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Newsletters

Employment Practices Newsletter - October 2013

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ADA Accommodations Need Not be Job Related

An assistant attorney general for the Louisiana Department of Justice suffered from osteoarthritis of the knee, and requested that her employer provide her with a free on-site parking space as an accommodation. The employer refused, and the employee filed a claim under the Americans with Disabilities Act, claiming that the employer failed to provide her with a reasonable accommodation. The district court granted summary judgment to the employer, holding that the employee failed to explain how the parking space related to her ability to perform the essential functions of her job. The U.S. Court of Appeals for the Fifth Circuit reversed, holding that there need not be a nexus between a requested accommodation and the essential functions of the requesting employee's job. In reaching this holding, the court focused on the language of the statute, as well as implementing regulations, and found no requirement that an accommodation be specifically linked to an employee's essential job duties. This case provides an important clarification of the accommodation process, and employers should be careful to fully evaluate all accommodation requests, even where there is no direct nexus between the requested accommodation and the requesting employee's job duties.

Feist v. Louisiana, No. 12-31065 (5th Cir. Sep. 16, 2013)

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Employee Benefits

Labor & Employment

Asking About Easier Jobs Triggers Employer's Duty to Participate in Interactive Process

An employee of a printing and copying company was diagnosed with stage four cancer, and was concerned that she would be unable to perform the physical aspects of her job. After her diagnosis, she spoke with her supervisor, stated that she wanted to keep working and asked whether there were any other easier jobs available. The supervisor stated that he did not know of any, nor did he direct her to human resources. Twenty minutes after the call with her supervisor, the employee resigned. She subsequently filed a failure to accommodate claim under the Americans with Disabilities Act ("DA). In rejecting the employer's motion for summary judgment, the court held that the employer's obligation to participate in the interactive process begins as soon as it is placed on notice of a disability. Ultimately, the court held that the ADA obligated the employer to push the process forward once the employee informed it of her diagnosis and the fact that she wanted to keep working. This case demonstrates the importance of participating in, and clearly documenting the steps taken during, the interactive process. Once employers learn of an employee's disability, steps must be taken to ensure that interactive process begins and is effective.

Suvada v. Gordon Flesch Co., Inc., No. 11 C 07892 (N.D. Ill. Sep. 13, 2013)

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Time Spent Changing into Protective Gear Exempt Pursuant to Collective Bargaining Agreement

Two laborers at a frozen food production plant sued their employer under the Fair Labor Standards Act (FLSA) seeking compensation for unpaid time spent changing into and out of protective gear, as well as time spent walking between changing stations and the time clock. A employee's "principal activity" is the job an employee was hired to perform. Employees must be paid for all time spent performing a "principal activity" as well as other activities that are "integral and indispensable" to a principal activity. But the FLSA also provides that an employee is not required to pay for clothes-changing time or for walking to and from an employee's "principal activity" if the employer customarily does not pay for such time or there is a collective bargaining agreement stating that such pay is not required. The employees were subject to a qualifying collective bargaining agreement and district court agreed, against the employees' objection, that "protective gear" qualified as "clothes" for purpose of the exemption. Nevertheless, the district court denied the employer's motion for summary judgment because it concluded that changing in and out of the protective gear was "integral and indispensable" to the to the employees' primary work activity. The U.S. Court of Appeals for the Eighth Circuit reversed because it found that, logically speaking, it makes no sense to classify as part of a "principal activity" time that is affirmatively exempted by an agreement that the FLSA expressly permits an employee to make. In so deciding, the Eighth Circuit rejected as "unpersuasive" a Department of Labor opinion letter, which argued that only regular clothing—not "protective clothing"—generated the exemption and that even regular clothes-changing can in certain circumstances constitute a "principal actinicity." This decision provides an important clarification regarding this exemption. However, employers must apply a fact-specific analysis regarding the application of the exemption, and seek assistance of counsel in implementing any policies based on it.

Adair v. ConAgra Foods, Inc., No. 12-3565 (8th Cir. Aug. 13, 2013)

Contact for more information: your Hinshaw attorney

Court Upholds Contractual Six-Month Filing Deadline for Age Discrimination Claim

After an employee for a delivery service was terminated, he filed an age discrimination claim against his employer. In addition to defending the matter on the merits, the employer also argued that employee's age claim was time-barred due to a six-month limitation period included within the employee's employment agreement. The employee argued that the provision was unenforceable because it foreclosed his ability to wait and receive a right to sue notice from the EEOC before bringing suit. In rejecting this argument, the Sixth Circuit pointed to the fact that claims under the Age Discrimination in Employment Act (ADEA), unlike claims brought pursuant to Title VII of the Civil Rights Act of 1964, do not require an employee to receive a right to sue notice as a precondition to filing suit. Rather, an employee can file suit 60 days after filing a charge of discrimination with the EEOC. Consequently, the provision did not impair the employee's rights and was held to bar his ADEA claim. In light of this holding, coupled with recent strong Supreme Court support for the

enforceability of class waivers within employment agreements, employers should evaluate their use of employment agreements within the workforce and determine if additional protections can be incorporated.

