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EMPLOYMENT LAW LETTER

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Vol. 17, No. 23
February 11, 2008

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DISABILITY DISCRIMINATION

Employee's prescription up in smoke — a bummer for pot patients in California

by Aaron N. Colby and Leonora Schloss

The California Supreme Court has concluded that an employee fired for medicinal marijuana use can't sue his former employer for disability discrimination or wrongful termination under California law. Neither the text nor the history of the Compassionate Use Act of 1996 addresses the respective rights and duties of employers and employees. The Act merely shields patients from criminal liability under state law. Further, the Act isn't a fundamental public policy supporting a wrongful termination claim.

Background

The Compassionate Use Act of 1996, which California voters approved through Proposition 215, "gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges." In 2005, however, the U.S. Supreme Court determined that federal law continues to prohibit marijuana possession, even by medical users.

Because of injuries sustained while serving in the U.S. Air Force, Gary Ross suffers from back spasms, which makes him a qualified individual under California's Fair Employment and Housing Act (FEHA). In 1999, he began using medicinal marijuana under the Compassionate Use Act.

In 2001, Ragingwire Telecommunications, Inc., offered Ross a job and required him to take a drug test. Before taking the test, he notified the testing facility of his medicinal marijuana prescription. After testing positive for marijuana, he presented his medicinal marijuana prescription to Ragingwire and explained that he used marijuana to relieve chronic back pain. The company fired him because his positive drug test was contrary to its drug policy.

Ross then sued, alleging that Ragingwire violated the FEHA's disability discrimination prohibition and wrongfully terminated him in violation of public policy. He claimed his disability and marijuana use didn't affect his job performance and pointed out that he had worked in the same industry since 1999 and had never received complaints despite his medical marijuana use. He also denied using or possessing marijuana at work.

The trial court threw out Ross' claim at the very start of the case because pot use is illegal under federal law, and the court of appeal came to the same conclusion.

Supreme court's decision

On appeal to the supreme court, Ross alleged that Ragingwire violated the FEHA by discharging him and failing to make a reasonable accommodation for his back injury and preferred treatment method. In rejecting his claim, the court stated that the Act doesn't give marijuana "the same status as any legal prescription drug." According to the

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court, that would be impossible "because [marijuana] remains illegal under federal law." The court examined the FEHA's text and legislative history and found that the Act merely exempts individuals from state criminal liability; it doesn't speak to employment law.

Ross also argued that allowing employers to avoid accommodating medicinal marijuana use eviscerated rights promised to medicinal users. The court noted, however, that the electorate could have addressed medicinal marijuana in the employment context but didn't. Further, the court's 1997 decision in *Loder v. City of Glendale* implicitly recognized that the FEHA doesn't require employers to accommodate illegal drug use. Therefore, Ross couldn't state a claim for disability discrimination based on Ragingwire's refusal to accommodate his marijuana use.

Aside from disability discrimination, Ross contended that his termination "violated fundamental public policies" contained in the Compassionate Use Act and the FEHA. By a 5-2 vote, the court ruled that he couldn't state a public-policy wrongful termination claim. According to the court, the firing couldn't be a public-policy violation because the Compassionate Use Act doesn't address employment issues. Therefore, Ragingwire lacked notice that employers could be required to accommodate medicinal marijuana use.

You may lawfully consider positive test results in making an employment decision.

The court also dismissed Ross' argument that his discharge violated his right to "determine whether or not to submit to lawful medical treatment" under the California Constitution, noting that Ragingwire's decision affected only his employment — not his access to medicinal marijuana. *Ross v. Ragingwire Telecommunications, Inc.* (California Supreme Court, 1/24/08).

Bottom line

For many years, California employers have been faced with a conflict between their antidrug policies and state law each time a medicinal marijuana user tested positive during a drug screen. This ruling clarifies that you may lawfully consider positive test results in making an employment decision.

While you aren't obligated to take action against someone who you discover uses medicinal marijuana, you still should carefully consider hiring or retaining the individual. You potentially expose yourself to liability from third parties and other employees for the on-the-job acts of drug-using employees, and allowing marijuana use may weaken your ability to defend against such a claim. Likewise, an employer with federal contracts that knows about an employee's medicinal marijuana use puts those contracts at risk.

If you allow an employee using medicinal marijuana to continue working, then the employee should be held to the same standards applied to employees who take prescription medication. If some employees are retained or hired after testing positive for marijuana and others aren't, you must always make sure there's a legitimate, nondiscriminatory reason for the termination or refusal to hire. Otherwise, you potentially face a discrimination claim.

Editor's note: Immediately after the supreme court issued this decision, San Francisco Democrat Assemblyman Mark Leno announced that he will introduce legislation designed to revise this holding and extend the Compassionate Use Act's protection to the employment context. Sacramento has a history of responding to restrictive employment rulings in that manner (for example, reversing the effect of judicial limitations courts placed on

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MARK'S IN BOX

What is *Friends* for?

When the California Supreme Court decided the *Friends* case last year, everyone wondered how far-reaching the decision would be. In the case, the court ruled against a female writing assistant on the TV show *Friends* who filed a lawsuit claiming that a sexually hostile environment existed because of risqué and sexist jokes and comments being flung by a sophomoric group of comedy writers. The court found that the vulgarity in the *Friends* writers' room wasn't an act of harassment aimed against women but rather an exercise of free expression that contained no intent to harass any woman. Notably, none of the comments was expressly directed at the writing assistant.

