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Labor & Employment Briefing

A NEWSLETTER ON EMPLOYMENT, LABOR AND BENEFITS LAW FOR CLIENTS AND FRIENDS OF ANDERSON, MCPHARLIN & CONNERS LLP

Failure to Report Harassment Does Not Bar Employer Liability

In *Myers v. Trendwest Resorts Inc*., a California Court of Appeal held that although the incidents of harassment occurred away from the office, California law holds an employer strictly liable for a supervisor's misconduct unless it stems from a private relationship.

Myers and Damlakhi worked in sales at Trendwest Resorts Inc. Myers alleged that between October 2001 and December 2003, Damlakhi sexually harassed her verbally and physically. Several of the physical incidents occurred while they were "driving for dollars," a sales staff term used to describe when employees ran errands for the company or made sales calls from a car, according to the complaint. On one occasion while "driving for dollars," Myers says Damlakhi drove into his garage, closed the garage door and grabbed her.

In 2003 the company implemented the "integrity line," an anonymous service for employees to submit complaints to the company. Myers says she did not know about the line until after she was fired in late 2003 for taking too much disability leave.

After her termination, Myers says she called the line to complain that Damlakhi continually sexually harassed her after she returned to work following a mental breakdown brought on by his ongoing misconduct. She says she did not know whether the company ever investigated her complaint.

Myers sued Trendwest under the Fair Employment and Housing Act alleging sexual harassment and failure to prevent sexual harassment. The company moved for summary judgment, and the trial court granted the motion. The appeal court reinstated the sexual harassment and failure to prevent sexual harassment claims and remanded. The court declined to grant Trendwest summary judgment on the sexual harassment claim, saying there was no evidence that the relationship between Myers and Damlakhi was private. In addition, the court said Myers presented evidence showing that she was admitted to a mental hospital in June 2003, which rebutted Trendwest's argument that she did not demonstrate that Damlakhi's actions were unwelcome.

The court also reversed summary judgment on the FEHA-based claim for failure to prevent sexual harassment.

The court said the company did not show that it complied with its statutory obligation to inform Myers about remedies for sexual harassment and other forms of discrimination that were available through the Department of Fair Employment and Housing. The court noted that establishing the integrity line did not excuse the company's violation of its obligation to inform Myers of the complaint procedure and legal remedies available through DFEH.

Myers v. Trendwest Resorts Inc.,
No. C052286, 2007 WL 603501
(Cal. Ct. App., 3d Dist. Feb. 28, 2007).

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Calculating Eligibility for FMLA Leave

An employee's previous period of employment with an employer must be counted toward eligibility requirements of Family Medical Leave Act (FMLA) despite there being an intervening five-year break in service with the employer, says the First Circuit Court of Appeals in a case of first impression. The First Circuit Court of Appeals decision in *Rucker v. Lee Holding Co., d/b/a Lee Auto Malls,* highlights the need for employers to take a closer look at initial FMLA eligibility requirements. The case further illustrates another ambiguity in the FMLA at the same time that the United States Department of Labor ("DOL") solicits comments from interested parties on the FMLA and its implementation.

Rucker was employed by Lee Holding ("Lee") for several years before severing ties with Lee for five years. Rucker was not on Lee's payroll and was employed by another employer unrelated to Lee. After five years, Rucker resumed his employment with Lee. He then worked seven and a half months before missing several days of work for back pain or to obtain treatment. Lee terminated his employment and *Rucker* sued Lee for violating the FMLA.

Employee can count prior employment with same employer towards FMLA 12 month requirement

Lee immediately moved to dismiss Rucker's complaint on the grounds that he was not eligible for FMLA leave because although Rucker met the 1,250 hours worked requirement, he had worked less than 12 months. 29 U.S.C. § 2611 (2)(A) defines eligible employee as someone who has been employed "for at least 12 months by the employer with respect to whom leave is requested" and "for at least 1,250 hours of service with such employer during the previous 12-month period." In response, Rucker relied on 29 C.F.R. § 825.110(b), which provides in relevant part, "The 12 months an employee must have been employed by the employer need not be consecutive months."