Dekarske v. Fed. Ex. Corp., No. 11-12132 (E.D. Mich. Sep. 9, 2013)

Contact for more information: Aimee E. Delaney

Despite "Incredibly Suspicious" Timing, Retaliation Claim Fails

A surgical technologist at a hospital was having performance problems. The technologist's supervisor contacted her by phone following a complaint from a physician that the technologist had failed to perform a number of critical tasks that ultimately delayed a surgery. During the call, the technologist became angry and insubordinate. Following that call, the supervisor contacted human resources to discuss terminating the technologist, and then communicated his decision to others, but not to the technician. The following day, the technologist contacted human resources to complain of racial harassment and discrimination. Forty-five minutes later, the supervisor contacted the technologist via phone and informed her of her termination. While the court found the timing "incredibly suspicious," it ultimately ruled that the evidence that the decision had been made prior to the technologist's complaint precluded a finding that her complaint was the "but for" basis for her termination. This case demonstrates the importance of carefully documenting the termination decision-making process.

Wright v. St. Vincent Health System, No. 12-3162 (8th Cir. Sep. 18, 2013)

Contact for more information: Tom H. Luetkemeyer

Illinois Supreme Court Denies Invitation to Review Restrictive Covenant Case

A company bought a business that marketed finance and insurance products to the automotive industry. After the sale, the company made an employment offer to an employee, subject to the employee's agreement to a two-year non-solicitation and non-competition covenant. The employee specifically negotiated a provision that the covenant would not apply if he was terminated without cause during the first year of his employment. The employee started with the company on November 1, 2009 and gave his two-week notice on February 1, 2010. The court held that a job offer itself, standing alone, is not sufficient support for a restrictive covenant unless there has been a period of substantial employment. Additionally, the court went on to create a new bright-line rule that "substantial employment" is a period of two years or more. Many observers believed the holding starkly diverged from established case law and hoped the issue would be taken up by the Illinois Supreme Court. On September 25, 2013, the Illinois Supreme Court denied the defendant's Petition for Leave to Appeal. Employers should evaluate the status of the restrictive covenants currently in place with employees and determine whether additional consideration is required in light of this holding.

Fifield v. Premier Dealer Services, Inc., No. 1-12-0327 (Ill. App. Ct. Jun. 24, 2013)

For more information, please contact your regular Hinshaw attorney.

Plan Language Defeats ERISA claims

An employee was severely injured while on the job and was placed on leave by his employer. The employee filed a claim for workers' compensation and continued to participate in the employer's group medical plan under which he incurred substantial medical claims. A new entity then acquired the employer and became the plan administrator of the medical plan under which the employee was covered. After three years, the employer asked the employee to submit a letter proving his ability to come back to work or face termination. The employee did not submit such letter and was terminated from employment. Subsequently, his coverage under the employer's group medical plan was terminated. The employee then filed suit for benefits and breach of fiduciary duty under ERISA. The district court dismissed the claim, which the Seventh Circuit upheld because the employee did not allege that the terms of the plan provided the employee with a right to continued benefits post-employment, and the employer's offering of long-term disability insurance did not suggest the employee was entitled to benefits post-employment. With respect to the breach of fiduciary claim, the court held that the employer was acting as the employer when it terminated the employee and not in its capacity as a fiduciary of the plan. This case demonstrates the importance of ensuring that group medical plan documents clearly state what benefits an

employee is entitled to post-termination.

Brooks v. Pactiv Corp., No. 12-1155 (7th Cir. Sept. 6, 2013)

Contact for more information: your regular Hinshaw attorney

Ban on Project Labor Agreements Upheld

Two unions in Michigan filed a complaint for an injunction against the Fair and Open Competition in Governmental Construction Act (Public Act 99, 2011) (Act), which restricted the use of project labor agreements (PLAs) on publicly funded construction projects. Project labor agreements, which lay out terms and conditions of employment on specific construction projects, can be entered into by governmental units, or by a contractor hired by the government, and a labor organization. The U.S. District Court for the Eastern District of Michigan granted the injunction and ruled that the Act was preempted by the National Labor Relations Act. On appeal, the U.S. Court of Appeals for the Sixth Circuit vacated the injunction and held that Michigan could take across-the-board action to prohibit government-mandated PLAs on state, local and publicly funded projects. To date, eighteen states have banned government-mandated PLAs.

Mich. Bldg. & Constr. Trades Council v. Snyder, Nos. 12-1246 & 12-2548 (6th Cir. September 6, 2013)

For more information, please contact your regular Hinshaw attorney.

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