Many of us expected the decision to be more limited — focusing on the unique facts of a writers' room, where telling sexist jokes was the central part of the job. We wondered how far the decision would go beyond the confines of writers of books, TV shows, or films.

That issue is now being tested by one of our two finalists for "Harasser of the Month" — 39-year-old Dov Charney, the founder and CEO of American Apparel, Inc., who has been sued for sexual harassment in Los Angeles Superior Court by his former sales manager, Mary Nelson. Nelson claims that Charney regularly referred to women as whores and sluts (and worse), held meetings wearing only his underwear (or less), and distributed magazines featuring nude pictures of himself and articles describing sex with company employees.

Charney claims that the nude pinups that adorn his office walls are historical works of art — not just harassing photos. He doesn't deny the allegations in full, though he describes them as "exaggerated." Rather, he bases his defense on the *Friends* decision. Charney has hired the lawyers who successfully defended that lawsuit, who claim that this lawsuit "is not about sexual harassment [but rather] the First Amendment rights of American Apparel and its founder."

It's worth mentioning that Charney also touts his company as a top-notch employer, paying his workers double the minimum wage, subsidizing meals, providing free English classes, and giving away substantial employee bonuses and stock grants. He trades on the goodwill generated by being the rarest of breeds — a made-in-the-USA, nonsweatshop, casual clothing company. Whether this fourth sexual harassment suit against the young company will tarnish that image remains to be seen.

Most important, if the "sex sells" First Amendment argument works at American Apparel, it works everywhere. A free pass goes not only to TV writers but also to Hooters and Larry Flynt. It goes to every carmaker, beer distiller, haberdasher, hotel, bar — indeed, any place that can claim "sex sells." That means every place in America.

If Charney is right, this issue bespeaks a 21st century sea change in the "hostile environment" doctrine, in which the prudish morays of Title VII of the Civil Rights Act of 1964 jurisprudence are a dinosaur, a relic. Maybe the "new school" approach is that everyone everywhere has the right to express their sexuality wherever, whenever, and however they want.

Absolute power corrupts absolutely?

Would that doctrine extend to employees working for nonprofit foundations and for important political leaders? Maybe so, if we look at our second finalist, 75-year-old John Burton. No recent politician has wielded more clout than the former U.S. congressman and California Senate president pro tem. While in office, Burton's prodigious fundraising was exceeded only by his legendary temper and his proclivity to protect his friends and marginalize his political enemies.

Now Burton runs the John Burton Foundation for Children. A year after hiring Kathleen Driscoll as the foundation's executive director, she is now suing him for sexual harassment. She claims that Burton repeatedly commented on her breasts and undergarments, frequently described erotic dreams he had about her, repeatedly introduced her as a thong model, mimicked masturbation in her presence — and there are a dozen other specific claims of misconduct.

One of Burton's defenders, California Democratic Party Chairman Art Torres, responded, "I can't imagine anyone would take him seriously. That's what he's like. He's old school, and he means nothing by it."

Wait a minute. When Charney touts sex in the workplace, it's "new school." When Burton is excused for his vulgarity, it's "old school." New school or old, if they let these cases go to a jury, both men likely will be taught the same lesson.

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employees who invoked the protections of the Americans with Disabilities Act and California's age discrimination statute). We will keep you posted as the effort wends its way through the legislature.

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EMPLOYEE BENEFITS

Court upholds forfeiture of purchase price of stock under incentive compensation plan

by Cari Cohorn

The California Court of Appeal, Second Appellate District, recently addressed a challenge to an incentive compensation plan that allowed employees to purchase shares of stock at a significant discount, subject to the requirement that employees who quit or were fired for cause before the end of a two-year vesting period forfeited both the shares and the funds used to buy them. The court confirmed that the forfeiture provision didn't violate the California Labor Code.

Voluntary incentive compensation plan

Salomon Smith Barney, a subsidiary of Citigroup, Inc., offered its securities salespeople a voluntary incentive compensation plan that allowed them to receive a portion of their compensation as shares of restricted Citigroup stock. Specifically, they could purchase shares at a substantial discount below market price. They immediately received the right to receive dividends and to vote the shares. The shares couldn't be sold or otherwise transferred for two years, however, and most importantly, an employee who resigned or was terminated for cause during the two-year vesting period forfeited the shares and the funds used to purchase them.

David Schachter participated in the incentive plan. He directed Smith Barney to use five percent of his compensation to purchase restricted shares. Under the plan, he purchased 44 shares on July 1, 1995, and 38 shares on January 2, 1996. On March 31, 1996, however, he voluntarily terminated his employment, thereby forfeiting all the stock.

Protracted litigation over forfeiture

Schachter filed a class-action lawsuit in May 1998 alleging (among other things) that the incentive plan's forfeiture provisions violated Sections 201 and 202 of the California Labor Code, which provide that earned but unpaid wages must be paid immediately when an employer discharges an employee or within 72 hours if the employee resigns without notice. On October 20, 2000, the court denied Citigroup's motion for summary judgment (a request for the speedy disposition of a lawsuit without a trial) on the grounds that the forfeiture of the stock and its purchase price was a forced employee rebate in violation of the Labor Code.

In November 2002, after the class had been certified, Citigroup filed a second motion for summary judgment, making essentially the same arguments. The case was transferred to a new judge, who granted the motion and entered judgment in the company's favor.

