

Employment Law Newsletter

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May/June 2009

DOJ STEPS UP ENFORCEMENT OF LAW TO PROTECT RETURNING SOLDIERS

Do you have employees returning from military service? If so, you need to be aware that the U.S. Department of Justice (DOJ) appears to be dramatically stepping up government enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

So far in 2009, the DOJ has filed 15 lawsuits on behalf of returning soldiers who have had difficulties getting their old jobs and opportunities back. Six of those complaints were filed in May alone. That pace greatly exceeds the seven complaints filed in 2007 and eleven in 2008. These new lawsuits have been filed nationwide – from Virginia to California.

Failing to promptly re-employ returning servicemen and women who suffered injuries appears to be the focus of the new enforcement actions. For example:

- On May 5, the DOJ brought suit against the California Department of Corrections and Rehabilitation (CDCR) alleging that it failed to promptly re-employ U.S. Air Force reservist Danny Felix. The complaint alleges that Felix did not get his old job back as a medical technical assistant because of his service-related back injury, and that the alternative positions that were offered required longer commutes and paid less.

The complaint also alleged that a suitable job was not offered until nine months after Felix's honorable discharge, and only after he told the employer that he had found a job with another employer.

- On May 26, the DOJ brought suit against the County of Fresno, California on behalf of Porotesano Faapouli, a Navy reservist who was seriously injured during a military training exercise. After several surgeries and an extensive recuperation period, Faapouli sought re-employment subject to his physical limitations. The complaint alleges that the County did not re-employ him, and instead, required Faapouli to take an unpaid leave of absence for several weeks until it concluded how his limitations could be accommodated.

After the unpaid leave of absence, the County allegedly offered Faapouli an entry-level position that paid \$10 per hour less than the supervisory position he had held before his on-duty injury.

In other complaints, the DOJ appears focused on employers' failure to afford deploying service members the opportunities for advancement that are afforded to other workers. For example:

- On May 26, the DOJ brought suit against the Newark Public Schools (NPS) alleging that it failed to honor its offer of a full-time teacher position that was made to George Lawton before Lawton was called to active duty with the Navy Reserve. The complaint also alleges that the NPS purged Lawton's file from the list of substitute teachers, and required him to submit a new substitute-teacher application upon his return from service.
- On April 30, the DOJ filed a complaint on behalf of Emelio Pennes against the New York City Department of Corrections (NYDOC) alleging that Pennes was denied a promotion because of his service in the Army Reserve. Before Pennes was activated to serve in Iraq, he applied for a promotion. Due to his deployment schedule, Pennes could not attend an interview for the promotion, and the NYDOC refused to reschedule the interview for a time when Pennes

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would be at home on leave. Although Pennes was ranked first among the candidates, he claims that he was not offered the job because NYDOC could not schedule the interview around his military obligations.

USERRA is designed to ensure that service members (1) are not disadvantaged in their civilian careers because of their service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. Violations carry heavy penalties.

For a long time, the Civil Rights Division for the DOJ has said that it has given a high priority to the enforcement of USERRA. But this recent activity indicates that after years of relying primarily on private lawsuits, the DOJ has a reinvigorated focus on enforcement of service members' rights. If you have employees who are returning from military service or have questions regarding how an employee's reservist activities impact human resources decisions, it is a good idea to stay out of the DOJ's targets by seeking advice to ensure that you are staying on the right side of the law.

THE CONSEQUENCES FOR MISCLASSIFYING EMPLOYEES JUST GOT STIFFER

On June 2, 2009, Colorado Governor Bill Ritter signed a bill allowing any person to file a complaint with the state alleging an employer is misclassifying an employee as an independent contractor. This new law, which became effective immediately, authorizes the Colorado Department of Labor and Employment to impose penalties of \$5,000 per misclassified employee and up to \$25,000 per misclassified employee for an employer's second or subsequent offense. Repeat offenders can also be prohibited from contracting with the state for up to two years.

These state-penalties are added to the already substantial consequences for employers' misclassifying workers as independent contractors. Improperly categorizing workers as independent contractors who are, by law, employees, exposes employers to federal and state tax liabilities, liability to workers' compensation programs, minimum wage and overtime violations, and claims under the Colorado Wage Claim Act, among others.

Under the new law, the Director of the Division of Employment and Training has the authority to investigate allegations and impose penalties on employers who get it wrong. To do so, the Director must find that there has been "willful disregard" of the proper classification. Although the "willful disregard" standard provides some cover for employers, and good faith mistakes may not trigger penalties, employers should expect increased state scrutiny over their classifications.

The good news is that the test of independent contractors has not changed in Colorado. That test, commonly referred to as "direction and control," defines an independent contractor as follows:

one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to control of his employer, except as to the result of his work.

