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EMPLOYEE BENEFITS

Companies can impose a waiting period on paid vacation accrual

by Michael Futterman and
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Futterman Dupree Dodd
Croley Maier LLP

A California auto detail business required its employees to work for at least one year before earning vacation. An employee left after six months and received no vacation pay upon his departure. He sued the company, claiming it unlawfully required him to forfeit his accrued vacation pay. The trial court dismissed the lawsuit because the company's written policy unambiguously and lawfully stated that employees did not earn vacation during the first year of employment. The California Court of Appeal agreed.

Employee sues over vacation policy

The written vacation policy implemented by Automobile Creations, Inc., and Dynamic Auto Images, Inc., states:

> All employees earn [one] week of vacation after completion of one year [of] service and a maximum of two weeks' vacation after two years of service. This means that after you have completed your first anniversary with the company, you are entitled to take one week of paid vacation, and after the completion of two years' service, you will accrue two weeks [of] paid vacation per year. This does not mean that you earn or accrue 1/12th of one week's vacation . . . each month during your first year. You must complete one year of service with the company to be entitled to one week [of] vacation.

Nathan Minnick worked for the auto companies for six months. Consistent with company policy, he did not receive any vacation wages in his final paycheck because he had been employed for less than one year.

Minnick sued, alleging the auto companies' vacation policy violates California law because it requires employees who work for less than one year to forfeit vested vacation pay. He asserted claims for (1) failure to pay all wages upon termination, (2) violation of California's unfair competition law, and (3) penalties under California's Private Attorneys General Act of 2004 (PAGA).

The trial court granted the auto companies' motion to dismiss. Minnick appealed, and the court of appeal affirmed.

Vested vacation pay constitutes earned wages

Vacation time constitutes wages for services performed. Similar to pension or retirement benefits, vacation pay is a

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form of deferred compensation that vests as it is earned and may not be forfeited. Although California law does not require businesses to provide employees paid vacation, if it is included as a component of employee compensation, the employer may not reclaim it after it has been earned.

Unless the benefit is otherwise addressed by a collective bargaining agreement, an employer must pay a departing employee all accrued but unused vacation at the employee's final rate of pay. Notably, if vacation pay is not earned, it is not vested, and an employee is not entitled to unvested vacation pay upon termination of the employment relationship.

Minnick's vacation pay did not vest under the policy

The court of appeal found Minnick's challenges to the auto companies' vacation policy unpersuasive. As he conceded, an employer may lawfully opt out of providing paid vacation. By logical extension, an employer is not required to allow vacation pay to vest beginning on the first date of employment. If an employer can lawfully restrict vacation accrual at the back end by capping the amount of vacation that can be earned, it follows that the employer can lawfully impose a waiting period at the front end.

The auto companies' vacation policy unambiguously imposes a waiting period. The policy states that before employees "earn" a vacation benefit, they must complete one year of service. The example in the policy makes clear that an employee does not "earn" or "accrue" vacation in the first year of service and therefore is not entitled to a prorated amount of vacation pay during the first year.

Minnick argued that the policy could be construed to mean that completing the first year of employment is a condition to obtaining *pay* for the vacation benefit that vested during that first year. The court of appeal found that to be an unreasonable interpretation. In the context of the policy, the language reasonably informs employees that their vacation accrual begins *after* the completion of their first year.

The court of appeal also rejected Minnick's assertion that the auto companies were unlawfully attempting to "contract around" the ban on forfeiture of wages. Logically, wages cannot be forfeited unless they are first earned. An employer has the authority to "front-load" vacation benefits, permitting the employee to take a one-week paid vacation during his second year even before it is fully earned, but also to provide that if the employee leaves before the end of the second year, he will be entitled to only a prorated share of the benefit (the vested portion). That would not constitute a forfeiture of vested vacation benefits. *Minnick v. Automotive Creations, Inc.* (California Court of Appeal, 4th Appellate District, 7/28/17).

Bottom line

Vacation pay is not a guaranteed benefit under California law. As a result, employers have wide discretion in deciding how much vacation to offer and determining the conditions for vesting. From the employee's perspective, a company's vacation policy is generally perceived as a significant component of his compensation. To avoid a misunderstanding and potential legal disputes, it is important to spell out vacation policies in straightforward, unambiguous language.

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EMPLOYER RETALIATION

A rarity! Employee has direct evidence of retaliation

by Mathew A. Goodin
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In most retaliation cases, an employee can only point to circumstantial evidence that the employer's actions were retaliatory. The most common indirect evidence is an adverse employment action taken shortly after the employee engaged in a protected activity or more favorable treatment of employees who did not engage in the protected activity. In the following case, the employee's supervisor openly told her that she would be retaliated against if she didn't lie during an investigation. Unsurprisingly, the court concluded that evidence was sufficient to allow the employee's retaliation claim to proceed to trial.

Lie or be fired

In April 2010, Melony Light began working as a seasonal park aide at the Ocotillo Wells District in San Diego County. In January 2011, she was promoted to a permanent position as an office assistant. In that position, she wasn't guaranteed regular full-time hours.

