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Newsletters

Employment Practices Newsletter - March 2012

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No ADA Claim for Cancer Patient Who Could Not Perform the Essential Functions of the Job

A warehouse supervisor exhausted his leave under the Family Medical Leave Act (FMLA) while he underwent treatment for cancer. When his leave expired, the employee requested more time off, and the employer terminated him. The employee sued, alleging that he was discriminated against because of his disability, in violation of the Americans with Disabilities Act (ADA). The U.S. Court of Appeals for the Tenth Circuit rejected the employee's claim, holding that he was not a "qualified individual" with a disability under the ADA because there was no reasonable accommodation that would have allowed him to perform the essential functions of his job. The court found that "physical attendance in the workplace is itself an essential function." Moreover, the court held that granting the employee additional unpaid leave would not have been a "reasonable accommodation" because the employee was unable to specify the expected duration of his impairment. Accordingly, the employee's ADA claim was precluded. As this case demonstrates, when no reasonable accommodation exists, employers do not need to continue employing an individual who is unable to perform the essential functions of the job. However, employers must always engage in the interactive process to determine if a reasonable accommodation does exist.

Valdez v. McGrill, Case No. 11-2051 (10th Cir. Feb. 13, 2012)

For more information, please contact your regular Hinshaw attorney.

***Dukes'* Applicability May Be Limited**

A group of bank employees claimed that it was company policy to deny overtime pay to nonexempt employees and that some exempt employees were improperly classified. The district court certified two classes for claims arising under the Illinois Minimum Wage Law (IMWL) pursuant to Federal Rule of Civil Procedure 23. The employer appealed the class certification, and the U.S. Court of Appeals for the Seventh Circuit considered the issue in light of the U.S. Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes, et al.* (S. Ct. June 20, 2011). Ultimately, the Seventh Circuit held that *Dukes* was not applicable and that the classes were properly certified. Of central importance to the court's ruling was the type of proof required in both cases. Specifically, in *Dukes*, plaintiffs had to establish discriminatory intent in order to establish liability under Title VII of the Civil Rights Act of 1964, as amended. Wage and hour claims

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generally do not hinge on the decision-maker's intent. Consequently, the Seventh Circuit held that the two classes satisfied Rule 23's commonality requirement because the only question to be resolved was whether the employer refused to compensate employees for overtime and/or whether employees had been misclassified. This case reflects that while *Dukes* may be a powerful holding as applied to claims of discrimination, its impact on wage and hour claims may be significantly more limited. Employers must ensure that they are adequately documenting hours worked by nonexempt employees and properly paying overtime in accordance with applicable state and federal law. Moreover, employers should ensure that all employees classified as exempt are properly classified as such.

Ross v. RBS Citizens N.A., Case No. 10-3848 (7th Cir. Jan. 27, 2012)

For more information, please contact your regular Hinshaw attorney.

Fourth Circuit: Under Pre-ADAAA Law, Employee May Not Seek Accommodation for Inability to Work Overtime Hours

In 2005, a maintenance engineer who was required to work 12-hour shifts was diagnosed with leukemia and advised by doctors that he could no longer work more than eight hours at a time. The employee requested that he be allowed to work shorter shifts, arguing that his leukemia constituted a disability that the employer was required to accommodate under the Americans with Disabilities Act (ADA). The employer refused to adjust the employee's schedule, taking the position that his inability to work overtime did not satisfy the ADA's definition of a disability, which required that he be "substantially limited" in a "major life activity." The employee sued the employer for failing to accommodate his alleged disability. The district court, deciding the case under the ADA as it existed prior to passage of the ADA Amendments Act (ADAAA) in 2008, agreed with the employer that the employee was not legally disabled because of his inability to work more than eight hours at a time. The U.S. Court of Appeals for the Fourth Circuit affirmed. Specifically, the Fourth Circuit joined five other federal circuits in holding that "an employee under the ADA is not 'substantially' limited if he or she can handle a forty hour workweek but is incapable of performing overtime due to an impairment." Further, the Fourth Circuit found, the employee had not satisfied the pre-ADAAA regulations of the U.S. Equal Employment Opportunity Commission (EEOC) with evidence showing that his inability to work overtime "'significantly restricted' his ability to perform a class of jobs or a broad range of jobs in various classes." While the Fourth Circuit's decision is positive for employers, it should be viewed with great caution in light of changes made by the ADAAA. In particular, the ADAAA led the EEOC to remove the requirement that an employee must be "restricted . . . in a class of jobs or a broad range of jobs" in order to be substantially limited in the major life activity of working. Consequently, there is a significant possibility that this case would be decided differently under current law. Employers should always contact counsel before responding to a request for accommodation, especially when there is a question as to whether a disability exists.

Boitnott v. Corning Inc., Case No. 10-1769 (4th Cir. Feb. 10, 2012)

For more information, please contact your regular Hinshaw attorney.

First Circuit Holds That Private Companies' Employees Not Entitled to Whistleblower Protections Under SOX

Former employees of private companies that act under contract as advisers to and managers of mutual funds organized under the Investment Company Act of 1940 sued their respective employers for unlawful retaliation after they were terminated. The employees claimed that they were entitled to protection under the whistleblower provision in the Sarbanes-Oxley Act of 2002 (18 U.S.C. 1514A) (SOX) because they had reported potential fraud and security violations. The parties agreed that the whistleblower provision did provide protection to employees of "public companies." However, the question of first impression before the U.S. Court of Appeals for the First Circuit was whether Congress intended Section 1514A's whistleblower provisions to extend to employees of a contractor or subcontractor to a public company and who engage in protected activity. The First Circuit held that only the employees of the defined public companies are covered by the whistleblower provision, and that the references to the "officer, employee, contractor, subcontractor, or agent of such company" (as relied upon by the employees) merely refers to who is prohibited from retaliating or discriminating, and is not a definition of who is a covered employee. Private companies should ensure that all managers are aware of this decision on an important issue of first impression. According to the First Circuit, SOX protection does not attach to an employee just because he or she performs contracting or subcontracting work for a public company. Companies should also remember, however, that many states, including California, Florida and Illinois, have enacted

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whistleblower laws that protect employees even where SOX does not.