This is inevitably a fact-intensive evaluation. Courts often focus on several factors such as the employer's right to control the details or performance, the right of either party to terminate the relationship without liability to the other, duration of the job, and whether the employer supplies the tools and equipment, among others.

Perhaps recognizing that navigating this multi-factored test is difficult for employers, the new law contains another important feature that allows employers to request a written advisory opinion from the state as to how to classify a particular individual. But even with this state assistance, properly classifying workers will remain a challenge because of differences between state and federal laws on this issue. Employers with questions or doubts as to the proper classification of workers are encouraged to contact HRO attorneys who are here to advise them on comprehensive strategies to avoid these now stiffer consequences.

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ON-CALL EMPLOYEES: DONE RIGHT IT SAVES YOU MONEY, BUT DONE WRONG, IT WILL COST YOU

Some employers are turning to on-call employees to keep down labor costs. Done right, it can save you money. But on-call employees can also become a liability risk. Several lawsuits were recently filed by on-call employees who claim that employers are restricting their freedom too much, and not paying them for it, in violation of state and federal laws.

In *Gomez v. Lincare Inc.*, 173 Cal. App. 4th 508, 522 (April 3, 2009), a California appellate court recently revived a class action brought by on-call workers of an in-home respiratory services provider. The on-call employees allege that they deserve compensation for the time spent on call dealing with customer questions by phone.

In *Lincare*, on-call employees undertook between two to six hours per week of answering customers' telephone calls. The appellate court held that this exceeds a "de minimis amount" and remanded the case for a final determination of liability.

In *Sweat v. Battelle Memorial Institute*, Case No. 07-cv-401-TS (D. Utah), a group of lab technicians is suing a science and technology development company, alleging that the company required them to be on call during their lunch break, mandating they be on company premises, in uniform and available for work. The plaintiffs claim they should be compensated for that time.

The less freedom an employee has while on call, the higher the risk that the on-call time qualifies as paid time. Employers who are using or intend to use on-call employees to keep costs down should look at what restrictions they place on on-call time. Restrictions such as how quickly employees must respond to telephone calls, how many calls an employee actually receives while on call, and geographic restrictions, such as whether employees are required to be at home or near the office, should be evaluated.

It is important that employers avoid not overly restricting on-call employees' freedoms. Make sure on-call employees have the flexibility to do what they want to do. On-call employees who are free to go to a restaurant or go play golf are not an issue. But employees who are required to sit in their house and answer frequent telephone calls may have to be paid for that time.

California Corner by Donald L. Samuels**WAGE AND HOUR ISSUES CONTINUE TO BE A FERTILE GROUND OF LITIGATION AND LIABILITY FOR CALIFORNIA EMPLOYERS**

California employers are wise to adhere to the strict requirements of California's wage and hour laws. Wage and hour issues continue to be a fertile ground for both class action and single plaintiff litigation. In 2008, 44,000 wage and hour class actions were filed in California. Additionally, the courts continue to struggle with the application of various wage and hour issues. For example, ever since the \$100 million verdict against Starbucks for violating the state's statute regarding tips and tip pooling, there have been a number of published opinions discussing this issue. In *Grodensky v. Artichoke Joe's Casino*, 171 Cal. App. 1399 (2009), the Court held that employees have a private cause of action to enforce claims for tips, that mandatory tip pools are legal; however, the tip pool cannot include managers who are agents of the employer, and therefore, precluded from participating in the tip pool. In *Ethridge v. Rains Int'l California, Inc.*, 172 Cal. App. 4th 908 (2009), the Court also addressed tip pools in holding that they may be shared with individuals who do not provide "direct table service" so long as they participated in the "chain of service." Significantly, national employers should be aware that California's rules regarding tips and tip credits are different from and more stringent than federal law on these issues. *continued*



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The growth of wage and hour class action litigation in California is directly related to the damages which are available. Violation of the wage and hour laws may give rise to liability that expands exponentially because the underlying violation triggers additional penalties. If an employer has misclassified an individual as being “non-exempt,” and therefore failed to provide him/her with overtime compensation, or has failed to pay an individual his/her proper wages and/or meal breaks, the penalties for those violations may be compounded by additional penalties. For example, these “underlying” violations may also violate: (1) the requirement that departing employees be paid all of their “wages” upon termination; (2) the requirement that an employee receive an accurate itemized statement of his/her wages (Cal. Lab. Code § 226); and (3) the Private Attorney General Statute (Cal. Lab. Code § 2699). Additionally, various claims are covered by California’s Unfair Competition Statute, California Business and Professions Code § 17200, and therefore are subject to a four-year statute of limitations as well as providing for “restitution.” Most of these statutes also provide for the award of attorney’s fees and costs to the employee.

The bottom line is that California employers need to be particularly vigilant in connection with wage and hour issues. A seemingly innocuous mistake in adhering to “technical” requirements may give rise to a multitude of penalties which, in the current legal landscape, are frequently pursued on a class-wide basis.