Leda Seals, the administrative officer of the Ocotillo Wells District, was Light's supervisor. Kathy Dolinar was the superintendent of the district and Seals' supervisor. Seals and Dolinar are close friends.

At some point, one of Light's female coworkers filed a complaint with the California Department of Parks and Recreation's human rights office alleging that Seals harassed and discriminated against her on the basis of her gender. Seals had been critical of Light's friendship with the coworker in the past and had made derogatory comments about the worker's sexuality. Light tried to talk to Dolinar about Seals' treatment of her coworker, but Dolinar told her that she didn't want to hear about it.

Before the human rights office investigators arrived to investigate the complaint in January 2012, Seals told Light that she and Dolinar expected her to lie to the investigators, saying, "If you're not on Dolinar's team, your career will be over." Seals also told at least one other employee to lie to the investigators.

After she met with the investigators, Seals began to distance herself from Light. In February 2012, she recommended that Light be transferred from the district office to the visitors' services office. On February 23, she called Light into her office and accused her of "cutting her down" to other employees. She raised her voice and told Light that her hours would be reduced to zero at Ocotillo Wells when the off-season started on May 30 and she would work in visitors' services until then. She told Light that she would fit in better there because the park rangers didn't follow orders either.

In March 2012, Light filed her own complaint with the human rights office. The ensuing investigation confirmed that Seals had retaliated against Light, and Dolinar had allowed a retaliatory culture to exist in the office. Following the investigation, Seals was placed on administrative leave and never returned. Dolinar took over Seals' job.

Approximately one week before her last scheduled workday, Light went on medical leave for anxiety. Before her return, her doctor sought assurances from Ocotillo Wells that the hostile and retaliatory work environment had ceased. The employer responded that Dolinar had been removed from her position and offered Light an office assistant position at Ocotillo Wells or a similar position in the San Diego District. Light decided to return to Ocotillo Wells.

About one year after she returned, Light was promoted to office technician. After another year and a half, she was promoted to staff services analyst, a permanent full-time position. She also received merit pay increases.

Light filed a lawsuit against the California Department of Parks and Recreation, Seals, and Dolinar alleging retaliation, harassment, and disability discrimination. The trial court granted summary judgment (dismissal without a trial) in favor of the employer, and Light appealed. She remained employed by Ocotillo Wells throughout the litigation.

Supervisor's threat is direct evidence of retaliatory intent

The primary issue in the published portion of the court's decision was whether the trial court had correctly dismissed Light's retaliation claim without a trial. The appellate court concluded that the trial court's decision was wrong.

Contrary to the trial court, the appellate court found that Light had suffered an "adverse action" by having her hours reduced to zero as of May 30, 2012. The court observed that the district's argument that the reduction in hours was a normal seasonal occurrence was related to the issue of whether it had a legitimate nonretaliatory reason for the decision, not whether the hours reduction was an adverse employment action.

The appellate court assumed the district offered legitimate reasons for its decisions, so it turned to the issue of whether those stated reasons were pretextual (false) or whether the circumstances as a whole supported an inference that the challenged action was retaliatory. The court pointed to evidence that Seals had asked Light and other employees to lie to the human rights office investigators and threatened Light with retaliation if she didn't support Dolinar. The court also relied on the

investigatory report following Light's complaint to the human rights office, which expressly found that Dolinar had allowed a retaliatory culture to exist at Ocotillo Wells. The court noted that wasn't merely circumstantial evidence; it was direct evidence of retaliation.

In the unpublished portion of the decision, the appellate court concluded that Light couldn't show that her employer was aware that she was suffering from a disability before it reduced her hours, and after it learned of her disability, it offered her a similar job at the same pay rate. As a result, the court found that she couldn't establish a claim for disability discrimination.

The court further found that the district reasonably accommodated Light's disability by allowing her to take medical leave and assuring her that she would no longer have to work with Seals and Dolinar when she returned to work. *Light v. California Department of Parks and Recreation* (California Court of Appeal, 4th Appellate District, 8/8/17, partially published).

Bottom line

In most cases, employees rely on circumstantial evidence of retaliation, such as evidence that calls into question the legitimate reasons the employer offered for its employment decisions. This is the rare case in which there was direct evidence of retaliation. Amazingly, Light's supervisors told her that she would be retaliated against if she didn't "follow orders." This case illustrates the need for proper training and oversight of supervisory employees because their actions are deemed to be the employer's actions.

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LEGISLATION

Sex offense and background check rules change for schools

by Beth A. Kahn and Ryan C. McKim
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Just in time for back-to-school season, the California Legislature has revised laws to protect students, pay nonexempt private school teachers overtime, and credential public school teachers. Specifically, to protect students, public schools must perform background checks on new classes of individuals who may have contact with students. Likewise, California has expanded the scope of offenses that constitute a sex offense for purposes of employment at both public and private schools. Separately, the state has revised earning standards for determining whether a part-time private school teacher is entitled to overtime pay. Finally, individuals seeking multiple-subject teaching credentials are no longer required to major in a subject other than professional education.

