county hospital suffered a seizure in 1997 and was diagnosed as having Focal Onset Epilepsy. Although her ability to perform her regular job was not effected, she was not allowed to use a stove, bathe unattended, or drive until 6 months had passed without a seizure. As an accommodation, plaintiff proposed to work two days at home and asked that the county vary her office schedule to meet her transportation needs. The county agreed to eliminate her driving between different work sites, but did not allow her to work from home. On appeal, the court noted that under the ADA a disability is not a “physical or mental impairment that substantially limits one or more . . . major life activities.” The court noted that although the EEOC’s enumeration is not exhaustive, driving is not only absent from the list but also conspicuously different in character from the listed activities.

### **Discharge Of Accommodating Supervisor Violates ADA**

The Eighth Circuit recently affirmed a jury verdict to a customer service supervisor who was fired because she made scheduling accommodations for an epileptic employee. In *Foster v. Time-Warner Entertainment Co.*, plaintiff presented evidence that she was fired after accommodating one of her employees who was experiencing side effects from a new medication to treat his epilepsy. Plaintiff accommodated the employee by permitting him to arrive at work later than usual and then stay later in the evening to make up for missed time. The accommodation angered co-workers, who complained to plaintiff’s supervisor. In response, the supervisor said the employee needed to “come to work, and take sick time,” and also issued a new sick leave policy prohibiting employees from making up time missed because of illness. Despite the new policy plaintiff continued to allow the employee to work at a flexible schedule and was subsequently fired for allowing the employee to falsify his timesheets. The Eighth Circuit not only affirmed the juries verdict in favor of the supervisor, but also concluded her case supported a \$136,000 punitive damage award since there was evidence that management disregarded the company’s internal policy on the ADA.

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