Labor & Employment News

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Contents

Save The Date

June 15-16, 2006 | Dallas

Firm attorneys will conduct a two-day seminar entitled *Human Resource Fundamentals*. The seminar will discuss trends and developments in federal and state employment laws. Seminar information will be posted on our web site as it becomes available.

June 22, 2006 | Dallas

Ryan Griffitts will speak at the EEOC's annual *Technical Assistance Program Seminar* ("TAPS"). TAPS are specialized training and education programs that provide practical, how-to guidance to employers regarding the latest developments in employment law and Commission policies and practices. Seminar information will be posted on our web site as it becomes available.

Job Coach May Be A "Reasonable Accommodation"

Home Depot recently agreed to settle an employment dispute with a developmentally disabled worker, Carolyn Pisani, who claimed her firing was discriminatory because Home Depot did not first communicate with her job coach about attendance problems. Pisani, because of her disability, had a job coach who monitored her job performance and regularly interfaced with her supervisors regarding performance feedback.

Several months into her employment, Pisani failed to report to work as scheduled on three consecutive weekends and was fired. However, Pisani claimed that someone saying they were a Home Depot manager—possibly a prank caller—telephoned her home and told Pisani not to report to work on the days she was absent. According to the EEOC, Home Depot knew of Pisani's claim regarding these calls when they terminated her.

Pisani filed suit under the Americans with Disabilities Act ("the ADA") and the EEOC subsequently intervened. The EEOC and Home Depot signed a consent decree which required Home Deport to pay Pisani $75,000 and also obligated the Company to notify and train all employees on a new "Working with a Job Coach" policy. In deciding to settle the case, it is likely Home Depot considered the fact that the law is somewhat unclear on whether a job coach is a "reasonable accommodation" when offered at no cost to the employer, as well as the fact that Home Depot's policy on job coaching was not followed at the store where Pisani worked.

Employers should take note of this case and ensure job coach policies are properly implemented, communicated, monitored, and enforced. For more information on supported employment services that may be available through various Texas agencies, see the websites for the Texas Department of Assistive and Rehabilitative Services <www.dars.state.tx.us/drs/vr.shtml>, the Texas Department of Aging and Disability Services <www.dads.state.tx.us/services/dads_help/mental_retardation/services.html>, and the Texas Department of State Health Services <www.dshs.state.tx.us/mhprograms/supportedemployment.shtm>.

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Employees Must Be Compensated For "Donning & Doffing" Specialized Gear

The U.S. Supreme Court recently held that the Fair Labor Standards Act ("FLSA") requires employers to pay employees for time spent walking from changing areas to their workstations after putting on specialized protective gear required for the job, as well as for time spent walking from their workstations to the place where the gear is removed.

In the case in question, the employees worked in a meat processing plant and wore specialized protective gear including leggings, aprons, and boots. Pay was based on time spent cutting and bagging meat and began with the first piece of meat cut and ended with the last piece cut. The employer also compensated employees with four minutes of time to change clothes.

The Court determined that, since the employee's principal activities included "donning" (putting on) and "doffing" (taking off) required specialized gear to cut and bag the meat, the employee's workday began and ended with the donning and doffing of that gear. Accordingly, the Court held that activities which occurred after putting on that gear, such as walking to a workstation, were compensable as part of a continuous workday and continued until that gear was removed.

In a companion case, which was part of the same decision, the Court also addressed whether employers are required to compensate employees for the time spent waiting to put on, or take off, required gear. The companion case concerned employees working in a poultry processing plant. The Court concluded that time spent waiting before putting on the required gear was not compensable because it was too far removed from the employee's "principal activity." Contrastingly, the Court concluded that time spent waiting before taking off the gear was part of the "principal activity" and was, therefore, compensable under the FLSA.

There are several important effects of this decision on employers. If you have any employees who spend time changing clothes on your premises, you should evaluate whether that changing time is integral and indispensable to their work. If it is, you may have to compensate employees for that changing time, as well as for time walking to and from their workstations. To minimize your potential exposure, you should place essential clothing and changing areas in close proximity to employee workstations. You should also focus on strategies that minimize waiting times before any clothing is put on or taken off to limit the amount of time employees could claim they did not receive compensation.

IBP, Inc. v. Alvarez, U.S. Supreme Court, 2005.