Safety first: background checks for school district vendors

Under **Assembly Bill (AB) 949,** sole proprietors and their employees who provide janitorial, administrative, grounds and landscape maintenance, student transportation, and food-related services to schools must submit fingerprints to the California Department of Justice as part of a background check if they "may" have any contact with students. School districts may also require vendors of other types of services to undergo background checks on a case-by-case basis. To make such a determination, "the school district shall consider the totality of the circumstances, including factors such as the length of time the contractors will be on school grounds, whether pupils will be in proximity with the site where the contractors will be working, and whether the contractors will be working by themselves or with others."

However, school districts may forgo the newly mandated background checks in "an emergency or exceptional situation, such as when pupil health or safety is endangered or when repairs are needed to make school facilities safe and habitable." Background check laws already exist for vendors that are not sole proprietors and their employees who provide janitorial, administrative, grounds and landscape maintenance, student transportation, and food-related services to schools.

Vocabulary lesson: definition of 'sex offenses'

AB 872 expands the definition of "sex offenses" in the context of schools. The expanded definition now includes intentionally sending "any harmful matter that depicts a minor or minors engaging in sexual conduct." Likewise, the term "sex offenses" includes any of the offenses that would require a person to register under the Sex Offender Registration Act.

The definition of "sex offenses" has important employment consequences. For instance, a person convicted of a sex offense is disqualified from employment in public schools. Similarly, a private school must provide notice to parents when it hires a person convicted of a sex offense who will come in contact with students.

Test for paying private school teachers overtime

Senate Bill (SB) 621 establishes a test for determining whether a part-time private school teacher is entitled to overtime pay. To understand the test, it's first necessary to understand when full-time private school teachers are exempt.

Full-time private school teachers are exempt if, among other things, they earn a monthly salary equivalent to at least the lowest salary offered by any school district *or* 70 percent of the lowest schedule salary offered

by the school district or county office of education where the private school is located, whichever is greater. A full-time private school teacher whose salary doesn't meet that test is entitled to overtime pay.

Under SB 621, a part-time private school teacher is exempt if, on a proportional basis, his salary is equal to or greater than an exempt full-time private school teacher's salary. For example, if the minimum salary of a full-time (i.e., 40 hours per week) exempt private school teacher is $4,000 per month, the minimum salary for a private school teacher who works half time (i.e., 20 hours per week) is $2,000 per month because that's the prorated minimum salary of an exempt full-time private school teacher.

Therefore, for both full-time and part-time nonexempt private school teachers, "any work in excess of 8 hours in one workday and any work in excess of 40 hours in any one workweek, and the first 8 hours worked on the 7th day of work in any one workweek, is required to be compensated at the rate of no less than 1½ times the regular rate of pay for an employee" and "hours worked in excess of 12 hours in one day as well as hours worked in excess of 8 hours on any 7th day of work are to be compensated at the rate of no less than twice the regular rate of pay of an employee."

To allow for budgeting, SB 621 authorizes private schools to use public school district or county office of education salary schedules that have been in effect for up to 12 months prior to the start of the school year.

Teacher credentialing 101

AB 170 authorizes college graduates with a degree in professional education to receive multiple-subject teaching credentials. The obvious purpose of such a law is to increase the number of teachers in California. Regardless of a graduate's major, however, she must still pass examinations to receive a teaching credential.

Before AB 170, a graduate with a degree in professional education didn't meet the minimum requirements for a multiple-subject teaching credential. That limited the pool of people qualified to receive multiple-subject teaching credentials as well as the supply of teachers.

Bottom line

Here's a review of today's lesson: First, protecting the safety of students remains a priority. The legislature wants background checks for all persons who come in contact with students. Second, part-time private school teachers may qualify for overtime pay. Finally, to make sure there are enough teachers, the state has revised the degree requirements to allow multiple-subject teaching credentials. Pencils down.

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LITIGATION

Employer that successfully defended discrimination lawsuit recovers costs

by Cathleen S. Yonahara
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The courts apply different standards for awarding fees and costs under the California Fair Employment and Housing Act (FEHA) depending on whether the prevailing party is the employer or the employee. If the prevailing party is an employee, he will recover his fees and costs. If the prevailing party is an employer, it will not be awarded fees and costs unless the court finds the lawsuit was frivolous. However, if an employee rejects an employer's settlement offer under Civil Code Section 998 and fails to obtain a more favorable judgment, the employer may recover its postoffer costs, regardless of whether the action was frivolous.

Procedural background

Aleksei Sviridov, a former police officer, sued the city of San Diego and the San Diego Police Department for wrongful termination, national origin discrimination, hostile work environment, and retaliation in violation of the FEHA. The trial court granted the city's motion for summary judgment (dismissal without a trial) and its motion to dismiss the wrongful termination claim because it was insufficient to establish a valid claim for relief.

