

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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LEAVE FOR PARENTS INVOLVED IN KIDS' EDUCATION

Jimmy is a good boy, occasionally. But today is not one of those occasions. The elementary school principal called this morning and told your payroll clerk, Beth, that her son may be expelled for conduct unbecoming of a third-grader (poured a bucket of paste down school-mate Molly's back) and that Beth needs to meet at the school immediately to discuss "the incident." Beth requests the day off to deal with Jimmy. However, Beth has no accrued leave and her absence will be a burden on the other office staff because today is payroll day.

Before the company rejects Beth's request, it better check out Beth's rights under Colorado's new Parental Involvement in K-12 Education Act (HB09-1057). The Act applies only to employers with 50 or more employees, same as the Family & Medical Leave Act. These employers must allow a nonexecutive or nonsupervisory employee to take up to 3 consecutive hours of unpaid leave, not to exceed 6 hours in a month or 18 hours in an academic year, to attend "Academic Activities" for their children in kindergarten through 12th grade.

You ask, "what's academic about a third-grader pouring glue on a classmate?" Actually, under the Act, "Academic Activity" includes a parent-teacher conference; or a meeting related to special education services; response to intervention; dropout prevention; attendance; truancy; or disciplinary issues. So, since Jimmy is threatened with disciplinary action, the Parental Involvement in Kids' Education Act kicks in.

The Act provides alternatives to instantly giving Beth the day off without pay. For example, the employer may agree to an arrangement allowing the employee to take paid leave to attend an Academic Activity and to work the amount of hours of paid leave taken within the same work week. The employer may require that the leave is taken in no longer than 3-hour increments and that the employee provide written verification from the school or school district of the Academic Activity. The employee must make a reasonable attempt to schedule the Academic Activity outside the regular work hours. Schools and school districts are required to make "their best efforts to accommodate the schedules of employees." Also, the employer may limit the ability of an employee to take leave in cases of a company emergency or other situations that may "endanger a person's

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health or safety or in a situation where the absence of the employee would result in a halt of service or production.”

Unless there is an emergency that prevents it, notice and written verification of the need for leave are to be provided by the employee no less than one calendar week in advance. If there is an emergency, the notice of leave must be given by the employee as soon as possible and written verification provided upon return to work.

Both the employer or employee may elect to substitute accrued paid vacation, sick, personal, or other paid leave for this unpaid leave. The employer, in fact, can satisfy this new Parental Involvement Leave requirement by making available to its employees existing paid or unpaid leave for this purpose. Thus, if the employer already provides its non-executive, non-supervisory employees with 18 or more hours of vacation per year, and allows the vacation benefits to be used for this purpose, it need not provide additional Parental Involvement Leave.

Back to Jimmy: Assuming Jimmy’s incident occurred after August 5, 2009, when the Act becomes effective, the employer should not just deny Beth the right to leave work and meet with the principal. Consider alternatives such as allowing Beth to make up the time later in the day; or contacting the principal with Beth and requesting that the meeting be delayed until later. It wouldn’t hurt Jimmy to sit in the principal’s office and stew for a few hours over his misdeeds. Remind the principal that, under the Act, the school has an obligation to use its best efforts to accommodate the employee’s schedule.

NOTE: Employers covered by this Act should update their Employee Handbooks to add a policy on Parental Involvement in K-12 Education

Leave. Paid leave policies should be modified to specifically allow or mandate the use of paid time off for Academic Activities so that an additional 18 hours need not be given for this purpose.

CONSIDER CONSIDERATION

In April 2003, Tracy Horner, an at-will employee with LCP, signed a noncompetition agreement with LCP. The agreement stated, among other things, that in the event of Horner’s termination, he agreed to return all company property and further agreed not to compete with LCP for a period of twelve months following his termination. A year later, Horner resigned his employment and took a job with LCP’s chief competitor. Immediately after starting that job, Horner began directly competing against LCP. Upon learning of his conduct, LCP brought a lawsuit against Horner for breach of the noncompete agreement. Horner argued that the Court should dismiss the claim because the agreement lacked consideration. Who won?

To enforce a contract, a party must first prove there was an offer, an acceptance, and consideration. “Consideration” requires that each party get something of value (i.e., a plus and a minus on both sides). For example, if Bob offers to paint John’s house for \$1,000 and John agrees, there is consideration because the deal creates pluses and minuses for both Bob (plus – \$1,000; minus – having to paint John’s house) and John (plus – getting a painted house; minus – pay Bob \$1,000). If, on the other hand, Bob simply offered to paint John’s house for free, there would be no consideration because there is no plus for Bob and no minus for John.