The United States District Court of Maine held in favor of Lee, finding that Rucker's prior service did not count toward the 12-month requirement and that the regulation cited by Rucker only provided for brief interruptions in attendance and does not address the situation where the employee severs all ties with the employer for a period of years. The First Circuit reversed, holding the FMLA's statutory language as to the definition of eligible employee is ambiguous. "The words 'has been employed … for at least 12 months by the employer' can be read to refer to only the recent period of employment by the relevant employer or to all periods of employment by the employer." The Court further reasoned that if Congress had intended to impose such an onerous requirement, it would have done so explicitly. In addition, in attempting to explain the ambiguity, the Court also noted that the Senate Committee report specifically states that the 12 months "need not have been consecutive," but does not provide any additional explanation.

The First Circuit then deferred to the DOL's interpretation of 29 C.F.R. § 825.110(b) set forth in its amicus brief, finding that the statement, "the 12 months an employee must have been employed by the employer need not be consecutive months" is not limited by the sentences that follow, which address how to count weeks of employment. In addition, the Court held the DOL's preamble to the regulations specifically rejected the idea of excluding service that occurred two or more years prior to the renewed employment and that there is no indication that a five-year break in employment would be any different.

The First Circuit's decision joins with a number of other decisions that may be the subject of comment by individual groups and persons responding to the DOL's recent request for information. On December 1, 2006, the DOL published an official Request for Information on the Family and Medical Leave Act of 1993. In it, the DOL seeks comments from interested groups and individuals on a number of questions for its consideration in the administration and implementation of the FMLA. Comments were due February 2, 2007. As the DOL admits in its Request for Information, legal challenges to the FMLA and its regulations have been wide-ranging, with the most prominent challenge coming from the Supreme Court's decision of *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81 (2002), where the Court struck down the penalty provision contained in 29 C.F.R. § 825.700(a), as exceeding the DOL's statutory authority. The Request for Information specifically asks a question about the eligibility standards of the FMLA as addressed in the Rucker case, stating, "although the eligibility provision has been in effect for over ten (10) years, several issues continue to arise which appear to warrant clarification."

Rucker v. Lee Holding Co. (1st Cir. 2006). 471 F.3d 6

Proposed Regulations on Travel Expense Reimbursement

California's employee-indemnification law, Labor Code § 2802, generally requires employers to reimburse any expenses incurred by employees in carrying out their job duties. In *Gattuso v. Harte-Hanks Shoppers, Inc.*, the court ruled that employers may satisfy this obligation by paying increased wages or commissions instead of tracking and reimbursing the actual expenses incurred.

The plaintiffs had sought to certify a class of outside sales people who used their own vehicles for company business. The plaintiffs claimed that the employer had violated California's employee expense reimbursement law because it neither reimbursed their actual out-of-pocket expenses, including gas and maintenance, nor paid a fixed mileage-based reimbursement amount. The employer countered that it had entered into compensation arrangements with individual workers which had been specifically designed to incorporate reasonable amounts for expense reimbursement in the form of increased wages and commissions. After examining the history and purpose of the Labor Code's reimbursement provision, the court agreed that this was a legitimate method of expense reimbursement.

The court reasoned that the statute does not specify any particular method by which the employer must indemnify employees for necessary expenditures or losses. And nothing in the statute indicates that the Legislature intended to create one exclusive method for such indemnification. Under the court's ruling, employers and employees have been free to work out reasonable compensation arrangements that obviate the administrative burden of submitting time-consuming expense reports and processing frequent expense reimbursement checks.

Obligations of Employers to Reimburse Employee Expenses to be Defined

In February 2006, the California Supreme Court granted review of the decision. The court will look at whether an employer complies with its duty under Labor Code §2802 to indemnify its employees for expenses they necessarily incur in the discharge of their duties by paying the employees increased wage or commissions instead of reimbursing them for actual expenses.

Perhaps, in anticipation of the California Supreme Court's ruling, the California Division of Labor Standards Enforcement ("DSLE") recently issued proposed regulations addressing employer reimbursement of employee travel expenses. The proposed regulations are intended to explain the requirements and methods by which employers may reimburse employees for work-related travel expenses necessarily incurred in connection with use of vehicles and overnight travel. If adopted, the proposed regulations will have an immediate impact on the process of employer reimbursement for employee travel expenses.

