

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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MEDICAL MARIJUANA IN THE WORKPLACE?

XYZ, Inc. has a policy declaring the company a Drug-Free Workplace, and prohibiting use of illegal drugs at any time during employment. The policy also requires that new hires pass a drug test before beginning work.

Recently, XYZ hired Julius Jointsmoker ("JJ" for short) to work in shipping. When he failed his new-hire drug test by testing positive for marijuana, he advised XYZ, for the first time, that he is a medical-marijuana user, authorized by Colorado law to use marijuana for his debilitating glaucoma condition. He provided Sally Stickler, the HR Manager, with a card identifying him as a medical-marijuana user. He assured Sally that he only smokes in the evenings and will not be under the influence during work hours. JJ also gave Sally a note from his doctor affirming that he is disabled by glaucoma and needs to use marijuana in the evenings for his condition. Sally does not want to make an exception to the Drug-Free Workplace policy for JJ. But if she doesn't make an exception, will XYZ violate the Americans with Disabilities Act's requirement that employers

reasonably accommodate applicants and employees with disabilities? Help!

In 2000, Colorado voters amended the state's Constitution, Art. 18, § 14, by making it legal for a physician to prescribe and a patient to use marijuana where the patient has a debilitating medical condition and might benefit from this drug. The patient must have a state registry identification card authorizing such use and must renew this card each year. Considering that glaucoma is one of the "debilitating medical conditions" specifically listed in the amendment, JJ may be within his Colorado Constitutional rights to smoke a joint or two in the evenings. But the Colorado Constitution does not afford any protection for the medical marijuana user in the work place. In fact, it specifically provides that the amendment does not "require any employer to accommodate the medical use of marijuana in any work place."

Another problem for JJ is that federal law still prohibits the distribution and use of marijuana, and makes no exception for medical use. Courts that have considered the conflict between state and federal law on this issue have held that the state

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law does not protect physician or patient from prosecution under the federal law. Thus, JJ's evening marijuana medication is illegal, federally speaking. Further, the Americans with Disabilities Act (ADA) excludes from its protection the current use of illegal drugs, including marijuana.

So, looks like Sally Stickler can terminate JJ for failing the new-hire drug test and does not have to accommodate his medical use of marijuana, even if he is disabled and complying with his doctor's prescription. But not so fast! We need to ask Sally whether XYZ uniformly terminates others who fail the drug test on the first try. A "yes" response will mean Sally can be a stickler with JJ too. However, if other new hires are given a second chance to pass the drug test, then the proper response is to also give JJ a second chance to pass the drug test. Sally will run afoul of the ADA by treating JJ differently than the non-disabled marijuana user. *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal.2008)

PUT IT ON MY EMPLOYER'S TAB

Effective February 13, 2008, OSHA issued a final rule clarifying who must pay for personal protective equipment (PPE) used by employees to comply with OSHA standards. Under the rule, all PPE, with a few exceptions, must be provided by the employer at no cost to employees. This rule applies to all employees, including short-term employees (temporary workers, piece workers, seasonal employees, etc.). Employers must implement the new requirements by **May 15, 2008**.

The final rule does not expand the types of PPE that employees must use, but does expand the employer's obligation to pay for the PPE. Prior to this new rule, many of the standards did not specify that the employer must provide the PPE at no cost to the employee, and many employers required their employees to pay. This practice must change.

Exceptions to the Rule

Employers are not required to pay for everyday clothing like long-sleeve shirts, long pants, street shoes, and normal work boots under this new rule. Similarly, they are not required to pay for "ordinary clothing, skin creams, or other items, used solely for protection from weather, such as winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, ordinary sunglasses, and sunscreen." The rule also excludes "non-specialty safety toe protective footwear" and "non-specialty prescription safety eyewear," so long as the employer permits employees to wear those items off the job site. Finally, if an employer provides employees with metatarsal guards and allows employees, at their request, to use shoes or boots with built-in metatarsal protection, the employer is not required to reimburse the employee for the shoes or boots.