On appeal, Schachter argued that the trial court ignored Section 437c of the Code of Civil Procedure, which prohibits a party from filing a summary judgment motion based on the issues raised in a previous summary judgment motion unless the party demonstrates a significant change in facts, circumstances, or law. He further claimed that the trial court's ruling on the merits was substantively incorrect. The court of appeal agreed with his procedural argument and reversed the trial court's order.

Schachter's success was short-lived, however. The appellate court didn't address the substantive issues raised in Citigroup's motion, and it noted that the trial court possesses inherent authority to reconsider its denial of the company's first motion for summary judgment. The appellate court sent the case back to the trial court, which reconsidered the denial and granted the motion in favor of Citigroup. The second appeal followed.

Schachter received all compensation despite forfeiture

The court of appeal first addressed Schachter's claim that he had never been paid the wages used to purchase the restricted shares. In other words, he asserted that payment of the wages used to buy the stock initially had been deferred but was withheld entirely when he left his employment before the end of the vesting period.

In rejecting that theory, the court examined the "economic reality of the transaction." The court viewed the transaction as indistinguishable from a two-step process in which Schachter received his wages in cash and then purchased the restricted shares. Schachter himself conceded that the two-step transaction wouldn't violate the Labor Code. The omission of the first step in the transaction merely amounted to an authorized deduction from his pay for his benefit. Labor Code Section 224 specifically allows such deductions.

You should ensure that the language in your compensation plans is clear.

Though Schachter conceded that a deduction under Section 224 is lawful, he nonetheless argued that he was entitled to have the purchase price of the shares returned to him upon his termination. In the court's view, that

position rested on the mistaken assumption that Schachter received no benefit when he purchased the restricted shares. To the contrary, he received precisely what he bargained for — the right to receive dividends and vote his shares as well as a *conditional future interest* in the shares. The terms of the incentive plan guaranteed him nothing more. Therefore, he received the benefit of his bargain at the time of the stock purchase and wasn't entitled to a refund of the purchase price.

Schachter's remaining arguments were simply variations on the theme that he hadn't received the wages he had earned but instead was given *only* shares of stock that were subject to forfeiture. For instance, he asserted that the restricted shares couldn't constitute wages under Section 200 because they lacked "ascertainable value." Again, the court reasoned that he received an asset with present value when he received the shares. Further, the value of the asset could be ascertained by reference to its cost, the potential return, and the risk of loss. More fundamentally, though, the argument that the shares weren't wages doomed Schachter to failure from the beginning: If the shares of restricted stock weren't wages, their forfeiture couldn't violate Section 201 or 202.

Similarly, Schachter claimed that the shares were instruments intended to acknowledge that his employer owed him for the services he performed. Therefore, he reasoned, the forfeiture provisions violated Section 212's requirement that any "acknowledgment of indebtedness" given an employee in lieu of wages be "negotiable and payable in cash, on demand, without discount." The shares of stock weren't acknowledgments that compensation was owed, however. Rather, they were themselves compensation. Thus, Section 212 was wholly inapplicable.

Schachter never earned money used to buy stock

Finally, Schachter's claims failed because he couldn't establish that under the terms of the plan, he had actually earned the funds used to purchase his shares. This holding relies on the principle that the moment at which compensation is earned depends solely on the parties' agreement. Further, California case law has held that the Labor Code allows employers to condition a benefit promised to an employee on future events, including the employee's continued employment for a specified period *after* he has performed the bargained-for services.

Thus, even if the court accepted Schachter's view that he had never been paid the funds used to purchase the stock, it nonetheless would conclude that under the terms of the plan, the purchase price wasn't earned until the end of the two-year vesting period. Therefore, he couldn't have been entitled to a refund. *Schachter v. Citigroup, Inc.* (Court of Appeal, Second Appellate District, 1/18/08).

Bottom line

Compensation plans allowing employees to use a portion of their wages to purchase shares of restricted stock may lawfully require employees to remain employed for a reasonable vesting period or forfeit both the shares and the funds used to purchase them upon resignation or involuntary termination. Though Schachter tried to invalidate the forfeiture provisions of Citigroup's incentive compensation plan under a variety of theories, none convinced the court.

Nonetheless, to avoid conflict and litigation, you should ensure that the language in your compensation plans is clear. Plan documents should explicitly state either that the funds withheld to purchase stock are deductions made for the employees' benefit, authorized by Section 224, or that employees don't earn the purchase funds unless and until they have remained employed (or at least avoided termination for cause) through the end of the vesting period.

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STATUTE OF LIMITATIONS

Employee's discrimination claims weren't time-barred

by Michael Futterman

A nursing instructor sued her employer for race and age discrimination under California's Fair Employment and Housing Act (FEHA). The court of appeal ruled that the claim wasn't time-barred because the employer had performed additional discriminatory acts during the limitations period — within one year after the employee filed an administrative complaint with the Department of Fair Employment and Housing (DFEH). In addition, the court said that evidence of discriminatory statements made before the limitations period could be used to prove that the employer's later decisions were based on prohibited motives.

County supervisor reduces nurse's teaching load

Yvonne Hammond worked as a nursing instructor for Los Angeles County. She spent 25 to 30 hours per week teaching classes at the county's Medical Staff Development Unit until the county hired Betty Brennan as her supervisor in late 2001. Hammond claimed that Brennan asked her to "demote" herself from nursing instructor to a position as staff nurse because she was "too old" to be in the classroom. Brennan hired younger nurses to teach classes, and according to Hammond, she refused to assign her any classes to teach. In fact, Hammond taught very few classes over the next few years. In mid-2004, a new nursing director gave her more assignments — but still at a level below her previous course load.

