

Employment Law Newsletter

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HEALTH CARE REFORM PROTECTS NURSING MOTHERS AT WORK

As part of the recent health care overhaul, U.S. employers are now required to provide "reasonable" rest breaks for nursing mothers to express their breast milk in the workplace. Employers must also provide a location for the breaks, other than a bathroom, that is private and free from intrusion from coworkers. Employers with fewer than 50 employees are excused from the new requirements if they would impose an undue hardship by causing significant difficulty or expense. Breaks for this purpose need not be compensated. The new requirements will appear in Section 7 of the Fair Labor Standards Act, at 29 U.S.C. §207(r)(1).

DOL ISSUES ANOTHER MANDATORY EMPLOYEE NOTICE

Employers who offer group health plans must notify employees of their potential right to receive premium assistance under a state Medicaid program or Children's Health Insurance Program (CHIP). This requirement applies to employers with employees in any of the 40 states that offer premium assistance, including Arizona, California, Colorado, and Utah. The notice must be provided to all employees in those states, not merely to group health plan participants. The notice must be a standalone document but may be accompanied by other documents. The new requirement takes effect on the later of May 1, 2010, or the first day of the first plan year after February 4, 2010. The U.S. Department of Labor has issued a model notice, available at <http://www.dol.gov/ebsa/chipmodelnotice.doc>.

COBRA SUBSIDY, UNEMPLOYMENT BENEFITS EXTENDED

On April 15, 2010, President Obama signed legislation extending the 65 percent COBRA premium subsidy to cover involuntary terminations through May 31, 2010. That legislation also extended emergency unemployment benefits for another two months, allowing claims through June 2, 2010, and payment of benefits through November 6, 2010. For further discussion of the COBRA premium subsidy, see our Alert entitled "COBRA Premium Subsidy Again Extended and Expanded" (March 10, 2010), found at <http://www.hro.com/files/file/publications/ALERT-COBRAPremiumSubsidyAGAINExtended.pdf>.

COURTS NOT "ACCOMMODATING" TO MEDICAL MARIJUANA

Oregon's Supreme Court has joined a growing list of state appellate courts ruling that employers have no duty to accommodate an employee's off-duty use of medical marijuana for treatment of a disability. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 2010 Ore. LEXIS 272 (Ore., Apr. 14, 2010), the Oregon Supreme Court held that the federal Controlled Substances Act preempts the Oregon Medical Marijuana Act and that the Oregon employment discrimination statute requires accommodation of drug use only where such use is authorized by the Controlled Substances Act. Because the federal act prohibits all use of marijuana (except as part of an FDA-approved research project), employers need not accommodate such use.

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Two other state supreme courts have reached similar conclusions. See *Johnson v. Columbia Falls Alum. Co. LLC*, 2009 Mont. LEXIS 120 (Mont. 2009) (neither Americans with Disabilities Act nor Montana Human Rights Act requires employers to accommodate use of medical marijuana); *Ross v. Ragingwire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008) (Fair Employment and Housing Act does not require accommodation of medical marijuana use or support claim for wrongful discharge in violation of public policy). In Washington, the Court of Appeals has held that employees discharged for use of medical marijuana have no claim for wrongful discharge, and that case is now pending before the state supreme court. See *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 216 P.3d 1055 (Wash.App. 2009), *review granted*, 2010 Wash. LEXIS 331 (Wash., Apr. 1, 2010).

Fourteen states currently authorize or decriminalize use of marijuana for medical purposes, and the employment laws relating to such use are evolving rapidly. HRO attorneys, including Eve Burton, (eve.burton@hro.com) are monitoring developments nationwide and can help employers understand their obligations and craft practical solutions.

REGULATORS EYE UNPAID INTERNSHIPS

Long a staple of college summer jobs, unpaid internships with for-profit employers are drawing increasing scrutiny from state and federal regulators. As recently reported in the *New York Times* (Apr. 2, 2010), the acting Director of the U.S. Department of Labor's (DOL) Wage and Hour Division, Nancy J. Leppink, has issued a warning to businesses considering unpaid internships: "If you're a for-profit employer or want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."

Based on a Supreme Court decision from the 1940s, DOL takes the position that unpaid internships with for-profit employers are lawful only if all six of the following criteria are met:

- The interns receive training similar to that which would be given in a vocational school;
- The training is for the benefit of the interns;
- The interns do not displace regular employees but work under close supervision;
- The employer derives no immediate advantage from the interns' activities, and on occasion, the employer's operations may actually be impeded;
- The interns are not guaranteed a job following the internship; and
- The employer and the intern understand that the intern will not be paid.

See e.g., *WH Opinion Letter FLSA2004-5NA* (May 17, 2004) (citing *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947)). However, at least one federal court of appeals has rejected DOL's all-or-nothing approach and held that no one factor is dispositive, and that courts must look at the totality of the circumstances. See *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023 (10th Cir. 1993).