The appellate court affirmed the summary judgment ruling but held that Sviridov could amend his complaint to make a claim for relief under the Public Safety Officers Procedural Bill of Rights Act (POBR). Sviridov did so. Following a bench trial on the POBR claim, the trial court entered judgment in his favor, ordered his reinstatement as a police offer, and awarded him back pay and benefits. The city appealed.

The appellate court concluded that Sviridov wasn't entitled to relief under the POBR because he failed to timely appeal his termination to the chief of police. It ordered the trial court to enter judgment in favor of the city and awarded the city its costs on appeal.

The city filed a memorandum of costs seeking $90,387, including $46,489 in costs awarded after summary judgment was entered in its favor. Sviridov asked the court to strike the entire bill for costs on the grounds that the FEHA and POBR precluded the city from recovering fees. The court denied his request, entered judgment in favor of the city, and awarded the city all of its requested costs. Sviridov appealed.

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THE PUBLIC SECTOR

EEO trumps Google employee's free expression

by Jeff Sloan and Tori Anthony
Renne Sloan Holtzman Sakai LLP

In early August, Google seized national headlines by firing software engineer James Damore for publishing an internal memo in which he argued that women are inherently worse at technology jobs than men for "biological" reasons. In addition to the important societal issues Google's action implicates, it raises interesting labor and employment law questions about how far employees can go in speaking their minds to oppose workplace diversity.

Memo stirs up a hornet's nest

Historically, Google has promoted a workplace culture of openness and encouraged the free exchange of views. However, that policy didn't insulate Damore from the consequences of speaking out against diversity by internally publishing a lengthy memo ("Google's Ideological Echo Chamber: How Bias Clouds Our Thinking About Diversity and Inclusion") in which he argued that the disproportionately high percentage of men in technology jobs isn't the result of bias, but rather is attributable to "biological causes" that predispose women to be far less likely to successfully work in tech or hold leadership positions.

Damore also alleged that Google squelches conservative ideas and promotes diversity with "discriminatory" employment practices like restricting programs and classes by gender or race. The memo suggested that Google "de-moralize diversity," "have an open and honest discussion about the costs and benefits of our diversity programs," "be open about the science of human nature," and "reconsider making Unconscious Bias training mandatory."

Damore's memo presented a puzzle for Google managers. On the one hand, doing nothing would cast doubt on Google's commitment to diversity and could be seen as condoning Damore's views. How different is his argument from an alt-right piece asserting that members of racial minority groups are less qualified than whites to be programmers? On the other hand, taking action against Damore would arguably conflict with Google's established policy encouraging openness to diverse viewpoints. In the end, commitment to gender and racial diversity easily trumped freedom of expression: Damore, an at-will employee, was terminated.

Danielle Brown (Google's newly appointed vice president of diversity, integrity, and governance) issued an internal response. While affirming Google's support for diversity, inclusion, and healthy debate, Brown explained that the company's continued commitment to free discourse "needs to work alongside the principles of equal employment found in our Code of Conduct, policies, and anti-discrimination laws."

Unfazed by Google's status as a preeminent world power, Damore lashed out publicly—garnering the support of Breitbart and other conservative news outlets—and filed an unfair labor practice charge with the National Labor Relations Board (NLRB). He was seen wearing a T-shirt emblazoned with a "Goolag" logo (alluding to Soviet labor camps for political dissidents).

Google convened an all-hands "town hall" meeting on the issues and allowed Googlers to presubmit questions or topics. Some of the comments from Google employees who supported the termination were leaked, resulting in Breitbart publishing their names and personal information. Google CEO Sundar Pichai canceled the town hall because of worries over safety and employees' ability to feel comfortable speaking out.

Was memo 'protected' by the NLRA?

In a previous article (see "Talia Jane's lament: Internet rants as protected concerted activity" on pg. 6 of our issue dated April 11, 2016), we noted that Internet posts by tech employees about their working conditions could be viewed as "concerted activity" protected by the National Labor Relations Act (NLRA). We also observed that a terminated tech employee might hesitate to file NLRB charges because of potential blackballing. In this case, however, Damore was unswayed, instead doubling down on his contention that Google's diversity measures are ill-conceived.

Damore's NLRB case is at the investigative stage. The core question is whether employee speech opposing diversity/EEO policies and complaining about their impact on workers is "protected" under the NLRA. Google will contend that it had the right to terminate Damore because his memo violated its EEO policy and contributed toward a hostile work environment. Damore, on the other hand, will contend that the memo challenged Google's discriminatory employment practices and reflected concerns held by

other employees about the unfairness of prodiversity policies and practices.

If this case ends up before the NLRB in Washington, D.C., it will present an intriguing political quandary. Any NLRB member appointed by Donald Trump surely won't want to broaden the rights of employees to engage in "protected activity," but given the Trump administration's aversion to diversity, his appointees are also likely to be sympathetic to an employee challenging diversity efforts. That could paradoxically result in conservative members of the NLRB expanding the NLRA's employee protections.