Hammond was the only African American among the four nursing instructors on staff. She claimed that on the few occasions she was allowed to teach, Brennan monitored her classroom performance but didn't similarly monitor the other instructors. She also asserted that Brennan repeatedly made racist remarks in her presence, referring to other African-American employees as "dumb" and once saying that she couldn't understand Hammond because she was probably speaking "Ebonics."

Hammond filed several internal complaints about Brennan's conduct. The county conducted an investigation. Brennan denied reducing Hammond's teaching assignments and singling her out for classroom monitoring. In June 2004, the county sustained Hammond's charges and told her that appropriate administrative action had been taken.

Hammond filed a complaint with the DFEH in July 2004. She then sued the county and Brennan under the FEHA for age and race discrimination, harassment, and retaliation.

The trial court denied Hammond's claims and dismissed her case. The court found that her claims were barred by the statute of limitations because they were based on acts that occurred before July 1, 2003, one year before she filed her DFEH complaint. The court also found that even if she had her teaching assignments taken away, that didn't constitute an "adverse employment action" and that the racially derogatory comments weren't so "severe and pervasive" that they violated the FEHA.

The court of appeal reversed the trial court and found that Hammond had the right to have her claims heard by a jury.

Statute of limitations didn't bar claims

The county and Brennan claimed that because Hammond's teaching duties were eliminated before July 2003, even though her status remained unchanged after that date, she didn't suffer any adverse employment action during the one-year limitations period before she filed her DFEH complaint. The court of appeal disagreed. It noted

CALIFORNIA NEWS IN BRIEF

Survey shows change in employer benefits. A survey of California employers shows increasing popularity of benefits such as child-care assistance, employee orientation, and telecommuting.

A survey from the California Chamber of Commerce shows that:

- 92 percent of employers responding to the survey provided employee handbooks in 2007, up 12 percentage points from a 1997 survey;
- 86 percent conducted employee orientations, up 15 percentage points;
- 89 percent conducted performance appraisals, up eight points;
- 53 percent offered child-care assistance, up 25 points;
- 35 percent offered eldercare assistance, a benefit not measured in 1997;
- 41 percent offered an employee assistance program, up seven points; and
- 29 percent offered telecommuting, up 14 points.

Grant going to retrain manufacturer's laid-off workers. A $205,000 state grant will help more than 100 workers laid off by a Santa Rosa medical device manufacturer find jobs in high-demand industries.

The workers had skills designed for their jobs at Medtronic Cardiovascular, according to Patrick Henning, director of the state Employment Development Department. "It's imperative that they receive additional training to help them find new jobs with comparable wages," he said. A survey of the workers indicated that most are interested in retraining, with many expressing an interest in the health care field.

Report examines cancer-causing workplace chemicals. A recently released report may spark new restrictions on the use of certain chemicals in the workplace.

The "Occupational Health Hazard Risk Assessment Project for California," released by the state Environmental Protection Agency, examines the "Proposition 65 chemicals," those identified to cause cancer, birth defects, and other reproductive harm. Among the findings:

- 44 workplace chemicals that are listed as known to cause cancer under Proposition 65 don't have a permissible exposure limit (PEL) established in California;
- 62 workplace chemicals listed as known to cause cancer under Proposition 65 have PELs but aren't regulated specifically as occupational carcinogens; and
- about 40 percent of the workplace chemicals of concern have been identified as being skin absorbable and could pose cancer, reproductive, and/or developmental risks through skin absorption as well as through inhalation. ✤

that the reduction in her teaching assignments continued after July 2003. In effect, each time Brennan decided not to assign her classes to teach could be characterized as a discrete adverse employment action and would create a claim if the decision was based on a prohibited motive.

The court of appeal distinguished this case from the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc*. In that case, an employee claimed that her employer gave her poor performance evaluations based on her sex. The performance evaluations were time-barred under the statute of limitations, but she argued that her claim was timely because the poor evaluations effectively resulted in her receiving lower pay during the limitations period. The Supreme Court rejected the employee's argument, holding that her failure to receive higher pay was a continuation of her damages, not a discrete "adverse employment action" occurring within the limitations period.

By contrast, each time Brennan decided not to assign Hammond classes to teach could be a discrete act of discrimination. Because some of those decisions occurred within the limitations period, Hammond's claim wasn't time-barred.

Prohibited motive

The county and Brennan also argued that to the extent that Brennan's comments about Hammond's age and race occurred before July 2003, they couldn't be used to prove that Brennan's decisions taken after that date were due to a "prohibited motive." The court of appeal rejected that argument. The court held that evidence of adverse employment actions based on prohibited motives occurring *before* the limitations period could be introduced as "background evidence" to show that adverse actions taken *during* the limitations period also were based on prohibited motives. As the court put it, if Brennan's initial decision to remove Hammond from the classroom was "tainted" by a prohibited motive, the jury could infer that subsequent decisions were similarly motivated. *Hammond v. County of Los Angeles* (Court of Appeal, Second Appellate District, 1/18/08).

Bottom line

An employee can rely on conduct and improper statements that might otherwise be barred by the statute of limitations if one or more acts in a series of adverse employment decisions occur within the period of limitations. You need to take proactive steps to prevent this type of conduct before it starts by creating an employment culture that respects diversity, establishing and enforcing policies that bar discriminatory and harassing behavior, and thoroughly investigating any complaints and taking prompt remedial action.