California regulators, meanwhile, have recently revised their criteria for evaluating unpaid internships. In a lengthy opinion letter issued on April 7, 2010, the California Division of Labor Standards Enforcement (DLSE) abandoned its former 11-factor test in favor of the six factors used by DOL. It is unclear from the letter whether DLSE requires that all six factors be met, but its application of those factors appears generally similar to DOL's interpretation. The letter can be found at <http://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf>.

Under either standard, employers must be mindful that unpaid internships are likely to be unlawful if the interns perform more than a minimal amount of productive work for the benefit of the employer. One way to avoid compliance issues is to pay interns at least the minimum wage. Otherwise, private-sector employers face potential wage and hour liability if their unpaid interns turn out to be more benefit than burden.

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Labor Look *by L. Anthony George*

BECKER APPOINTMENT BIG WIN FOR UNIONS, BAD NEWS FOR EMPLOYERS

Craig Becker's recess appointment to the National Labor Relations Board (NLRB) was a big victory for labor unions and bad news for U.S. employers, especially union-free employers. Becker, appointed by President Obama on March 27 without Senate approval, is widely expected to push an aggressively pro-union agenda on the five-member board that regulates much of U.S. labor-management relations. In his published writings, Becker has advocated radical revision of the rules governing union organizing elections, making it harder for employers to resist unionization. Among other things, he has stated that employers:

- "should have no right to be heard" in election-related proceedings before the NLRB;
- "should have no right to raise questions concerning voter eligibility or campaign conduct" by labor unions and "should not be entitled to charge that unions disobeyed the rules";
- should have no right to hold mandatory meetings of employees to discuss the union organizing campaign and the election;
- should have no right to speak in the workplace about union-organizing issues at all, unless the union is granted equal time in the workplace; and
- in general, "should be stripped of any legally cognizable interest in their employees' election of representative."

Becker, who will serve at least through 2011, has argued that the NLRB can and should make these changes by case decision and regulation, avoiding congressional action. He is also expected to support implementation of many provisions of the so-called "Employee Free Choice Act" in the same way, including restrictions on employer speech regarding unionizing, "snap elections" to minimize the employer's opportunity to campaign, and increased penalties for employer misconduct.

Union-free employers who wish to remain that way should keep a wary eye on the NLRB for the next two years.

Colorado Comment *by L. Anthony George*

BILL TO EXPAND EMPLOYMENT DISCRIMINATION REMEDIES DIES IN HOUSE

On April 15, 2010, a bill to expand remedies under the Colorado Anti-Discrimination Act (CADA) died on a tie vote in the House of Representatives. HB-1269, the "Workplace Fairness and Civil Rights and Remedies Act of 2010," would have authorized compensatory and punitive damages for employment discrimination claims under CADA. Remedies under that act are currently limited to reinstatement and back pay. See *Watson v. Public. Serv. Co. of Colo.*, 207 P.3d 860 (Colo. App. 2008). The Colorado Association of Commerce and Industry led a coalition of employers and business associations in successful opposition to the bill. However, supporters of the bill are expected to continue their efforts in future sessions.



HRO's Going Green

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California Corner *by Nicole D. Gomes*

KIN CARE STATUTE DOES NOT APPLY WHERE PAID SICK DAYS UNCAPPED, NON-ACCRUING

The California Supreme Court recently determined that California's "kin care" statute, which permits an employee to use accrued paid sick leave to care for sick relatives, does not apply to paid sick leave policies that provide for an uncapped number of compensated days off. In *McCarther v. Pacific Telesis Group*, 225 P.2d 538 (Feb. 18, 2010), a collective bargaining agreement entitled covered employees to paid time off for up to five consecutive days in any seven-day period for the employee's injury or illness. There was no bank of paid days that accrued over time and no cap on the total number of days of permissible absence. Plaintiff employees contended that they were entitled to use paid sick leave to care for sick family members pursuant to California Labor Code Section 233, which permits employees to use accrued paid sick leave to care for sick relatives. The trial court disagreed, the Court of Appeals reversed and held for the employees, and the California Supreme Court reversed the Court of Appeals and found in favor of the employer.

The Supreme Court interpreted Section 233 to apply only to policies that provide a measurable, banked amount of sick leave that accrues over time, because Section 233 provides that employees must be permitted to use kin care for at least the amount of leave that would be accrued during a six-month period. The Court observed that Section 233 "cannot sensibly be applied" if the amount of compensated time for sick leave to which an employee might be entitled in six months cannot be determined. Therefore, because the sick leave provision in the labor contract provided no "accrued" sick days and no cap, Section 233 did not apply.

California employers should review their sick leave policies and practices to determine whether they conform to Labor Code Section 233 and this recent decision, keeping in mind that other leave requirements, such as the California Family Rights Act and/or Family and Medical Leave Act, may also impact an employer's ability to discipline employees for taking time off to care for themselves or ill relatives.

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