Added protections in the public sector

As we often note, public-sector managers face far greater challenges than their private-sector counterparts. That's because public-sector workers are largely unionized and enjoy "for-cause" job protection. Moreover, unlike private-sector employees, public-sector workers' speech on matters of public concern is shielded by the First Amendment to the U.S. Constitution. In most states, their right to speak out about workplace issues is protected by a nonfederal NLRB equivalent (like California's left-leaning Public Employment Relations Board, or PERB).

In the public employment context, free-speech principles could very well prevail if a public-sector employer tried to terminate an employee for writing a memo like Damore's. While PERB would be loath to appear to support attacks on workplace diversity, it's unlikely that it would narrow the definition of protected activity under state statutes on that basis.

Bottom line

This case stands for the principle that "free speech" is ordinarily not guaranteed in private-sector employment. Things would potentially be different if Damore was employed by a public agency rather than Google.

Google was caught in a conflict between competing commitments to encouraging free expression and ensuring that diversity is valued and protected. It ultimately chose diversity. Unlike most public-sector and other private-sector employers, its litigation coffers are boundless, and concern about the legal risk of terminating Damore likely wasn't a significant factor in its decision. Given its lack of gender diversity, Google needed to strongly condemn Damore's contention that innate "biological causes" predispose women not to be engineers. It had good reason to believe that keeping him in the workplace would be seen as tolerating gender hostility.

The tragic events in Charlottesville, Virginia, reignited the national debate over diversity, EEO policies, and racism. President Trump's depiction of those events further fed the flames. Google's termination of Damore was joined to the post-Charlottesville debate when the alt-right scheduled national protests against Google's action. Damore—a self-described "classic liberal"—has become a poster child for conservative anti-diversity forces.

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Was city entitled to recover its costs?

The general rule is that a prevailing party is entitled to recover costs in any legal action or proceeding except as otherwise provided by statute. However, according to the California Supreme Court's decision in *Williams v. Chino Valley Independent Fire Dist.*, a prevailing defendant under the FEHA "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so."

But another statute was at issue in this case because the city made several statutory offers to settle Sviridov's lawsuit under Code of Civil Procedure Section 998. The city served Sviridov with settlement proposals under Section 998 in which it offered to waive costs in exchange for a dismissal of the action on three separation occasions—after the initial investigation of the lawsuit, prior to trial, and after the court granted summary judgment.

Section 998 provides, "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer." This cost-shifting statute is designed to encourage settlement by penalizing parties who fail to accept reasonable pretrial settlement offers. An employee who refuses a reasonable pretrial settlement offer and then fails to obtain a more favorable judgment is penalized by having to pay the employer's costs incurred after it made the settlement offer. Other appellate courts have held that it is improper to deny a prevailing employer costs under Section 998, even in an FEHA case.

Sviridov failed to substantively respond to the city's argument that *Williams* was inapplicable because the trial court properly awarded costs under Section 998. Accordingly, the trial court found he waived that argument. Furthermore, the appellate court held that "a blanket application of *Williams* to preclude Section 998

costs unless the FEHA claim was objectively groundless would erode the public policy of encouraging settlement in such cases."

Finally, Government Code Section 3309.5 did not preclude an award of costs in this case. Government Code Section 3309.5 is a sanctions statute, meaning it allows the court to impose sanctions against a party or his attorney for frivolous actions brought under the POBR. However, the statute provides that it doesn't create standards for the POBR that are different from those applicable to other civil actions. Accordingly, the sanctions statute was not designed to be an exception to the cost-shifting statute set forth in Civil Code Section 998.

The appellate court affirmed judgment in favor of the city and awarded the city its costs on appeal. *Sviridov v. City of San Diego* (California Court of Appeal, 4th Appellate District, 7/2817, published 8/15/17).

Bottom line

An employer that prevails in defending a discrimination or harassment lawsuit under the FEHA cannot recover its fees or costs unless it establishes that the employee's lawsuit was frivolous. But if an employee rejects an employer's settlement offer under Section 998 and fails to obtain a more favorable judgment, the employer may at least recover the costs (but not attorneys' fees) it incurred after it made the offer, without having to demonstrate that the lawsuit was frivolous. Section 998 creates economic incentives on both parties to settle the lawsuit rather than proceeding to trial. This decision emphasizes the importance of California's public policy encouraging settlements.

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REGULATIONS

WHD is pivoting on a dime on Obama-era regs

President Donald Trump's campaign was based in large part on the promise of reshaping government to be leaner, meaner, and more employer-friendly. One of his first actions was to sign an Executive Order instructing the various regulatory agencies to reduce regulatory burdens on businesses. While that directive is being met with varying degrees of speed and success by different federal agencies, one that seems to be going full speed ahead is the U.S. Department of Labor (DOL) and, more specifically, its Wage and Hour Division (WHD).

In the roughly three months since Secretary of Labor Alexander Acosta was confirmed by Congress, the WHD has placed a number of pending regulations on hold for further review and withdrawn or expressed the intent to withdraw regulations and guidance documents that were already in effect. Let's take a quick look at some of the more significant changes already made or being considered.

