

Employment Law Newsletter

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INVOCATION, NOT IMPLEMENTATION, OF FMLA RIGHTS TRIGGERS RETALIATION CLAIM

Two recent court decisions broaden the scope of the Family Medical Leave Act (FMLA) by holding that an aggrieved employee or former employee need not be eligible for FMLA leave, nor actually take FMLA leave, to assert a claim under the statute's retaliation provision.

In the first case, *Reynolds v. Inter-Industry Conference on Auto Collision Repair*, No. 08 CV 2115 (N.D. Ill, Jan. 22, 2009), a new father sought FMLA leave to care for his newborn son who was in the hospital. While he had only been with the company for less than a year at the time of his request, he would not take the leave until he was eligible several months later. Before reaching a decision on his request, the company terminated his employment on the basis of inadequate skills. The employee filed suit, claiming he was fired for requesting FMLA leave. The company responded that he wasn't eligible for FMLA leave at the time of his termination, and therefore could not sue under the statute. The court disagreed, stating that employees who attempt to use but are denied FMLA leave can make a case for retaliation.

A similar result was reached in *Erdman v. Nationwide Insurance Co.* No. 07-3796 (3d Cir. Sept. 23, 2009), when a court disagreed with earlier decisions stating that the first requirement of a retaliation claim is that the worker "took an [sic] FMLA leave." In deciding that invocation of FMLA rights is the first requirement of a retaliation claim, the Court followed the emerging trend of broadening the scope of the FMLA and its retaliation provision.

Given the trend of broadening FMLA protection, companies should be on notice that meticulous documentation is a must to back up any action taken against employees who have asked for leave – even if those employees were not eligible.

NEW IRS PENALTY FOR COBRA SUBSIDY ABUSE

The IRS, in a move that should come as good news to struggling companies who still carry former workers on their insurance plans, has announced a new penalty for terminated employees who misuse COBRA.

Enacted earlier this year, the American Recovery and Reinvestment Act (the "Act") calls for COBRA premium assistance for employees who are terminated between September 1, 2008 and December 31, 2009. Under the Act, laid-off workers receive a subsidy to purchase continued health insurance coverage through their former employers under COBRA, with the former employers paying 65 percent of the premium and then seeking a credit against their payroll taxes. The Act, clearly intended to help former employees, could end up costing them if they don't adhere to the eligibility rules.

Under the new penalty, called the "6720C" penalty, terminated employees who accept a COBRA subsidy once they become eligible to participate in a different group plan with a new employer will not only lose their health insurance, but will face a penalty of 110 percent of the subsidy.

Here's how the penalty works:

- Former employee Joe is laid off by ABC, Inc. and accepts a COBRA subsidy valued at \$3,500.00 to continue his health insurance coverage.
- Six months later, Joe is offered coverage from his new employer, XYZ, Co. that is more expensive than what he pays while accepting the COBRA subsidy.

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- Joe declines coverage from XYZ, Co.
- ABC, Inc. learns of Joe's new employment and the availability of insurance coverage and contacts the IRS.
- Joe loses his insurance and must pay \$3,500.00 to repay the subsidy amount, plus a \$350.00 penalty.

Of course, there is always an exception. Not everyone who accepts a subsidy despite ineligibility will be penalized. Taxpayers with a modified adjusted gross income exceeding \$145,000.00, or \$290,000.00 for those filing joint returns, don't qualify for a subsidy at all. In cases where such individuals receive a subsidy, the amounts will be recaptured when they file personal tax returns.

Employers who suspect that a former employee may be collecting a subsidy despite eligibility for another plan can report this to the IRS by completing Form 3949-A, Information Referral.

By educating terminated employees about the 6720C penalty when they sign up for coverage, employers can save company resources while helping former employees avoid insurance fraud and the accompanying penalties — a win-win situation for all involved.

BEWARE OF THE NOT-SO-INDEPENDENT CONTRACTOR

Flexibility, specific expertise, tax benefits and cost savings are only a few of the advantages available to businesses using independent contractors. Add to that list the fact that Title VII and other federal discrimination laws may not protect independent contractors, and businesses are further tempted to go that route when looking for help. However, while a company may not be liable for discrimination against an independent contractor, it can be held liable for discrimination by an independent contractor.

In a recent case, *Halpert v. Manhattan Apartments, Inc.*, No. 07-4074 (2d Cir. Sept. 10, 2009), a realtor, Manhattan Apartments, Inc. (MAI), retained a third party, Brooks, to recruit and hire staff. When interviewee Halpert was told by the recruiter that he was "too old" for the job, he filed suit against MAI under the federal Age Discrimination in Employment Act (ADEA). MAI sought to have the case thrown out because, it argued, the recruiter was an independent contractor, and therefore MAI could not be held liable for his actions. However, the controversy was not whether MAI was liable for discrimination against an independent contractor (an action typically not protected against under the ADEA), but whether MAI can be held liable for age discrimination by an independent contractor working as an agent for MAI. The Court answered this question with an unequivocal, "yes."

This case could have a significant impact on all companies who use independent contractors, but especially those companies that plan to contract out human resource functions to a third-party contractor. Employers who think that using an independent contractor to conduct interviews will absolve them from compliance with federal anti-discrimination laws should think again. A company's potential liability does not depend on whether the individual acting for the company is an actual employee or an independent contractor – either individual can be an agent for the company for purposes of federal anti-discrimination laws, regardless of his or her employment status for other purposes.

Companies working with independent contractors should be mindful of the following factors used to determine whether an intended independent contractor is actually an employee: the skill the job requires; who provides the equipment or tools; where the work occurs; the duration of the relationship; whether the worker provides services to others, and, most importantly, the extent of control over the worker's schedule and manner of work. With careful thought and guidance, employers can structure their relationships with temporary workers in a way that enables them to enjoy the many benefits of an independent contractor while avoiding the hidden pitfalls.