Horner argued that the agreement he signed with LCP was not a contract because there was no

consideration, as there was no benefit to him for signing and no minus for LCP. LCP countered that Horner's continued employment was sufficient consideration. It argued, as courts in other jurisdictions have ruled, that an employer's forbearance of its right to discharge an at-will employee is sufficient consideration. But the Court disagreed with LCP and determined that "while an employer may agree to continue an at-will employee's employment if the employee agrees to sign the covenant, nothing prevents the employer from discharging the employee at any future date. Thus, the employer's promise requires nothing more than was already promised under the original at-will relationship." So, the Court dismissed LCP's breach of contract claim because it determined that the noncompete agreement lacked consideration. 2009 WL 1621306

Practical Tip. The *Horner* case marks the first time that a Colorado court issued a ruling on the consideration issue in noncompete agreements. Initially, the decision does not concern situations where the employer and the employee enter into a noncompete agreement before the employment relationship begins because in that situation the consideration is that the employer is offering the employee a job. Instead, *Horner* is limited to situations where the employer enters into a new noncompete agreement during the employment relationship. And in those situations *Horner* requires that the employer offer the employee some additional consideration for signing the agreement other than continued employment.

The next question then is what is sufficient consideration that an employer should provide an employee for signing such an agreement. Unfortunately, *Horner* did not provide any significant guidance on this issue beyond noting that "Horner did not receive a pay increase, promotion, or additional benefits in consideration

of his new commitment [not to compete against LCP]." Although, by indicating Horner's lack of receipt of those benefits, the *Horner* Court certainly implied that an increase in those benefits would be sufficient consideration. How much of an increase in benefits is required for sufficient consideration though remains unanswered.

While it is unlikely that a court would determine that giving the employee the pen they signed the agreement with or a one cent increase in their hourly or salary rate would constitute sufficient consideration, it is also unlikely that Colorado courts will require employers to double the vacation-accrual rates or give five-figure increases in pay to employees signing noncompete agreements during their employment. Instead, whether there is sufficient consideration will likely depend on the restrictions in the agreement. So, the longer and more encompassing the noncompete restrictions are, the greater benefit the employer will probably need to provide, and identify to, the employee. Finally, employers with noncompete agreements with current employees where they did not give any consideration should consider re-executing such agreements and providing appropriate consideration this time.

SUPREME COURT RULING COULD IMPACT FUTURE DISPARATE IMPACT CLAIMS

In a narrow 5 to 4 vote, which included a strong dissent, the United States Supreme Court ruled that the City of New Haven violated Title VII's anti-discrimination provisions when the City discarded test results that determined which firefighters would be eligible for promotion and the decision to discard the test results was made because not enough minorities scored well on the

exam. *Ricci et al. v. DeStefano et al.* (Decided June 29, 2009).

Background – The City of New Haven uses a written and oral examination to identify those firefighters best qualified for promotion. As part of the process, the City hired an outside consultant to create the exams. This company, as part of the creation of the exams, took active measures to ensure that the implementation of these examinations would not inadvertently discriminate on the basis of race. But despite these efforts, when the City got the results of the exams they found that white candidates had outperformed minority candidates by a significant degree. Fearing that if they kept the test results they could face Title VII liability for adopting a promotion policy that has a disparate impact on minority firefighters, the City elected to discard the test results. White and Hispanic firefighters that performed well on the test sued.

Legal Refresher – Title VII prohibits both intentional acts of employment discrimination (“disparate treatment”) and policies and practices that are not intended to discriminate but in fact do have a disproportionate adverse effect on minorities (“disparate impact”).

Issue in this case – Can an employer engage in intentional discrimination (in this case against the white and Hispanic firefighters who performed well on the exam) for the asserted purpose of avoiding or remedying a disparate impact (in this case the impact would be on those minorities who performed poorly on the exam)?

Ruling – Only when employers have a “strong-basis in evidence” that a policy or practice has a disparate impact, that the practice or policy is not job related and consistent with business necessity, and that there exists an equally valid,

less discriminatory alternative. The Court noted that the “fear of litigation alone cannot justify the City’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.” And in this case, the Supreme Court held that the City did not have a “strong-basis in evidence” because they relied solely on the results of the exams without any additional evidence of discriminatory impact.

Long-term Impact - This ruling suggests that employers are no longer safe to discard a practice or policy that inadvertently creates an adverse impact towards minorities. Further assessment of that practice and policy must take place to determine whether a “strong-basis in evidence” exists that implementation of such policy or practice will likely result in liability under Title VII’s disparate impact statute. Accordingly, such a ruling could limit the circumstances in which employers can be held liable for policies and practices when there is no evidence of intentional discrimination against minorities.