Lawson v. FMR, LLC, Case No. 10-2240 (1st Cir. Feb. 3, 2012)

For more information, please contact your regular Hinshaw attorney.

NLRB Finds Arbitration Provision Violative of NLRA

A homebuilder with operations in more than 20 states began to require each new and current employee to execute a "mutual arbitration agreement" (MAA) as a condition of employment. The MAA required arbitration of all claims on a individual basis, precluding employees from filing joint, class or collective claims addressing their wages, hours, or other working conditions against the employer in any forum. Upon review, the National Labor Relations Board (NLRB) concluded that the MAA violated the National Labor Relations Act (NLRA), specifically Section 7, which protects the rights of employees to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid" and "to refrain from any and all such activities." The NLRB found that the employer, by making the MAA a condition of the employment, explicitly restricted activities that were protected by Section 7 of the NLRA, as the Board found that this section protects employees who join together to bring claims on a classwide basis. This decision applies only to employees as defined in the NLRA, and has no impact on managers, supervisors, or independent contractors, who are not covered under the NLRA. Employers should be aware that there are strict state and federal rules governing arbitration agreements.

In re D.R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012)

For more information, please contact Jeffrey M. Novell or your regular Hinshaw attorney.

Ninth Circuit Requires Application of California Law Over Contractual Choice of Law Provision

A class of truck drivers sued a home delivery and transportation logistical support services company, claiming alleged violations of the Fair Labor Standards Act and various related California labor laws, including failure to pay overtime, failure to pay wages, and unfair business practices. The company argued that the drivers were not employees, but rather independent contractors, and pointed to the independent truckman's agreement and equipment lease agreement (Agreement) signed by the drivers. Further, because the Agreement contained a provision indicating that Georgia law was to apply to any disputes relating to the relationship, the company claimed that Georgia law confirmed that the drivers were not employees and thus could not maintain their claims. The district court found that Georgia law applied and that under it, there is a presumption of independent-contractor status and the drivers could not establish the existence of an employer-employee relationship. The U.S. Court of Appeals for the Ninth Circuit reversed. The court found that the district court failed to consider whether applying Georgia law would be contrary to fundamental California policies, and whether California had a materially greater interest in the resolution of these issues than did Georgia. Because the appellate court found Georgia law to directly conflict with California law on the presumptions and burdens involved in the consideration of independent contractor status, and because worker protection is a fundamental public policy in California, the application of Georgia law would be improper. Finding that California law applied to the dispute, the case was remanded with instructions for the district court to reconsider the issues in light of it. Many employers include choice of law provisions in employment and independent contractor agreements. However, such provisions must be narrowly tailored and compliant with specific state laws to ensure that the employer can ultimately obtain the benefit of the provision.

Ruiz v. Affinity Logistics Corporation, Case No. 10-55581 (9th Cir. Feb. 8, 2012)

For more information, please contact your regular Hinshaw attorney.

Department of Labor Announces Proposed Rules Expanding FMLA Leave

The U.S. Department of Labor recently announced that it is issuing a notice of proposed rulemaking to implement new statutory amendments to the Family and Medical Leave Act (FMLA). The provisions specifically address military caregiver leave and airline flight crew employee leave. The proposed amendments would expand military family leave provisions. Currently, the law only affords coverage to family members of currently serving service members. The amendments would extend the entitlement of military caregiver leave to up to five years after leaving the military. The proposed amendments would also incorporate a special eligibility provision for airline flight crew employees to make FMLA benefits more

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accessible by allowing special calculations to determine the amount of leave used.

http://www.dol.gov/opa/media/press/whd/WHD20120177.htm

For more information, please contact your regular Hinshaw attorney.

DOJ Issues Best Practice Advice for Employers Facing I-9 Audits

The U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practice (Office) recently released advice on best practices for employers to use in response to audits by the U.S. Immigration and Customs Enforcement (ICE). The Office specifically advises that employers need to effectively communicate with employees and unions to ensure that the audit process is transparent and not discriminatory. It further advises that an employer should ensure that an employee knows why the employer is seeking I-9 information. There are also several practices the Office suggests that employers avoid. For example, an employer should not selectively verify the employment eligibility of certain employees based on their national origin or citizenship status. In addition, no employee should be terminated or suspended without providing him or her with notice and a reasonable opportunity to present valid Form I-9 documents. The Office suggests that an employer should not ask an employee to provide additional evidence of employment eligibility or more documents than ICE is requiring it to obtain, but should also not limit the range of documents that employees are allowed to present for purposes of the Form I-9. An employer's response to an I-9 audit can raise challenges by, and tension with, employees. The Office's advice should aid employers in reducing these conflicts without compromising their obligations to comply with the audit. As such, employers should utilize it during I-9 audits.

Download to read: The Office's advice on best practices for employers to use in response to audits by the U.S. Immigration and Customs Enforcement

For more information, please contact Eileen M. Caver or your regular Hinshaw attorney.

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