



Governor Davis Signs Bill Requiring Employers to Purchase Health Insurance for Employees

On October 5, 2003, soon-to-be-departing Governor Gray Davis signed landmark legislation to require many California companies to purchase health insurance for employees. The bill will extend coverage to more than a million uninsured workers, or almost half of the uninsured workers in the state. The measure, S.B. 2, requires California-based employers with 20 to 199 workers to provide health insurance or contribute to a state insurance purchasing pool. Companies with 200 workers have until January 1, 2006 to provide coverage for workers and their dependents, or pay a per worker fee into the State Health Purchasing Fund. Employers may offer a variety of insurance options to employees, but at least one option must include minimum coverage required under the Knox-Keene Health Care Service Plan Act, and coverage for prescription drugs. Employers must pay at least 80 percent of premium costs, with a cap on employee contributions at 5 percent of wages for workers earning less than 200 percent of the federal poverty level. It remains to be seen whether legal challenges to the legislation will prevent or delay its implementation. Opponents claim that key components of the legislation are preempted by the federal Employee Retirement Income Security Act (ERISA), which limits states' ability to regulate employer health and welfare programs. Other challenges may come in state court from opponents who claim the bill is in effect a tax on businesses that must be approved by two-thirds of the Legislature.

Court Rules That FMLA Rule Requires Three Consecutive Days of Incapacity

The Eleventh Circuit Court of Appeals (encompassing Florida, Georgia and Alabama) recently held that an employee must be incapacitated for 3 consecutive days to have a serious health condition under the Family and Medical Leave Act. In *Russell v. North Broward Hospital*, a hospital hired Plaintiff Russell as a patient accounts adjustment representative in June 1996. By January 2000, plaintiff had been disciplined for attendance problems on several occasions, culminating in a three-day unpaid suspension and a warning that continued absenteeism would result in termination. In May 2000, Russell slipped and fell on the job and suffered a fractured elbow and a fractured ankle. The fall also aggravated an existing wrist condition. Over the next 10 days, Russell was absent from work intermittently to attend doctor's appointments related to the fall. She left work early several times due to pain, and, on at least two occasions, failed to report to work or call in to explain her absence. Following her termination for extensive absenteeism, Russell sued the hospital, claiming retaliation

for exercising her FMLA rights by taking time off due to a "serious health condition." The District Court instructed the jury that an employee must be incapacitated for more than three consecutive calendar days to qualify as having a "serious health condition" under the FMLA, and the Court of Appeals agreed. Despite Russell's argument that she established seven consecutive partial days of incapacity, the Court reasoned that requiring full days of incapacity ensures that "serious health conditions" are in fact serious and result in an extended period of incapacity, as Congress intended.

Sixth Circuit Holds Internal Leave Policies May Not Inhibit Requests For Unforeseen FMLA Leave.

The Sixth Circuit recently held that an employer's policy to require employees to request a leave under the Family and Medical Leave Act (FMLA) within three days of taking an unforeseeable leave creates an unreasonable barrier to the exercise of an employee's FMLA rights. In *Cavin v. Honda of America Manufacturing Inc.*, Plaintiff Cavin was a production associate in Honda's assembly department, who was involved in a motorcycle accident and injured his shoulder. After being treated in a hospital emergency room, Cavin was out of work for several days. Although Cavin submitted the proper paperwork after returning to work, Honda disallowed a portion of his leave under the FMLA because he failed to satisfy the company's internal leave notice requirement. Cavin had two additional approved leave periods related to the motorcycle accident over the next five weeks, but was terminated for violating Honda's policy when he failed to timely submit certification forms because his physician did not return them in time. Honda terminated Cavin, who then sued alleging violation of the FMLA. The District Court dismissed the suit, finding Cavin did not provide Honda with "timely, adequate notice of his need for FMLA leave," because Cavin did not follow Honda's FMLA policy. The Sixth Circuit Court of Appeals disagreed, holding that Honda's policy of requiring an official request within three days of an unforeseen leave creates an unreasonable barrier to an employee's exercise of FMLA rights. The court held that notice requirements for unforeseen leave should be more flexible than for foreseeable leave because unforeseen leave will likely occur in the context of a medical emergency. As this case demonstrates, employers should be particularly careful when addressing employee leave claims related to an unforeseeable absence.