Limitations on the Rule

1. Employers are only required to pay for the minimum level of PPE required by the standards. If an employer decides to upgrade the PPE, then they are required to pay for that as well. But if the employee chooses to use different PPE from the PPE offered by the employer or chooses to use their own PPE, the employer is not required to pay for those items.

2. If an employee loses or intentionally damages PPE, the employer is not required to pay for replacements. All other replacements, like those needed due to general wear and tear, must be paid for by the employer.

3. When the provisions of another OSHA standard specify whether the employer must pay for specific equipment, employers must follow the payment provisions of that standard, rather than this general rule.

And,.....

Don't forget that just like other company property, employers have the right to deduct from non-exempt employees' final paychecks for property that is not returned so long as employees sign an authorization permitting the employer to deduct from their paychecks for lost property. Employers should have non-exempt employees sign a deduction authorization at the time the PPE is issued. Of course, the deduction may not result in the employee receiving below minimum wage and it cannot reduce the overtime pay employees receive in their final paycheck.

ONLY IF MEDICARE ISN'T PAYING.....

Good Hearted Company (GHC) continues health insurance benefits for its retirees until they are Medicare eligible. The law does not require this, but GHC likes to do right by its retirees and bridges the gap in health insurance coverage for those who retire before age 65. Retiree Hiam Thankless sues GHC when he loses eligibility for GHC's group plan upon turning 65 and becoming Medicare eligible. Hiam claims that GHC is violating the Age Discrimination in Employment Act (ADEA) by providing less benefits to older retirees than to younger retirees. Does Hiam Thankless have a viable claim?

Until recently, the answer was "you betcha," at least in the Third Circuit. You see, in 2000, the Third Circuit issued a controversial ruling that if an employer provided health insurance benefits to retirees, the ADEA required that the benefits not vary based on age. Thus, the benefits received by Medicare-eligible retirees had to be the same, or cost the same, as the health insurance benefits received by younger retirees.

The effect of this ruling was to penalize generous employers and discourage them from providing any health insurance benefits at all to retirees. By giving retirees gap insurance until they qualified for Medicare, the employer exposed itself to liability under the ADEA unless it continued the insurance for Medicare-eligible retirees on the same level as for younger retirees.

On December 26, 2007, the EEOC's new administrative exemption to the Age Discrimination in Employment Act (ADEA) became effective, permitting employers to coordinate the health benefits they offer retirees with Medicare or a comparable state health benefit plan. The rule allows employers to offer health benefits to retirees who aren't yet eligible for governmental health care benefits and to then modify, reduce, or eliminate the benefits when the retiree becomes eligible.

As a result of the EEOC's new exemption to the ADEA, employers no longer run the risk of violating the ADEA when they provide less health insurance benefits to Medicare-eligible retirees than are offered to younger retirees. The employer may elect to supplement the benefits retirees receive under Medicare, or bridge the gap by providing health insurance between the time employees retire and the time they become eligible for government health care.

The scope of the rule is very narrow and simply eliminates the ADEA as a factor in coordinating retiree health benefits with Medicare or a comparable state health benefit plan. It does not apply to coordinating health benefits of current employees with Medicare, nor does it affect other benefit programs, or legal obligations under laws other than the ADEA. The rule also does not require any changes to contractual agreements, including union-negotiated collective bargaining

agreements, regarding retiree health benefits. See www.eeoc.gov/policy/regs/index.html

TIP CREDIT REQUIRES NOTICE

Under the Fair Labor Standards Act (FLSA) and Colorado's Minimum Wage Order, employers are permitted to pay cash wages below minimum wage if the difference is made up in tips. The difference between minimum wage and the amount of cash wage that must be paid to a tipped employee is commonly referred to as a "tip credit." In Colorado, the tip credit can not exceed \$3.02 per hour. Because Colorado's minimum wage is currently \$7.02, the cash wage paid by employers to tipped employees must be at least \$4.00 per hour (\$7.02 - \$3.02 = \$4.00).