According to the DLSE, the proposed regulations are needed because there is insufficient judicial authority explaining the meaning of Labor Code §2802 and its obligations for employers. The lack of definitive guidance under the statute has caused some confusion among employers with respect to the types of expenses that must be reimbursed to employees, the rates of reimbursement, and whether additional compensation satisfies the reimbursement requirements. The proposed regulations provide specific rules for the payment and recordkeeping of vehicle and per diem expenses necessarily incurred by employees in performing their job duties. These proposed regulations also attempt to clarify the extent to which other types of incidental travel expenses are reimbursable under § 2802, such as, tolls, parking, rental car costs, laundry, mailing, telephone, shipping of baggage or work-related material, and commuter transportation costs.

In addition, the proposed regulations provide that employees who bring a claim for expense reimbursement to the Labor Commissioner will be entitled to recover their attorney fees; even if the fees are for legal work performed during the administrative process.

The DSLE held one hearing on February 7, 2007, seeking comments on the proposed regulations and the regulations have not yet been adopted. We will keep you informed of the developments on reimbursement of employee expenses as they progress.

Disabled or Regarded as Disabled?

by Eric A. Schneider

The case of *Walton v. U.S. Marshals Service* presents the unusual situation where the employer terminated the employment because of a hearing deficiency, but the plaintiff claims that she was *not* disabled, but was regarded as disabled.

Naomi Walton had sued the Marshals Service under the Rehabilitation Act of 1973 claiming that she was fired because of her hearing impairment. (The court footnoted that the standards under that act are the same as those under the Americans with Disabilities Act.) The Service had in fact fired her because she was essentially deaf in one ear, and that as a consequence, she could not localize the direction of sounds, putting herself, other law enforcement personnel, and the general public in danger.

The Court cited the Equal Employment Opportunity Commission's Regulations which state that an individual who is "regarded as" disabled:

- Has a physical or mental impairment that does not substantially limit major life activities or is treated by a covered entity as constituting such limitation;
- Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairments; or
- Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limited impairment. (Footnote omitted.)

The Supreme Court in *Sutton v. United Airlines, Inc.* (1999) 527 U.S. 471 tacitly approved the EEOC Regulations as valid and held that an employee could be regarded as disabled in one of two ways:

- A covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more life activities; or
- The covered entity mistakenly believes that an actual non-limiting impairment substantially limits one or more life activities. (527 U.S. at 489.) They further stated "in most cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has the substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." (527 U.S. at 489.)

The plaintiff had alleged that she was regarded as substantially limited in the major life activities of hearing, working, and localizing sound. The court found that she had failed to raise a genuine issue of material fact that her employer regarded her as disabled with respect to any of those activities.

The lower court had found that she had not raised a genuine issue of material fact either as to the Service having subjectively believed her hearing to be substantially limited or that the ability to localize sound was an objective and substantial limitation on the major life activity of hearing, and the Court of Appeals agreed.

The court had cited authority to the effect that an employer which required its employees to meet certain vision standards does not render someone who had failed to meet that standard as being substantially limited in the major life activities of working or seeing. Likewise, the inability to localize the source of sound does not equate to an impairment that substantially limits the major life activity of hearing.

She similarly did not establish a material dispute regarding the Service regarding her as substantially limited in the major life activity of working. It cited authority to the effect that a plaintiff "'must present specific evidence about relevant labor markets to defeat summary judgment' and 'identify what requirements posed by the class of jobs were problematic in light of the limitations imposed on her.'" (Citing *Thornton v. McClatchy Newspapers, Inc.* (9th Cir. 2001) 261 F.3d 789, 795-796; citations omitted.) No evidence was presented by the plaintiff about relevant labor markets or her particular training, knowledge, skills, or abilities.

Walton v. U.S. Marshals Service (9th Cir. 2007) 476 F.3d 723

Men Filing More Harassment Complaints

Sexual harassment complaints filed by men have risen from 9.1 percent in 1992 to a record 15.4 percent in 2006, according to the U.S. Equal Employment Opportunity Commission.