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LABOR LAW

Firefighters don't have to deal with union

by Jim Nickovich

In this case before the California Court of Appeal, firefighters Richard Maldonado and Michael Pittman had to prove that jumping through union hoops would have been a waste of time. Ultimately agreeing, the appellate court found that the firefighters couldn't have been forced to exhaust internal union remedies when doing so would have been pointless.

Firefighters fined

On June 16, 2004, CDF Firefighters (CDFF) filed a complaint stating that Maldonado and Pittman each owed it over $22,000 in fines and that they breached their contractual obligations to it by failing to pay fines that were properly levied against them. The CDFF, a California nonprofit mutual benefit corporation, is the exclusive bargaining representative for firefighters employed by the state of California. Pittman is a fire captain and had been a rank-and-file employee of the California Department of Forestry and Fire Protection for more than 20 years. Both Pittman and Maldonado served as members of CDFF boards in Region IV.

Why were Maldonado and Pittman fined? Division Chief Larry German filed charges against them alleging that by voting in favor of a Region IV bylaw disallowing members holding the rank of assistant chief and above from being elected to Region IV offices, they had violated his right to attend the statewide conference as a voting delegate. Pittman and Maldonado faced similar charges by forester Darla Mills.

There's more — let's take a step back

In January 2000, Pittman lost his membership in the CDFF at the same time the department took action to terminate him. The department's action was overturned by the State Personnel Board in December 2001, and Pittman returned to work in January 2002. He sought to resume his active membership in the CDFF, but CDFF President Tom Gardner (who also was a CDFF board member) declined to reinstate his membership until July or August 2002.

In September 2002, Pittman filed charges against Gardner and attached a transcript of a recorded conversation between the two of them. A CDFF hearing committee was convened, and the committee ultimately dismissed Pittman's claims.

On January 22, 2003, without prior notice to its board members, the CDFF board adopted a new bylaw that for the first time authorized trusteeships over CDFF chapters and regions. On January 23, in an executive session,

WORKPLACE TRENDS

Will boomers take their know-how with them? A new survey indicates that most large organizations are making no effort to transfer knowledge from their retiring baby boomers to other employees.

A survey of 2,046 HR executives by consulting firm Novations Group shows that just four percent have a formal process in place and 23 percent have an informal process. Twenty-nine percent said they plan to create a process, and 44 percent said they have no such plans.

"Despite wide concern about loss of institutional know-how and industry expertise as boomers retire, employers have been slow off the mark in seeking a solution," said Novations executive consultant Tim Vigue.

Companies examining 401(k) participation. Employers are increasingly realizing that automatic 401(k) enrollment isn't enough to ensure stability for retirees, and they're starting to automate more aspects of their plans, according to a survey by HR company Hewitt Associates.

The biennial survey of more than 300 midsize to large companies offering 401(k) plans revealed that just 25 percent of the companies viewed a high participation rate as the primary measure of 401(k) success, down from 43 percent in 2005. More employers are now picking more appropriate default contribution rates and investment funds and are coupling auto enrollment with other automated tools.

Benefits costs for employers continuing to rise. U.S. employers saw health benefits costs rise by 6.1 percent in 2007, the same pace as last year, to an average of $7,983 per employee, according to the National Survey of Employer-Sponsored Health Plans, conducted annually by consulting firm Mercer.

Figures show that cost increases have held steady for three years and are likely to slow a bit in 2008. But the 2007 increase is still more than twice the rate of inflation. The survey shows that more small employers are dropping their plans. Among employers with fewer than 200 employees, health coverage prevalence fell from 63 percent to 61 percent in 2007, down from 66 percent five years ago.

Survey finds disconnect over work-life balance. Half of HR professionals think maintaining work-life balance is an important issue, but 89 percent of employees consider flexible working and telecommuting as important considerations when assessing a new job, according to online job-search company Monster.

"Employers should look to improve their employment brand by creating and promoting a flexible, balanced work atmosphere as an effective means of improving recruitment and retention," according to Jesse Harriott, vice president of research at Monster. ✤

the board imposed an emergency trusteeship over Region IV, removing all officials from office and appointing trustees to take charge of their financial records and property.

That same day, the CDFF's retiree representative, Ron Bywater (another CDFF board member), filed charges against Pittman alleging that a CDFF check in the amount of $120 had been submitted on Pittman's behalf for transcripts of the hearing, that Pittman had used three days of union release time for the hearing, and that he had improperly taped his conversation with Gardner.

On January 24, Pittman filed amended charges against the CDFF with the state's Public Employment Relations Board alleging that the CDFF had violated the Government Code when it:

(1) imposed the trusteeship;

(2) had Bywater file internal charges against him;

(3) had its attorneys file false police reports against him; and

(4) had an investigator submit a report alleging violation of Penal Code Section 632, subdivision (a), which prohibits certain taping of conversations.

Those charges were later dismissed.

On June 3, 2004, Pittman filed a petition with the Sacramento Superior Court, seeking reversal of the fine imposed against him by the CDFF and reinstatement as a member. On June 16, the CDFF filed a complaint with the Fresno Superior Court, seeking the fines it claimed were owed by Pittman and Maldonado. Both claims were consolidated in the Fresno court. In November 2005, the court entered a judgment of over $44,000 in the CDFF's favor, concluding that Pittman had failed to exhaust his internal union remedies. Both Pittman and Maldonado appealed to the California Court of Appeal.