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EMPLOYERS MUST CONSIDER WHETHER TO REQUIRE ARBITRATION OF STATUTORY CLAIMS WHEN NEGOTIATING, ADMINISTERING LABOR AGREEMENTS

In *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009), the United States Supreme Court held that a collective bargaining agreement that clearly and unmistakably requires covered employees to arbitrate statutory claims of age discrimination under the Age Discrimination in Employment Act is enforceable as a matter of law. Subsequent cases have extended that holding to claims arising under Title VII of the Civil Rights Act of 1964, which bans discrimination on the basis of race, sex, religion, and national origin. See, e.g., *Mathews v. Denver Newspaper Agency LLP*, 2009 U.S. Dist. LEXIS 37697 (D.Colo. 2009).

To require arbitration of statutory claims, the collective bargaining agreement must explicitly prohibit violations of those statutes. A general ban on age or sex discrimination, for example, is not sufficient. Compare *Borrero v. Ruppert Housing Co., Inc.*, 2009 U.S. Dist. LEXIS 52174 (S.D.N.Y. 2009) (arbitration required; agreement prohibited discrimination on various bases, "including but not limited to claims made pursuant to Title VII . . ."), with *Shipkevich v. Staten Island Univ. Hosp.*, 2009 U.S. Dist. LEXIS 51011 (E.D.N.Y. 2009) (arbitration not required; agreement did not reference any statutes).

The issue of whether to require arbitration of statutory claims is a mandatory subject of bargaining. See *Pyett*. However, the Company and the Union may waive that requirement by agreement or past practice. See *Mathews*. Moreover, arbitration of statutory claims will not be required if the Union interferes with the employee's attempt to arbitrate those claims. See *Borrero*.

In the wake of *Pyett*, many questions remain. When arbitrating statutory claims, is the employee entitled to discovery and to retain private counsel? Is the arbitrator required to apply the same burdens of proof and burden-shifting paradigms that would apply in civil litigation? May the Union exercise any control over the employee's evidentiary presentation in the hearing?

In light of *Pyett*, employers should carefully consider whether to require arbitration of statutory discrimination claims when administering existing labor agreements and negotiating new ones.

California Corner *by Donald L. Samuels*

CALIFORNIA SUPREME COURT WEIGHS IN ON SOME UNIQUE CALIFORNIA EMPLOYMENT-RELATED LAWS

California has a number of unique laws that make it challenging for businesses to operate in California. Three recent California Supreme Court cases exemplify some of those unique laws. In two cases, the California Supreme Court addressed the Unruh Act and in the third case the California Supreme Court addressed the privacy protections contained in the California Constitution.

In *Munson v. Del Taco, Inc.* (June 11, 2009), the California Supreme Court was asked to decide whether a plaintiff who seeks damages under the Unruh Act by claiming the denial of full and equal treatment on the basis of disability must prove intentional discrimination. The California Supreme Court answered in the negative. By way of background, California has a state civil rights act entitled The Unruh Civil Rights Act, which, among other things, prohibits discrimination based on disability. Under that act, businesses which violate state or federal disability access rules are subject to statutory damages. This law has been the source of a great deal of litigation against California businesses whereby disabled individuals claim denial of access to the facilities for technical violations of the ADA Architectural Guidelines and are able to recover statutory damages and attorney fees. By contrast, under federal law, individuals are only entitled to recover injunctive relief and attorney fees for similar violations. In *Munson*, the California Supreme Court specifically held that the California statute adopts the federal ADA standard, and therefore does not require proof of intentional discrimination in order to enable an aggrieved individual to obtain statutory damages. It is important to note, however, that effective January 1, 2009, the California



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legislature amended the Unruh Act by, among other things, restricting the availability of statutory damages and allowing them only if an accessibility violation actually denied the plaintiff full and equal access. Additionally, the amendments limit those statutory damages to one assessment per occasion of access denial. The bottom line is that the accessibility requirements under state law are broader than the regulations under the ADA.

In another case interpreting the Unruh Act, the California Supreme Court, in *Hughes v. Pair* (July 2, 2009), addressed the provision of the Unruh Act which prohibits sexual harassment in a business, service or professional relationship. (Cal. Civ. Code § 51.9). Specifically, the Supreme Court held that a successful plaintiff must establish, as in a traditional sexual harassment case involving an employer and employee, that the harassment was sufficiently pervasive or severe as to alter the conditions of the business relationship. The significance of the statute, if not the ruling, is that businesses in California may be subject to claims of sexual harassment even if there is not an employer-employee relationship.

Finally, the California Supreme Court addressed the constitutional right to privacy in *Hernandez v. Hillsides, Inc.* (August 3, 2009). In that case, the California Supreme Court was confronted with a claim of invasion of privacy arising from the secret videotaping of an employee's office in an effort to ascertain who was accessing a company computer in order to view pornographic websites after hours. Article 1 Section 1 of the California constitution grants individuals in California a right to privacy, and that right to privacy applies to actions by both the government and by private employers. Based on the facts of the case, the Supreme Court ultimately concluded that there was not an invasion of privacy. However, and more importantly, the Court recognized both the applicability of the constitutional right to privacy to an employment situation involving secret videotaping and cautioned that under different facts, the Court may have reached a different conclusion. The Court's concluding sentence to its opinion reads, "[n]othing we say here is meant to encourage such surveillance measures, particularly in the absence of adequate notice to persons within camera range that their actions may be viewed and taped." The lesson learned here is that California employers must be mindful of not only traditional privacy rights but those imposed by the California constitution.

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