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Weekly Employment Brief

June 25, 2001

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California Labor Commissioner Withdraws DLSE Opinion Letter On Work Furloughs

In a surprise and somewhat encouraging move, State Labor Commissioner Arthur Lujan withdrew a recent DLSE opinion letter on exempt employees and work furloughs. The Opinion letter essentially precluded employers from engaging in the popular cost saving measure of requiring exempt employees to take time off without pay or to use accrued vacation during work furloughs in increments less than a month. The opinion was a major departure from prior California law which most pundits had interpreted to allow forced furloughs of exempt employees in increments of a week or more. While Labor Commissioner Lujan has vacated the DLSE Opinion, he declined, for the moment, to announce a definitive rule. Rather his actions should be read as only a "standstill," and not a blessing of any position on the matter. While we believe that employers are, more likely than not, still able to compel California employees to take one-week, or more, unpaid furloughs, Commissioner Lujan properly noted that California law "appears in flux." Consequently, a well-advised employer will proceed with caution, and carefully evaluate the risks without compromising their business objectives, recognizing that any action by the employer will precede a final definitive rule from the state.

Failing To Provide The Pill Can Constitute Sex Discrimination

The U.S. District Court for the Western District of Washington recently ruled that Bartell Drug Co. violated the sex discrimination requirements of Title VII by excluding prescription contraceptive coverage from its employee health benefit plan. In the first Federal decision to address the issue, the court in *Erickson v. Bartell Drug Co.*, noted that although the employer's plan covered almost all drugs and devices used by men, "the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees . . . ." Notably, Title VII does not require employers to offer any specific benefits. However, once an employer decides to offer a prescription plan "covering everything except a few specifically excluded drugs and devices," it has an obligation to ensure that the plan does not discriminate on the basis of sex.

Supreme Court Rules That Front Pay Damages Award Is Not Subject To Title-VII Damages Cap

A unanimous U.S. Supreme Court reversed the U.S. Court of Appeals for the Sixth Circuit, holding that a front-pay award is not subject to Title-VII's cap on compensatory damages in *Pollard v. E.I. du Pont de Nemours & Co.* The Court's decision resolves a conflict in the lower courts over whether "front pay," *i.e.*, wages and benefits from the date of judgment to the time the plaintiff is hired, promoted, or reinstated, was subject to Title-VII's damages cap. (The damages cap is sliding, and ranges from $50,000 for companies with 100 or fewer employees to $300,000 for companies with more than 500 employees) Because back-pay remains subject to the Title-VII damages cap, the Court's decision will not likely have as great an impact in California where the FEHA provides for unrestricted damages.

Employees Must Remain Employed In Order To Qualify For Reasonable Accommodations Under The ADA

A Federal District Court in Massachusetts recently held that a deaf UPS worker who quit her job before UPS could arrange for a sign language interpreter was unable to maintain a lawsuit under the ADA. In order for an employee to state a claim for failure to reasonably accommodate they typically must show that they: (1) are a qualified individual with a disability; (2) that they work for an employer covered by the ADA; and (3) that the employer did not reasonably accommodate a known disability. The plaintiff in *Loulseged v. Akzo Nobel Inc.*, argued that UPS purposefully delayed her accommodation for an interpreter, and the court openly questioned whether UPS moved with "maximum speed." However, the court found that the more important issue was, "not whether UPS reasonably accommodated [plaintiff] but whether [plaintiff] effectively precluded UPS from being able to reasonably accommodate her by resigning." Ultimately, the court found the employee's resignation was a complete "failure to continue to engage in the interactive process and prevented UPS from making any further attempts to reasonably accommodate her."

You Must Show Up To Work In Order To Get Paid

The Seventh Circuit recently ruled that regular attendance is generally an essential function for jobs and therefore does not require employers to provide unlimited sick days as a reasonable accommodation under the ADA. In *EEOC v. Yellow Freight Sys*, a dockworker with AIDS requested unlimited sick days as a reasonable accommodation. His employer denied his request and eventually terminated his employment for poor performance. Although common sense dictates that regular attendance is usually an essential function in most every employment setting, the employer took two important steps to support its claim. First, the company had a five-step policy for addressing absenteeism, and second, the employee had been consistently warned about his continued absences. Employers would be wise to follow similar steps before deciding to terminate disabled employees with attendance problems.