Of the 12,025 sexual harassment complaints received last year by the EEOC and state and local fair employment practices agencies, about 1,850 were filed by men. In 1992, men filed about 960 of the 10,532 sexual harassment complaints.

Overall, the number of sexual harassment complaints has declined in 9 of the last 10 years. In 1997, there were 15,889 sexual harassment complaints.

The EEOC received a total of 75,768 discrimination complaints against private sector employers last year, up from 75,428 in 2005 and the first increase since 2002.

Electronic Document Retention

by Kristin M. Kubec

The new Federal Rules of Civil Procedure regarding electronic discovery, effective December 1, 2006 adds what at first glance seems to be simple language to the existing rule, but will in fact have widespread implications, especially in employment practices cases. At the present time, these new rules impact any federal court cases or cases pending in states that follow the Federal Rules of Civil Procedure. It is believed that states that do not expressly follow the Federal Rules will adopt the same or similar language in their own discovery acts.

At the heart of the new amendments is the addition of language to Federal Rule of Civil Procedure 34, which now permits a party to serve a request to produce not only documents, but any electronically stored information, including sound recordings, images, data or data compilations stored in any medium from which information can be obtained. The addition of this language now creates a larger obligation to produce and maintain information that is electronically stored.

In employment practices cases, the employer is generally the party who will have the greater burden under these rules, because it is generally the employer who has a large amount of electronically stored data that may be relevant to a case.

There are six key components to e-discovery addressed by the amendments:

- They created a new form of information covered by discovery called Electronically Stored Information (ESI), which a party must preserve and consider in discovery;
- Parties are required to discuss electronic discovery issues during the initial case planning conference;
- ESI is to be produced as it is "ordinarily maintained or reasonably usable" absent agreement to the contrary;
- A limited exception to this type of discovery was included, for situations when ESI is "not accessible because of undue burden or cost;"
- A safe harbor from sanctions where a party fails to preserve ESI as a result of the routine, good-faith operation of its electronic information systems was established; and
- The additional protection in case of the inadvertent disclosure privileged information contained in ESI.

The new rules do not alter the obligation of an employer to preserve and maintain any information (electronic, paper or otherwise) when put on notice of a claim. In employment practices cases, it will be the obligation of the employer to identify and maintain any electronically stored data that may be relevant to the matter as soon as it is put on notice of a claim. Failure to do so could be catastrophic, as the courts have not hesitated to direct verdicts against organizations who failed to preserve records. Clearly, these amendments will have the immediate effect of increasing the costs associated with defending a lawsuit, given the enormous time and expense in locating, preserving, managing and searching electronic information.

Human Resources considerations under the new rules:

Discriminatory E-mails

Is it possible that employees have sent or received workplace e-mails which were racist, sexist or otherwise could be considered discriminatorily harassing? If the answer is yes, you should be worried. E-mails are permanent. If you think deleting the e-mails erases the problem, you're wrong. There are ways to recover e-mails even after they are "deleted." It will be increasingly common for plaintiff employment lawyers to discover discriminatory e-mails during litigation. Human Resources needs to ensure that employees are aware that their e-mails may be turned over to opposing counsel.

EEOC Position Statements

It is probably rare that you, or your employment lawyers, send a position statement to the EEOC or another similar administrative agency and then discover documents that contradict something in your position statement. However, now that electronic discovery is the norm, that prospect is much more likely. Authors of position statements should now review electronic discovery in advance of locking into a position with an administrative agency.

Retaliation

Do you really know how a claimant's manager reacted after hearing that a current employee filed a charge of unlawful discrimination? During your investigation the supervisor seemed very professional, but did you check all of the relevant e-mails? They may show another story.

Out of Context E-mails

Most e-mails are written with far less thought than a formal letter. E-mails are treated more as an informal communications shortcut than as means of traditional correspondence. That informality and abbreviation means they are usually written in a way that can easily be taken out of context. Will e-mails written by your workforce come back to haunt your organization with respect to anti-trust issues, regulatory issues, compliance issues or in any other type of litigation?