But there are some hoops through which an employer must jump if it intends to use the tip credit to satisfy minimum wage: (1) the tip credit must be claimed only for qualified tipped employees—individuals customarily and regularly receiving more than \$30 per month in tips; (2) the employee must receive sufficient notice of the minimum wage and that a tip credit is being used to meet minimum wage; (3) all tips received by the employees must be retained by them—management can not share in the tips; and (4) the tips must be given gratuitously by the customer and not required by a service charge.

All of the above requirements must be met for the employer to use tip credits, but this article is devoted to the "notice" requirement.

In *Pellon v. Business Representation International, Inc.*, a group of tipped employees alleged that their employer could not take the tip credit because they did not receive sufficient notice. Admittedly, the employer had posters in conspicuous places at work advising them of the tip credit, but the contention was that no one ever

"explained" to them how the tip credit worked and they didn't understand it. Attorneys for the employees pointed to the case of *Bonham v. Copper Cellar Corp.* for the proposition that a displayed poster alone does not satisfy the notice requirement.

The *Pellon* court rejected this argument that a conspicuously placed poster was not sufficient notice, pointing out that *Bonham* dealt with facts that were clearly distinguishable. In *Bonham*, the evidence showed that the poster "was not prominently displayed, employees were not directed to it and its contents were not introduced at trial." Under those circumstances, the poster did not satisfy the notice requirement. But in this case, there were two prominently displayed posters, located in areas that each of the employees passed every day, and the contents of the posters were admitted as evidence, without valid refutation. This posting satisfied the Department of Labor's regulations explicitly requiring employers to post "a notice explaining the FLSA minimum wage provisions."

Practical Tip. Posters are available on line, free, at www.dol.gov/esa/regs/compliance/posters/flsa.htm for the FLSA; and for Colorado at www.coworkforce.com/lab/MinimumWageOrderPoster.pdf. Make sure you post both of these posters in your workplace where they are conspicuous to every employee. The explanation of "Tip Credit" is more complete in the FLSA poster, but Colorado's minimum wage and minimum cash wage for tipped employees are higher than under the FLSA, and are correctly stated only in the Colorado poster. Be sure to change the Colorado poster every January to reflect the new minimum wage and minimum cash wage for tipped employees. Also, it wouldn't hurt to advise employees in a handbook policy and in the orientation process where the posters are located.

IF ONLY I HAD KNOWN I WAS USING FMLA LEAVE!

Susan Downey had worked for the Sheriff's Office for several years when she sustained injuries to her knee and shoulder. From December 29, 2002 through March 16, 2003, Downey was on FLMA leave related to surgeries for these injuries. She received notice from the Sheriff that he was designating this as FMLA leave. When she returned, Downey had fifty-two hours of FMLA leave remaining through December 2003. Then she would accrue another 12-weeks of FMLA leave.

In June 2003, Downey injured her left knee, and from July 30, 2003 through October 3, 2003, she took a second period of leave to have surgery on that knee. The Sheriff charged Downey with FMLA leave for this period, though he did not specifically notify her that he would do so. As of August 7, 2003, Downey had exhausted her 12 weeks of FMLA leave. However, the Sheriff kindly continued her on paid leave through her return on October 3, 2003.

When Downey returned to work, she was transferred to the corrections division. In her new position, she did not have some of the fringe benefits she had in her previous position, such as overtime pay and the use of a car. Although the FMLA requires that a returning employee be reinstated to the same or equivalent position, the Sheriff defended the transfer on the basis that Downey ran out of FMLA in August and, therefore, had no right of reinstatement to the same or equivalent position upon her return in October.