Minimum salary requirement

Perhaps the hottest HR topic of 2016 was the Obama administration's final regulation raising the minimum salary requirement for white-collar employees to be classified as exempt from $23,660 to $47,476 per year. The new requirement was originally scheduled to take effect on December 1, 2016, but was delayed by a court ruling at the last minute.

In late July 2017, the WHD announced that it would be seeking public comments about the minimum salary requirement, including the salary-level test, the exempt-duties test, the effect of bonuses and incentives on the salary test, and the salary test for highly compensated employees. One of the more interesting ideas apparently being considered is using a different minimum salary level for different types of white-collar exemptions.

The deadline to submit comments is September 25, 2017.

Tip-pool regulation

Under the Fair Labor Standards Act (FLSA), employers are allowed to count a portion of an employee's tips as wages in order to satisfy minimum wage requirements. In the past, different federal appeals courts have disagreed over the proper distribution of tips by an employer that pays its employees at least the full minimum wage and therefore doesn't need to use the tip credit to meet minimum wage requirements. These employers

frequently establish a "tip pool," meaning they accumulate tips received by all tipped employees and distribute them evenly to some part of the employee population.

One question that many courts historically disagreed on was whether employers could distribute tip-pool proceeds among all employees, even those who don't customarily receive tips (such as kitchen and maintenance staff). In 2011, the WHD issued regulations that said no, they couldn't. Now, however, the WHD has begun the process of revoking the 2011 regulations and says it won't be enforcing them in the meantime.

Going forward, employers that use a tip pool will need to look to case law to determine their legal obligations, at least until the issue is resolved by the U.S. Supreme Court or a new regulation is issued.

Joint employment definition

During the Obama administration, the DOL issued an administrative interpretation (AI) that allowed two separate businesses to share legal responsibility for an employee if they both exercised at least "indirect control" over him. This was an expansion of the previous definition of joint employment, which required both companies to exercise direct control over the employee. This created problems for parent, subsidiary, and affiliated companies; employers that used staffing agencies or outsourced certain payroll or HR functions to a third party; and franchisers that relied on franchisees to set employees' work conditions.

The WHD has now withdrawn the AI, and it is no longer available on the DOL website. While the law hasn't technically changed, the existence of a joint-employment relationship will now be determined by using the previously applicable "direct control" standard rather than the Obama administration's broader "indirect control" test.

Independent contractor interpretation

Another Obama-era AI took the position that "most workers" are employees, not independent contractors, under the "economic realities" test used by courts. This was a part of the Obama DOL's enforcement initiative on misclassification of independent contractors. While it remains to be seen, withdrawal of the AI may be a sign that the DOL intends to back off of the intense focus it had been placing on independent contractor arrangements during the Obama administration.

Other DOL changes

The DOL has been busy outside the WHD as well, taking action on such items as fiduciary rules for Employee Retirement Income Security Act (ERISA) plans (delayed effective date), electronic reporting of injury and illness data to the Occupational Safety and Health Administration (OSHA) (delayed deadline), and disability claims procedures for ERISA plans (under review).

Bottom line

It looks like this is only the beginning when it comes to the regulatory environment for employers. It's hard to predict what will come next, but as always, we will be working to provide you with all the information you need to remain compliant in your workplace practices. ✤

DOCUMENTATION

9th Circuit upholds $300,000 penalty for I-9 violations

The Immigration and Nationality Act (INA) requires employers to verify that their employees are legally authorized to work in the United States. It also prohibits employers from knowingly continuing to employ aliens who aren't authorized to work. The INA calls for penalties of varying amounts for each violation, depending on the nature of the violation. Consequently, penalties can add up quickly when there are widespread violations.

That fact was illustrated by a recent decision from the 9th Circuit Court of Appeals (whose rulings apply to all California employers), which upheld an administrative decision assessing penalties in the total amount of $305,050 for some 503 individual violations.

What does INA require?

To enforce the requirement that employers verify that their employees are legally authorized to work in the United States, INA regulations require the use of the Employment Eligibility Verification Form, known as the I-9 form. Completed I-9 forms must be kept for at least three years or for one year after the employee leaves employment, whichever is later, and must be presented to federal agents for inspection upon request. As an entirely separate requirement, the INA prohibits the continued employment of an alien when the employer knows that the person is or has become unauthorized to work.

What happened to DLS?

In the late 2000s, DLS Precision Fab, a small sheet metal fabricator in Phoenix, Arizona, grew quickly to around 200 employees, thanks to a government contract. To manage the workforce and ensure compliance with all legal requirements, the company hired a "well-credentialed" HR director who, unbeknown to the company, shirked his duty to ensure compliance with the INA.

When Immigration and Customs Enforcement (ICE) officials reviewed DLS's records, they found almost 500 violations of the I-9 requirements and 15 instances of the continued employment of unauthorized aliens. DLS didn't dispute those facts. After an administrative

enforcement action, an administrative law judge (ALJ) assessed $305,050 in penalties.

DLS appeals

DLS raised several issues on appeal.