E-mail policies – your organization should have an electronic document retention policy. How long should e-mails be preserved? Where should they be kept? Also, what policies, if any, about the appropriate content or use of e-mails should be distributed to employees?

1. **E-mail surveillance** - Employers routinely monitor the workplace for safety issues, environmental hazards and quality control. Drug testing, surveillance cameras and security guards are increasingly common. Why then is e-mail surveillance so rare? If a "smoking gun" e-mail can cause your organization tremendous public relations problems, cost millions of dollars and/or become a regulatory nightmare, don't you want to be on the lookout? E-mail surveillance can be a great tool to monitor for harassing e-mails, as well as a whole host of other issues.
2. **E-mail training** - Most employees do not have a clue that their e-mails can be searched during the discovery phase of litigation and used against your organization during a trial. Further, most employees think that e-mails are temporary missives that are easily deleted. Finally, most employees do not spend much time writing e-mails and do not worry about them being taken out of context. These potentially disastrous mistakes should be addressed in a training session.

High Court to Decide Supervisor Bias Case

The US Supreme Court has agreed to consider whether an employer was liable for Title VII race bias, even though the human resources official who made the formal decision to discharge an African-American employee worked in a different city, never met him and did not know his race. In making her decision, the human resources official relied exclusively on information provided by the employee's Hispanic supervisor, who not only knew the employee's race, but also had a history of both treating African-American employees unfavorably and making racist remarks in the workplace. The theory of liability is called subordinate bias.

The employer, BCI Coca-Cola Bottling Co, asked the High Court to review the Tenth Circuit Court of Appeals June 2006 decision which reinstated the US Equal Employment Opportunity Commission's (EEOC) suit filed on behalf of the employee. In that decision, the circuit court concluded that under a subordinate bias theory of liability, triable issues existed as to whether the employee's discharge was pretext for race bias. Subordinate bias liability occurs when a biased low-level supervisor "with no disciplinary authority. . .effectuate[s] the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker."

To prevail under such a theory, explained the Tenth Circuit, a causal nexus must be established -- e.g., the aggrieved employee must show that the supervisor's "discriminatory reports, recommendations, or other actions caused the adverse employment action." However, an employer can avoid liability by conducting an independent investigation of the biased supervisor's allegations. Simply asking the employee for his version of what occurred (i.e., "taking care not to rely exclusively on the say-so of" the supervisor), defeats the causal link and any inference that the adverse action was racially discriminatory.

With that in mind, the Tenth Circuit held that the EEOC made a factual showing that the supervisor harbored animus towards African-American employees. Aside from the supervisor's history of making racist comments, the EEOC also cited a key example of disparate treatment. Unlike the employee in the EEOC's suit who was discharged for failing to work on one of his days off, the same supervisor who fired him also failed to discipline a Hispanic employee who committed the same offense.

The EEOC also sufficiently alleged the causal link. In discharging the employee, the HR official relied exclusively on the supervisor's account of the insubordination without ever asking for the employee's side of the story or conducting an independent investigation into the events that caused the discharge. The HR official's investigation, which only consisted of pulling the employee's personnel file, was inadequate as a matter of law to defeat the inference that the supervisor's race bias tainted the employer's decision to discharge the employee. The personnel file contained no information about the issues surrounding the employee's discharge. Accordingly, "[e]mployers therefore have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class," explained the Tenth Circuit.

In granting certiorari, the Supreme Court agreed to address "[u]nder what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee."

BCI Coca-Cola Bottling Co. v. EEOC (10th Cir. 2006) 450 F.3d 476, cert. granted January 5, 2007

New EEOC Publication Addresses Employment of Health Care Workers with Disabilities

The U.S. Equal Employment Opportunity Commission (EEOC), has issued a new question-and-answer fact sheet on the application of the Americans with Disabilities Act (ADA) to job applicants and employees in the health care industry. The new publication, part of a series of Q&A documents about specific disabilities in the workplace and specific industries, is available on the EEOC's web site at http://www.eeoc.gov/facts/health_care_workers.html.