Union procedures futile

On appeal, Pittman argued that he didn't have to go through the internal union avenues in appealing the CDFF's decision to expel him because doing so would have been futile or impossible since the matter would have been heard by the very board participants who had acted against him. Therefore, the confirmation of his expulsion would have been inevitable and the appeal would have been pointless. The court of appeal agreed.

Pittman provided a letter the CDFF sent to the district attorney stating that he should be charged with a felony for illegally taping a conversation with Gardner and discussing its adoption of the trusteeship and its imposition on Pittman and Maldonado's region. According to the court, that showed "comprehensive, uncontradicted evidence" that it would have been futile to exhaust internal union remedies.

Similarly, Maldonado and Pittman were allowed to challenge the CDFF's breach of contract claim. Relying largely on the conclusion that pursuing internal union procedures would have been futile, the court of appeal reversed the lower court's finding and ruled that the CDFF's request to dismiss the suit wasn't appropriate. *CDF Firefighters v. Maldonado* (Court of Appeal, Fifth Appellate District, 1/14/08).

Bottom line

Members of a union must normally honor all internal union procedures and remedies before taking their grievances to the courts. You should be mindful of that when employees under a union contract sue the company or the union directly. That obligation may be excused, however, if the aggrieved union member can prove with "comprehensive, uncontradicted evidence" that it would have been futile to exhaust internal union remedies.

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EMPLOYEE STATUS

Ninth Circuit says directors and volunteers aren't employees

The number of employees is often the definitive factor in determining whether a particular employment law applies to a particular employer. And for an employer that's close to the threshold level for coverage, the question of who counts as an employee can be important. That was the issue in a recent case decided by the Ninth U.S. Circuit Court of Appeals (which covers California).

Enough employees for law to apply?

Fred Fichman was employed for about a year and a half as the executive director of The Media Center, a nonprofit corporation that operates community access cable channels in Reno and Sparks, Nevada. When his employment ended in December 2003, he sued in federal court, claiming that his discharge violated the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA).

During Fichman's employment, The Media Center (except for a single two-week period) had fewer than 15 paid employees. The ADA covers employers only if they have 15 or more employees, and the ADEA applies only if there are at least 20 employees. As a consequence, the trial court threw out Fichman's claims because the statutes didn't apply. Fichman appealed, urging that The Media Center had enough employees to be covered by the statutes if the court counted its directors and the volunteer producers that provided public-access programming.

Court's decision

For guidance, the Ninth Circuit looked at a 2003 U.S. Supreme Court decision on whether an individual should be deemed an "employee." In the case, the Court had described six factors for determining the issue:

(1) whether the organization can hire or fire the individual or set the rules and regulations of her work;
(2) whether and, if so, to what extent the organization supervises the individual's work;
(3) whether the individual reports to someone higher in the organization;
(4) whether and, if so, to what extent the individual is able to influence the organization;
(5) whether the parties intended for the individual to be an employee, as expressed in written agreements or contracts; and
(6) whether the individual shares in the organization's profits, losses, and liabilities.

Using those six factors, the Ninth Circuit concluded that the trial court had correctly ruled that The Media Center's directors aren't employees. The organization doesn't hire or fire the directors. The board selects its own members, and each has a full-time job independent of The Media Center. They aren't compensated, and reimbursement for board travel and the provision of food at meetings don't amount to wages. The principal rewards for directors are personal satisfaction and professional status, typical of volunteer work. Directors aren't supervised by The Media Center and instead operate under their own set of bylaws. The directors clearly influence organization policies, but there is no intent for them to be considered employees. Since the organization is a nonprofit entity, the final factor didn't apply. Bottom line: The directors aren't employees.

It's good to know who counts as an employee and who doesn't.

But what about the producers who provide programming on the public-access stations? Are they employees? The producers submit video programming for broadcast on such topics as the arts, cooking, and religion. The court noted that could include the type of "eccentric production" satirized on *Saturday Night Live's* "Wayne's World" sketch.

The producers pay The Media Center for classes through which they become certified to use the station's facilities. They also sign a contract to indemnify The Media Center against any liability for their programming. They aren't hired or fired, and The Media Center doesn't exert any control over them. Thus, the Ninth Circuit held that the trial court was correct in excluding the volunteer producers and the other "aspiring Wayne Campbells of northern Nevada" from the employee category at The Media Center.

For Fichman, the exclusion of directors and volunteer producers meant that The Media Center didn't have enough employees to be covered by either the ADA or the ADEA. The trial court's decision rejecting his claims therefore was affirmed. *Fichman v. The Media Center*, Case No. 05-16653 (9th Cir., January 14, 2008).

What it means

If you're a small employer, you need to understand at what point you're approaching or have reached the

AGENCY ACTION

EEOC issues fact sheet on employment tests. The Equal Employment Opportunity Commission (EEOC) has issued a fact sheet on how federal discrimination laws apply to employer tests and other selection procedures. See www.eeoc.gov/policy/docs/factemployment_procedures.html.

The fact sheet describes common employment tests, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks. It focuses on best practices for employers to follow when using tests and other screening devices and cites recent EEOC enforcement actions.

Discriminatory employment tests and selection procedures are prohibited by Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, which are enforced by the EEOC.

Pension guaranty group reports on benefits. Eighty-four percent of retirees who receive benefits from the federal pension insurance program are paid the full benefit amount they earned under their retirement plan, according to information from the Pension Benefit Guaranty Corporation (PBGC).