The "good-faith" defenses. DLS contended that it was entitled to the "good-faith" defenses provided by two provisions of the INA. However, the first provision is limited to charges that an employer knowingly hired, recruited, or referred an ineligible alien, and DLS wasn't charged with that violation (it was charged with a different violation: continuing to employ an unauthorized alien), so that defense wasn't applicable. The second provision does in fact apply to alleged failures to complete, retain, or produce I-9 forms, many of the charges against DLS, but it is limited to "technical or procedural" failures, not the substantive failings in question. So it, too, was unavailable.

Statute of limitations. DLS next contended that the five-year statute of limitations in the INA barred the penalties. The court rejected that defense for all but one of the alleged violations for two reasons: (1) DLS failed to properly raise the defense in its answer to the charges and (2) all but one of the charges were in fact timely.

On the second point, the court ruled that the statute of limitations begins to run on the date on which the claim accrues. In this case, the paperwork violations pertaining to the I-9 forms continued until DLS was no longer required to retain the forms. Therefore, the statute of limitations didn't begin to run when employees were hired without complete I-9 forms. Rather, it began to run on the last day that DLS was required to retain the forms. Because all of the I-9s in question were required to be retained by dates that were less than five years before the administrative complaint was issued, the I-9 charges were timely. The same was true for all but one of the charges of continuing to employ unauthorized aliens. Only one of those workers left DLS's employment before the five-year statute of limitations began to run.

Assessing penalties without a factual hearing. Finally, DLS objected to the fact that, in the administrative proceedings, the ALJ assessed the penalties without holding a hearing on the proper amount of the penalties. In particular, DLS argued that it was entitled to raise an "ability to pay" defense to the amount of the penalties. The court rejected that contention on the basis that although the ALJ could consider that factor if she had wanted to, the INA doesn't list ability to pay as a factor in determining the penalty, and the judge wasn't required to consider it. Therefore, ability to pay wasn't a fact that was significant in determining the amount of the penalties. As for the statutory factors, there was no factual dispute about any of them, so the ALJ acted properly in determining the penalties in a summary fashion. *DLS Precision Fab LLC v. U.S. Immigration & Customs Enforcement,* Case No. 14-71980 (9th Cir., August 7, 2017).

Takeaways

The 9th Circuit's decision doesn't describe exactly what went wrong with DLS's I-9 process, so we don't know for sure what the company did wrong—whether it was a total failure to complete and retain proper forms or what. Still, there are at least two takeaways.

First, the fact that the company's top management presumably thought that its new HR director was on top of the I-9 process didn't matter because, as in many aspects of the law, ignorance is no defense. The second is that the INA has teeth, and prosecution for violations is often quite simple: You either have proper I-9 forms or you don't. And penalties can be assessed for each missing or inadequate form. Even for small employers, those penalties can be substantial indeed.

All employers would be well served by periodically auditing their I-9 processes and records. Discovering and remedying problems before ICE knocks on the door is immeasurably better than waiting until the knock comes.

Stay up to date on all of the complex reporting requirements for immigrant employees by attending this one-day event: I-9 Compliance and Immigration Enforcement Update: Tactical Strategies for Completing Documentation, Surviving ICE Inspections, and Avoiding Costly Penalties, being held in San Francisco on November 9, 2017, and San Antonio, Texas, on December 6, 2017. To register or learn more, visit http://bit.ly/2w3PNbz. ✤

HOSTILE WORK ENVIRONMENT

Employee assaulted by coworker proceeds with hostile work environment claim

Generally speaking, an employer can be held responsible for a hostile work environment based on sex or another protected category in one of two ways: if its supervisors create the hostile work environment or if it doesn't take prompt and effective corrective action when it's on notice of a hostile work environment created by coworkers or nonemployees.

In a recent decision, the 9th Circuit found that an employee presented sufficient evidence to go to trial on her claim that her employer created a hostile work environment when its management appeared to "condone" the conduct of her coworker after she reported it.

Facts

All events in question occurred in 2011. Cynthia Fuller was employed as a probation and parole officer by the Idaho Department of Corrections (DOC). Herbt

Cruz, a senior probation officer, was a coworker. They began a consensual intimate relationship but didn't initially report it to the DOC as required by DOC policy.

In late July, the Idaho State Police informed the DOC that Cruz was under investigation for the rape of a civilian, and on August 15, the department placed him on paid administrative leave. The DOC's manager responsible for the district where Fuller and Cruz worked called a staff meeting, in which he told employees that Cruz was on administrative leave because of a confidential ongoing investigation and that he "was not authorized to be on the premises." However, the manager went on to say that the DOC looked forward to his prompt return to work.

The next day, Fuller told her supervisors about her relationship with Cruz, but they didn't inform her of the reason he had been placed on leave. Fuller soon learned that Cruz had been accused of rape, but she continued her relationship with him. Over the course of the next two weeks, however, Cruz raped Fuller three times—all outside the workplace.

On September 6, Fuller told the district manager of the assaults, and the manager told her that Cruz had a history of this kind of behavior and that he knew of several instances. The next day, however, the manager sent an e-mail to all district employees, including Fuller, providing an "update" on Cruz that seemed to be sympathetic about his situation and stated that employees could talk to him and "give him some encouragement."