Downey sued the Sheriff, alleging that he interfered with her rights under the FMLA by failing to provide her with individualized written notice that the July 2003 leave would be designated as FMLA leave. She claimed that, had she been notified of this, she would have postponed her knee surgery to a time when it would not have caused her to exceed her FMLA allowance. She would

have been able to preserve her right to reinstatement to the same or equivalent position.

FMLA regulations provide that “[i]n all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee.” The regulations explain that, “[o]nce the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave.” The notification must be “provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave.”

The court allowed Downey’s FMLA claim, explaining that when an employer fails to give individualized notice that a leave is being designated as FMLA leave, if the employee can prove prejudice as a result of the employer’s noncompliance, the employer is liable for compensation and benefits lost by reason of the violation, for other monetary losses sustained as a direct result of the violation, and for appropriate equitable relief, including employment, reinstatement, and promotion. The question to be resolved was whether “the employee would have exercised his or her FMLA rights in the absence of the employer’s actions.” And, applying this standard to the facts in the Downey case, the Court determined that the organization violated the FMLA because it did not provide Downey notice that her July 2003 leave would be FMLA leave. *Downey v. Strain*, 510 F.3d 534 (C.A.5 (La.), 2007).

Practical Tip. This type of claim can be avoided through timely written notice to employees that their leave is FMLA leave, the date when the FMLA will be exhausted, and the consequences of not returning by that date. Just do it!

Q & A

- Q. An employee with extensive dental problems is seeking FMLA leave benefits and has given us certification from her dentist that the problem qualifies as a “serious health condition” under the FMLA. Is as dentist a health care provider under the FMLA? Do we have to accept this opinion?*
- A. The FMLA regulations define “health care provider” broadly to include doctors of medicine and osteopathy, dentists, podiatrists, clinical psychologists, optometrists and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation), nurse practitioners, nurse-midwives and clinical social workers, who are authorized to practice under State law and are performing within the scope of their practice as defined by the State law, and Christian Science practitioners listed with the First Church of Christ Scientist in Boston. “Authorized to practice in the State” means that the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider. Therefore, if your employee’s dentist is properly licensed in Colorado and is performing treatment within the scope of his license, the dentist qualifies as a health care provider under the FMLA. However, you can require a second opinion, so long as you are willing to pay for it. 29 CFR 825.118; 29 CFR 825.307(a)(2).
- Q. Under the new FMLA amendment allowing an employee who is the spouse, son, daughter, parent, or next of kin of a servicemember up to 26 weeks of leave to care for the servicemember who is seriously injured, can we combine leaves for spouses who work for us?*
- A. Yes. In any case in which a husband and wife work for the same employer and are entitled to servicemember family leave to care for a seriously injured servicemember, the aggregate number of workweeks of leave to which both the husband and wife are entitled may be limited to 26 workweeks during the single 12-month period. 29 USC §2612(f).
- Q. Is an alcoholic employee who shows up late almost every Monday due to a hang-over entitled to FMLA for his hangovers? Our employee claims his alcoholism is a serious health condition.*
- A. Although the FMLA statute itself does not specifically address whether alcoholism or substance abuse constitute “serious health conditions,” the regulations that implement the statute provide the answer. Substance abuse may be a serious health condition under certain conditions, but FMLA leave may be taken only for treatment of this condition. 29 C.F.R. § 825.114(d). On the other hand, absence because of the employee’s use of the substance, rather than for treatment, does not qualify for FMLA leave. Unless your employee is getting medical or other programmatic treatment for his alcoholism on Mondays, his tardiness does not qualify as FMLA leave. 2008 WL 108764.
- Q. We have a policy that prohibits pregnant employees from working with chemicals that are hazardous. Is it legal?*
- A. On its face, the policy discriminates against women in violation of Title VII. Unless you can prove that pregnancy actually interferes with the employee’s ability to perform the job, the policy is illegal. The safety risk, alone, is not a defense where the safety rule does not apply equally to men. 2008 WL 141917.