The new Q&A fact sheet provides practical information about applying ADA employment rules in health care jobs, in a variety of settings - from public and private hospitals and nursing care facilities to doctors' and dentists' offices and diagnostic laboratories. The occupations within the health care field are many and varied, including not only physicians, surgeons, dental hygienists and nurses, but social workers, physical therapists, medical records clerks, laboratory technicians, paramedics, home health aides, and custodial and food service workers in medical facilities.

Although the rules under Title I of the ADA are the same for employers and individuals with disabilities in all industries, this fact sheet explains how the ADA applies to some unique situations that may arise in the health care setting. Many of the real-life examples in the fact sheet are based on cases that have been decided by courts or settled by the EEOC.

Topics discussed in the new publication include:

- When someone is an "employee" covered by the ADA (as opposed to an independent contractor);
- When someone is an "individual with a disability" under the ADA;
- How to determine if a health care applicant or employee with a disability is qualified for ADA purposes;
- What types of reasonable accommodations health care workers with disabilities may need and the limitations on a health care employer's obligation to provide reasonable accommodation;
- When an employer may ask health care applicants or employees questions about their medical conditions or require medical examinations; and
- How a health care employer should handle safety concerns about applicants and employees.

Legislative Update

Cellular Telephone Usage

Employers should be aware that by July 1, 2008, California will ban the use of hand-held cellular telephones and similar devices while driving a motor vehicle. Hands-free operated devices will be permitted. Employers may want to consider revising their policies to reflect this change and to ensure that employees who are expected to use cellular telephones while driving on company business utilize hands-free devices.

USERRA Posting

All private sector and state government employers must post a notice in the workplace informing employees of their rights under the Uniformed Services Employment and Reemployment Rights Act. The latest version of the USERRA poster can be downloaded at http://www.dol.gov./vets/programs/USERRAPrivate.pdf.

Informational Pamphlets Available

Several informational pamphlets have been revised and can be downloaded to distribute to employees:

- Paid Family Leave – Form DE 2511 may be downloaded at: http://www/edd.ca.gov/direp/pdfpub.asp#de2511.pdf
- State Disability Insurance – Form DE 2515 or the State Disability Insurance Provisions is available at http://www.edd.ca.gov/direp/dipub.htm
- Information for the Unemployed – For Your Benefit – California's Programs for the Unemployed – Form DE 2320, describes services provided by the Employment Development Department and can be accessed at http://www.edd.ca.gov/uirep/uipub.htm
- Workers' Compensation Medical Care – two new publications, the fact sheet "The Basics About Medical Care for Injured Workers" and the medical booklet "Getting Appropriate Medical Care for Your Injury" are now available at http://www.dir.ca.gov/chswc/

Senator Proposed Paid FMLA Leave

Senator Chris Dodd (D-CT) announced on February 1, 2007, that he will be introducing a bill that would amend the Family and Medical Leave Act to provide for at least six weeks of paid leave for employees for the birth or adoption of a child or in order to care for themselves, their children or an immediate family member. The program would be funded by a shared-cost mechanism, involving the employer, the employee and the federal government. The bill, which is expected to be co-sponsored by Senator Ted Stevens (R-AK), would also expand the number of individuals eligible for FMLA leave.

Sick Leave Grace Period

In San Francisco, businesses were granted a 120-day grace period before they must pay for employee sick time under a law that took effect February 5 2007. The grace period is intended to give city government and other large employers time to establish systems for reimbursing workers under the city's law mandating paid sick leave, the first such ordinance in the country.

The law requires companies to provide one hour of paid sick time for every 30 hours worked, with a cap of either 40 or 72 hours of leave, depending on the size of the business. Voters approved it in November.

Importance of Electronic Privacy Policies and Practices

by Kristin M. Kubec

On January 30, 2007, the Ninth Circuit Court of Appeals decided the case of *United States v. Ziegler*, an appeal by a man convicted of various child-pornography charges. In deciding this case, the *Zieglar* court affirmed the importance of an employer's policies and practices regarding employees' right to privacy in their workplace computers and stored electronic data.

In *Ziegler*, the employer had in place a computer monitoring policy and consistently monitored its employees Internet activities. This policy was expressly set forth in the employment manual and the employees were also provided information about the policy through training.