The DOC began an internal investigation of Cruz and concluded in late October to terminate his employment. But the department, deciding to wait to see if Cruz would be criminally charged, didn't notify him until late December that it intended to terminate his employment. He then promptly resigned. In the meantime, the DOC didn't inform Fuller of Cruz's status.

Fuller obtained a protective order against Cruz and took time off from work because of the assaults, but the DOC wouldn't pay her for that time, even though Cruz was on paid leave. When she returned to work, she felt ostracized because her coworkers, not knowing why she had been absent, suspected that she was faking being sick because they had been misled by management about Cruz's situation.

When Fuller asked the DOC to inform her coworkers about her protective order because she thought Cruz

CALIFORNIA NEWS IN BRIEF

State files $6.3 million misclassification, wage-theft suit. Glendale-based Calcrete Construction, Inc., is facing a $6.3 million lawsuit over wage theft and misclassification of workers as independent contractors, according to an August 14, 2017, announcement from the California Labor Commissioner's Office. The office has asserted wage-theft violations affecting 249 construction workers and willful misclassification of 175 workers as independent contractors.

Investigators found that Calcrete forced its workers to sign contracts stating they were independent contractors, under threat of termination. The company then used staffing agencies Dominion Staffing and Southeast Personnel Leasing to pay the workers. The employees typically worked 10 to 12 hours Monday through Friday and eight hours on Saturdays. They were paid only their regular hourly rate and not for the 18 to 28 hours of overtime they regularly worked, the Labor Commissioner's Office says.

State accuses franchise owner of misclassifying workers as exempt. The Labor Commissioner's Office announced on August 9 that it has cited a Jack in the Box franchise operator $903,084 for misclassifying 40 managers as exempt and denying them overtime pay. Nor-Cal Venture Group, Inc., owns 26 Jack in the Box franchises in California, most in the Greater Sacramento area.

An investigation found that 40 employees were misclassified as exempt and were required to work a minimum of 45 hours per week with no overtime pay. In California, managers who spend less than half of their work time on managerial duties must be paid overtime. Investigators determined that the 40 workers were performing the same duties as other employees.

Restaurant cited for back wages, penalties. A Chula Vista restaurant has been cited $274,000 in back wages and penalties for multiple wage-theft and labor law violations, the Labor Commissioner's Office announced on August 16. Dorantes Inc., doing business as La Querencia, has been ordered to pay $164,688 to six employees who worked an average of nine hours per day, five days a week, without breaks and were paid on average less than $6 an hour. La Querencia was also fined $110,150 in civil penalties, workers' compensation penalties, and wage statement penalties.

The Labor Commissioner's Office launched a complaint-based investigation at the Mexican restaurant in January and found that the owner was underreporting the number of workers it employed. The owner claimed five employees, but investigators found 14 workers were employed at the restaurant. ✤

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could walk into the offices and no one would know to call the police, the DOC declined. Instead, on November 16, the department sent employees another "update" about Cruz informing them that the investigation was ongoing and that "we hope to bring this to a resolution as soon as possible." The message went on to remind them that because the investigation was ongoing, Cruz wasn't allowed in the DOC offices, but it only asked them to contact a supervisor if they saw him there. Fuller resigned the same day.

Lawsuit

Fuller sued the DOC and two DOC managers, claiming several grounds for money damages, including a hostile work environment under Title VII of the Civil Rights Act of 1964. The district court rejected all of her asserted grounds. On her hostile work environment claim, the court concluded that she hadn't presented sufficient evidence to warrant a trial. On appeal, a three-judge panel of the 9th Circuit disagreed in a 2-1 decision.

DOC appeared to 'condone' Cruz's conduct

The majority of the 9th Circuit panel found that if Fuller's evidence was believed, a reasonable jury could conclude that the DOC's conduct after she reported the assaults created a hostile work environment by effectively punishing her for taking time off, by verbally and financially supporting Cruz, and by letting her believe he might return to work any day. "A reasonable woman in Fuller's circumstances could perceive the repeated statement of concern for Cruz's well-being by supervisors as evincing their belief that Fuller was lying or, perhaps worse, as valuing Cruz's reputation and job over her safety." Accordingly, the appeals court reversed the district court's ruling and sent the case back for trial. *Fuller v. Idaho Department of Corrections,* Case No. 14-36110 (9th Cir., July 31, 2017).

What's an employer to do?

The DOC contended that it was simply trying to protect the rights of both employees. At trial, a jury might agree. However, the apparent lack of empathy exhibited by the DOC's management toward Fuller, their public support of Cruz, and their failure to inform Fuller of the October decision to terminate Cruz's employment were sufficient to provide Fuller with a reasonable basis to perceive a hostile work environment.

This case illustrates how important it is for employers to promptly and fairly investigate employee complaints of a hostile work environment and to take prompt corrective action if warranted. Leaving a complaining employee in the dark, feeling at continued risk, is seldom a good idea. ✤