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TWFC Accepts Retaliation Charges Regarding Emergency Evacuations

FEMA may not be the only government agency with which Texas employers may have to contend while attempting to recover from hurricane storm damage and business interruption. The Texas Workforce Commission, Civil Rights Division ("TWFC") could cause employers a tidal surge size headache as well. A little known provision of the Texas Labor Code, Section 22.002, makes it unlawful for an employer to "discharge or in any other manner discriminate against an employee who leaves the employee's place of employment to participate in a general public evacuation ordered under an emergency evacuation order" — which would include Hurricane Rita evacuation orders issued by Governor Perry or by the mayors of Galveston, Houston, Beaumont, etc. The section contains an exception allowing discharge of emergency services personnel who leave their post during such a crisis.

The TWFC has issued a press release informing the public of Chapter 22's prohibition <www.twc.state.tx.us/news/press/2005/092805press.pdf>, modified its Intake Questionnaire to add "emergency evacuation" as a basis for discrimination <www.twc.state.tx.us/crd/iq.pdf>, and begun accepting discrimination charges for alleged violations!

There are no reported cases interpreting *Chapter 22*. Presumably, it will be interpreted similarly with other discrimination statutes, e.g., as long as the discharge was motivated by legitimate, nondiscriminatory reasons—including economic necessity, business interruption, etc. — there would be no violation. Stay tuned!!

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Internet Recruiting: Who is an Applicant?

Last spring, we told you about the new "applicant" definition under the Uniform Guidelines on Employee Selection Procedures (UGESP). See *Labor & Employment News*, *Volume 6*, *Issue 2*.

The U.S. Department of Labor's Office of Federal Contract Compliance Program (OFCCP) governs federal contractors and sub-contractors. OFCCP requires covered federal contractors to collect gender, race, and ethnicity data on applicants and employees so OFCCP can ensure nondiscrimination and affirmative action. OFCCP recently issued its own Internet Applicant rule. The Final Rule, effective February 6, 2006, defines who is an Internet Applicant for data collection and recordkeeping purposes. Although the Rule took effect last month, OFCCP has agreed it will not cite contractors making good faith compliance attempts for purely technical recordkeeping violations until after May 2006.

There are four requirements to be considered an "Internet Applicant":

1. The individual must electronically express an interest in employment;
2. The employer must consider the individual's qualifications;
3. The individual must meet the job's minimum qualifications; and
4. The individual must not, directly or indirectly, remove themself from the candidate pool.

If an applicant satisfies all four of these requirements, they are deemed an Internet applicant for purposes of OFCCP's rule and the employer must retain their application, along with demographic information. In addition, employers who use internal job databases must retain a record of each resume added to the database, a record of the date it was added, the position for which each search of the database was made, the substantive search criteria used and the search date. Employers who use external databases must keep a record of each position searched, the substantive search criteria for each search, the search date, and the resumes of anyone who met the basic qualifications and was actually considered. Employers must also retain all tests and test results, as well as interview notes. Noncompliance can result in penalties, contract termination, and debarment from future federal contracts.

The Final Rule can be downloaded at <www.dol.gov/esa/regs/fedreg/final/2005020176.pdf >. In addition, OFCCP has recently issued a PowerPoint presentation outlining the Rule which can be downloaded at <www.dol.gov/esa/ofccp/Presentation/Applicant%20Rule%20Presentation_files/frame.htm>.

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QuickTips

- An employer is prohibited from requesting or accepting a release or a waiver of a former employee's right to collect unemployment benefits in Texas.
- When confirming a new hire's salary and employment benefits in an offer letter, make sure to include language in the letter stating that the employment relationship shall be "at will." Otherwise, the employee may argue that the offer letter constitutes an employment contract.
- Employers should investigate all complaints of discrimination or harassment, even those made by a departing employee.

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The Attorneys in the Labor & Employment Section of Thompson Coe counsel public and private sector management in connection with all federal, state and local laws regulating employment. Our experienced attorneys can help clients by simplifying the employment law maze, resolving sensitive employment-related issues and reducing the risk of costly lawsuits.

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How to Reach Us

If you would like more information about the issues discussed in this newsletter, or have a suggestion for a future article, please contact Mark Blaha at mblaha@thompsoncoe.com or 214.880.2598

This issue of *Labor & Employment News* may also be found online at www.thompsoncoe.com