Federal pension law limits the benefit amount the PBGC may guarantee when it takes responsibility for a failed pension plan. Of more than 525,000 PBGC participants studied, 16 percent saw their benefits reduced. The average reduction was 28 percent.

Labor Department reaches $20 million settlement. The U.S. Department of Labor (DOL) has announced a settlement requiring Union Labor Life Insurance Co. of Washington, D.C., to pay back nearly $16.7 million in fees and compensation to benefit plans that invested in Separate Account J, a pooled separate account holding plan assets for the benefit of employee benefit plan investors.

In addition, the insurer must pay $3.3 million to an escrow account to cover civil penalties and excise taxes resulting from alleged violations of federal employee benefits law. The settlement resolves a DOL investigation concluding that Union Labor Life had used its authority over the separate account to unilaterally set its own compensation in violation of the Employee Retirement Income Security Act. Separate Account J invests in secured mortgages on real estate development projects constructed with union labor.

More veterans working in federal workforce. The U.S. Office of Personnel Management has noted a small increase in the number of armed forces veterans working for the federal government. The number of veterans employed by the federal government increased from 456,254 in fiscal year 2005 to 457,965 in 2006, while the number of disabled veterans increased from 92,642 to 97,828. The full report is available at www.opm.gov/employ/veterans/dvaap/2006/DVAAP-FY2006.pdf. ✤

threshold number of employees to be covered by various employment laws. As this case notes, the ADA (like Title VII) requires a minimum of 15, and the ADEA requires 20. The Family and Medical Leave Act kicks in at the 50-employee level. Other federal, state, and local laws have different thresholds, some at far lower numbers of employees. This case provides helpful guidance about who actually should be deemed an employee. If your employee complement is approaching the coverage level for a particular statute, it's good to know who counts as an employee and who doesn't. ✤

FAMILY AND MEDICAL LEAVE

FMLA now applies to families of members of armed forces

In January 2008, Congress passed and President George W. Bush signed the Family Leave in Connection with Injured Members of the Armed Forces Act, which grants additional leave under the Family and Medical Leave Act (FMLA) to the relatives of military personnel. The Act creates two new categories of FMLA leave: "active duty family leave" and "injured service member leave."

Active duty family leave

The first new category is for employees who have a family member who has been called to or is on active duty in the armed forces. Those employees may take up to 12 weeks of FMLA leave when they experience a "qualifying exigency" arising out of the fact that a spouse, parent, or child is on or has been called to active duty. Employers may require certification that the employee's family member is on active military duty.

The legislation doesn't define "qualifying exigency," instead instructing the U.S. Department of Labor (DOL) to do so. That term is expected to include — at a minimum — situations in which the employee is needed to fulfill family and child-care responsibilities for covered service members who have been called to active duty.

The legislation also instructs the DOL to establish standards regarding other aspects of the new leave requirements, including what type of certification employers may request to verify that the family member is on active duty.

The active duty leave entitlement is basically the equivalent of when an employee needs time off for his own or a family member's serious health condition or for the birth or adoption of a child. It appears to be subject to most of the same requirements as other forms of FMLA leave, including employee eligibility and notice requirements, maintenance of benefits, and job reinstatement.

Therefore, it shouldn't be too difficult to adjust your policies and procedures to comply with this requirement, especially after the DOL has clarified what is meant by a "qualifying exigency." In the meantime, you should interpret that phrase broadly.

Injured service member leave

The second type of leave is for employees who have a family member injured in the line of duty. This part of the legislation

creates an entirely new type of leave with different criteria than traditional FMLA leave.

In general, employees are entitled to injured service member leave if they're the "spouse, son, daughter, parent, or next of kin" of a "covered service member" who has a "serious injury or illness." Although the terminology is similar to traditional FMLA leave, this new requirement is quite different. The main differences include the following:

- Qualifying employees are entitled to a combined total of 26 weeks of leave (including traditional FMLA leave) in a 12-month period, as opposed to the usual 12 weeks.
- The definition of a "serious injury or illness" covers a much broader range of health concerns than a "serious health condition," which is the standard that applies when an employee takes regular FMLA leave. Employers may require certification of the service member's health condition.

Extra weeks of leave. Employees who qualify for injured service member leave will be entitled to take up to 26 weeks of leave — including traditional FMLA leave and active duty family leave — in a 12-month period. Although the law specifically provides that employees may take injured service member leave intermittently, it appears that they won't be able to spread it out for more than 12 months.

It isn't clear whether employees may take additional injured service member leave in the future for a different family member, but it appears that they may not. Such employees, however, would be entitled to the regular 12 weeks of FMLA and active duty family leave in future years, assuming they're eligible for it.

As with regular FMLA leave, employers may require employees — or an employee may elect — to take injured service member leave concurrently with paid leave, such as vacation, personal, or sick leave.

Employees entitled to leave. Employees who request injured service member leave must meet the same eligibility requirements as employees who seek leave for other purposes. In other words, they still have to qualify for leave by having worked for the employer for at least 12 months and having worked at least 1,250 hours within the 12 months before taking leave.

In addition to spouses, parents, and children, however, employees may take leave to care for an injured service member for whom they are the "next of kin." That's defined simply as the "nearest blood relative," which is a broader standard than what applies to other types of FMLA leave.