Mr. Ziegler apparently accessed child pornography through his work computer and his employer notified the FBI of his activity, who in turn seized the files from the work computer and prosecuted him. Mr. Ziegler argued that the search was unconstitutional. The Ninth Circuit originally ruled that Mr. Ziegler had no constitutional right of privacy in his work computer and refused to suppress the seized files.

However, after a rehearing the Court came to the same conclusion but from an entirely different approach. The Ninth Circuit held that employees who maintain a private office do in fact "retain at least some expectation of privacy in their offices" and therefore are protected by the Fourth Amendment from an unreasonable search and seizure. Because the employer had an express monitoring policy that had been conveyed to its employees, it possessed "common authority" sufficient to consent to a government search. Therefore, the search was consistent with the Fourth Amendment. The ruling is significant in that it recognizes that employees do have some expectation of privacy in their offices, including the use of the office computer. Based on this ruling, the absence of a clearly communicated electronic monitoring policy may limit an employer's ability to take action based upon information learned during the monitoring.

This decision is in line with previous decisions discussing an employee's expectation of privacy in workplace data. It underscores the importance of employers maintaining written policies that clearly establish the company's right to monitor, access, and inspect computers, email, voice mail, and other electronically stored documents and data that are used by employees at the work location or in the course and scope of their employment elsewhere, such as laptops or when an employee telecommutes. Employers who do not have such a policy in place are encouraged to implement one.

United States v. Ziegler (9th Cir. 2007) 474 F.3d 1184

Mediation Memoranda Need Clear Language

In *Fair v. Bakthiari*, the California Supreme Court ruled that, under the California Evidence Code, parties who mediate their dispute and sign a settlement memorandum, but who do not clearly demonstrate their intent that the memorandum be enforceable, cannot introduce the settlement in court and get enforcement of their agreement.

The court held that settlement agreements produced as a result of mediation are not admissible unless they indicate on their face that the parties intended the agreement to be binding or otherwise enforceable.

Although the California Legislature, in enacting the Evidence Code section at issue, does not require parties in mediation to use a "formulaic phrase," there must be some writing signed by the parties that indicates the agreement is enforceable and binding. Terms related to the eventual enforcement of the settlement agreement, like arbitration or forum selection clauses, are inadequate.

The failure to clearly express the parties' intent will render the agreement inadmissible, and thus unenforceable. To make a settlement memorandum enforceable, the parties should explicitly state such an intention.

Fair v. Bakthiari (2006) 40 Cal.4th 189

Paid Sick Leave Bill Introduced in Congress

On March 15, 2007, U.S. Senators Edward Kennedy (D-Mass.) and Rep. Rosa DeLauro (D-Conn.) introduced the Healthy Families Act, legislation that would guarantee seven paid sick days per year to employees working at least 30 hours a week at companies with 15 or more workers. Under the bill, the sick days could be used for the employee's own medical condition, doctor appointments or medical treatment, as well as to care for an ill family member. Pro rata paid sick leave benefits would be available to part-time employees.

According to Kennedy, almost half of private-sector workers are denied paid sick days and of the lowest quarter of wage earners, 79% have no paid sick days at all. The Healthy Families Act would benefit 66 million Americans: 46 million would gain access to paid sick days; 19 million would gain paid sick days for leave for doctors' visits and family care; and 1 million Americans would gain additional paid sick days.

Employment Practices Group at Anderson, McPharlin & Conners LLP

Our Employment Practices Group places a special emphasis on keeping pace with rapidly changing employment laws and providing employers with effective representation in this constantly evolving area. For twenty years, our clients have known that we understand the challenges they face and that we will work with them in assessing risks and developing cost-effective strategies to bring employment matters to prompt and satisfactory resolution.

Our Employment Practices Group has broad experience with labor and employment matters and is well versed on the intricacies of the subjects with which we deal. Our Employment Practices attorneys have published numerous articles on a wide range of labor and employment topics and are frequently featured as speakers at seminars and conferences around the country. Equally important, the Group's attorneys have considerable "hands on" experience in addressing the problems that businesses encounter in managing a workforce and are thus able to offer practical, real-world advice that makes good business sense.

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