Serious injury or illness. Eligible employees may take injured service member leave to care for a family member who is a "covered service member." To qualify, the relative must:

- be a member of the armed forces, National Guard, or reserves;
- suffer from an injury or illness incurred on active duty in the armed forces that *may* render him medically unfit to perform the duties of his office, grade, rank, or rating (*i.e.*, a "serious injury or illness"); and
- be undergoing medical treatment, recuperation, or therapy, be in outpatient status, or be on the temporary disability retired list as a result of the serious injury or illness.

Those of you covered by the FMLA should make good-faith efforts to comply immediately.

That's an incredibly broad and vague requirement. For example, how does one determine when a service member's injury or illness "may" render her unfit to perform her duties? Again, the legislation leaves that up to the DOL to clarify.

Learn how to create a plan of action so your organization can come into compliance with the new FMLA amendment as quickly as possible by listening to the audio conference "New

What about USERRA and other questions?

The new types of FMLA leave established by the Family Leave in Connection with Injured Members of the Armed Forces Act shouldn't be confused with the leave to which employees are entitled under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The primary difference is that USERRA grants leave to employees who are in the armed forces, while the FMLA grants leave to employees who have a family member in the armed forces.

The legislation leaves employers with questions, some of which may be answered by the DOL, which is expected to issue proposed regulations interpreting various aspects of the new requirements soon. In the meantime, those of you covered by the FMLA should make good-faith efforts to comply immediately even though the legislation doesn't include an effective date. Typically, that means it will be effective immediately.

The first step should be to inform employees of the new leave entitlements. You should also quickly revisit your FMLA policies and procedures to identify any that may be affected by the legislation.

Exactly what changes you may need to implement will depend in part on the DOL's regulations. While awaiting those regulations, take a broad view of whether employees are entitled to either of the new types of leave.

TRAINING CALENDAR

Audio seminars for HR professionals. These learning opportunities will be broadcast live on the following dates. They are also available on CD or online in streaming audio after the broadcast. For more information or to register or order, call toll-free (800) 274-6774 or visit www.HRhero.com/audio.

2-19 ***"2008 Recruiting: Feed Your Talent Pipeline Using MySpace and Other Social Media,"*** presented by Shel Holtz.

2-20 ***"Workers' Comp Claims: The 10 Biggest Mistakes Employers Make,"*** presented by Rocky McElhaney.

2-26 ***"Doing Business in China: What HR Needs to Know,"*** presented by Angie Castille and Zack Dong.

"New FMLA Leave Rules for Soldiers' Relatives: What Employers Need to Know," presented by David S. Fortney, Susan M. Webman, and J. Robert Brame.

2-28 ***"What to Save, What to Shred: Comply with Personnel Record Retention Laws,"*** presented by Jeanne M. Bender and Jason S. Ritchie.

3-4 ***"Preparing for the Avian Flu and Staph Pandemic: What HR Must Do Now!"*** presented by Michael McCourt and John J. Matchulat.

3-6 ***"What Every Supervisor Should Know About Employment Law,"*** presented by John B. Phillips, Jr.

3-12 ***"New Rules in Battle to Control Employee E-mail Use,"*** presented by Peter M. Panken and Robert P. Tinnin, Jr.

3-13 ***"Camisoles, Tattoos, and Nose Rings! Is Your Dress Code Legal?,"*** presented by John B. Phillips, Jr., and Kara Shea.

3-18 ***"AMA Guides, 6th Edition: Critical Update for Attorneys and Workers' Comp Professionals,"*** presented by Rocky McElhaney.

3-19 ***"Dealing with Doctors: Medical Certification Challenges for FMLA, Workers' Comp, ADA,"*** presented by Charles S. Plumb and Kristen L. Brightmire. ✤

FMLA Leave Rules for Soldiers' Relatives: What Employers Need to Know" on February 27. To register or for more information, contact customer service at (800) 274-6774. ✤

WAGES

2008 pay raise picture looks much like 2007, survey says

Most employers responding to a recent HRhero.com annual raises survey expect 2008 pay raises to be similar to 2007's. That's one of the findings of the online survey, which drew 1,119 responses from December 3 through December 13, 2007.

Three percent a popular figure

Twenty-nine percent of the respondents said the average raise in their organization for 2008 will be three percent. Eighteen percent said they plan four percent raises, and 15 percent plan 3.5 percent pay hikes. Smaller numbers of employers planned raises between one and seven percent. Three percent said they plan no raises in 2008.

Sixty-five percent of the respondents said 2008 raises will be about the same as last year, 14 percent plan slightly smaller raises, and 11 percent plan slightly bigger raises. Four percent said they expect raises to be a lot smaller, and three percent weren't sure.

Forty percent of respondents said most of their employees will get the same percentage increase, but 35 percent said a significant number would get different raises. Twenty-two percent said raises "will be all over the map."

Why people get raises

The survey asked employers which factors affect employee raises. Respondents could choose as many factors as applied. Merit was by far the top factor, a choice of 71 percent. Other top choices were job classification, seniority, and approval of a board of directors.

Sixty-five percent reported that their 2008 raises wouldn't include a cost-of-living adjustment. Eleven percent said their raises would include three percent for cost of living, seven percent planned a two percent adjustment, one percent expected a one percent adjustment, and one percent planned four percent or more. Eleven percent weren't sure.

To view all of the survey results, go to www.HRhero.com/survey/results.cgi?raises2008. As part of your *Employment Law Letter* subscription, you can see results from all HRhero.com surveys at www.HRhero.com/lc/survey/archive.shtml. ✤

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