AND.... ANOTHER SUPREME COURT RULING COULD IMPACT FUTURE ADEA CLAIMS

Quite a session for the Supreme Court! In a second hotly disputed 5 to 4 decision, the majority held that, unlike claims brought under Title VII, a plaintiff bringing a disparate-treatment claim under the ADEA must prove that age was the “but-for” cause for the challenged adverse employment action rather than just being a motivating factor.

In Title VII cases, and what the dissenting judges urged should be the standard in ADEA cases, an employee need only show that membership in a protected class was at least a

motivating factor to the adverse decision. Once this is shown, the burden shifts to the employer to show that it would have taken the same action regardless of the employee's protected status.

But after the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, issued on June 18, 2009, cases brought by employees under the ADEA are no longer subject to this burden shifting. In short, it should be far more difficult for employees to prove age discrimination because they now have the burden of showing that age was THE reason for an employer taking an adverse employment action, not just a motivating factor.

Practical Impact – Hopefully very little. Employers should make employment decisions that do not factor in an employee's age. However, employees may be less inclined to bring age discrimination claims, and the likelihood for success on those claims, if brought, has certainly diminished.

NEW FINES FOR MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS

As if the liability for misclassifying an employee as an independent contractor wasn't high enough in Colorado, HB09-1310, which became law on June 2, 2009, ups the ante for employers when it comes to not paying unemployment taxes on "independent contractors" who are really employees. The Department of Labor may impose a fine of up to \$5,000 per misclassified employee for the first misclassification with willful disregard, and for a second or subsequent misclassification with willful disregard, a fine of up to \$25,000 per misclassified employee. Additionally, upon a second violation, an order prohibiting the employer from contracting with the State, or receiving any

funds from the performance of contracts with the State for up to 2 years after the date of the order may be imposed.

"Misclassification of employees" is defined in the new law as erroneously classifying a person as an independent contractor, free from control and direction of the employer in the performance of services, when the employer cannot show an exception to the general rule under the unemployment statute (8-70-103(11)) that the service being performed for the employer is presumed to be employment. The burden is on the employer to prove independence of the worker.

The state legislature in enacting HB09-1310 explained that misclassified employees pose a "significant problem" in Colorado that leads to underpayment of employment taxes and gives businesses who misclassify an unfair competitive advantage over businesses that properly classify employees and pay appropriate taxes. The new Act encourages anyone who is aware of misclassifications (including your competitors) to file a complaint with the Division of Employment and Training. The Division will investigate and take action. A new poster is coming out that all employers must post in a conspicuous place at work to ensure that everyone in the workplace is aware of this new law and how to file a complaint. The poster should be available soon on the Division's website at www.coworkforce.com.

UPDATE ON EMPLOYMENT LAW SEMINAR COMING SOON!

Bechtel & Santo, LLP, will present a full-day Employment Law Update Seminar on August 6, 2009, in Durango, Colorado, sponsored by the Durango Area Human Resources Managers (E-mail jacquelyn@cci-colorado.org for sign-up information).

Q & A

Q. Instead of time sheets, we rely on the computer record of when an employee logs in and out of his computer for determining hours worked. A few trouble makers complained that they often perform work before and after they first log in for the day. They claim that as much as a half-hour of work time is not compensated each day because of our practice. But we give everyone a 30-minute paid lunch even though they are not working during this period and we don't legally have to pay them. Can we off-set the paid lunch against any extra time they might work before logging in and after logging out?

A. No. But you can give employees notice that you are discontinuing paying for the duty-free lunches and use the money saved to help pay for the actual hours worked. Your company is building up liability by relying on the computer log-in and log-out as the record of time worked when employees claim that this is not accurate. The duty-free paid lunch is a nice benefit to employees, but not required. A recent court decision held that the FLSA does not allow a benefit of pay for time not worked to be off-set against pay owed for time worked. The FLSA requires that employers keep accurate records of time worked and pay accordingly. 2009 WL 102407.

Q. We allow employees to drive company vehicles home and use them for commuting to work. This is helpful to the company because employees don't have to report to the main office and can drive directly to the first work site in the morning and directly home at the end of the day. Does this make

us liable to pay the employee for their home-to-work travel?

A. Not necessarily. The Portal-to-Portal Act provides that the use of an employer's vehicle for travel by an employee and activities performed by an employee incidental to the use of the vehicle for commuting shall not be considered part of the employee's principal activities and, thus, need not be compensated as work time, if the use of the vehicle for travel is within the normal commuting area for the employer's business and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee. Courts, when deciding if driving time in a company vehicle is work time, look at the factual circumstances. The more the activity is undertaken for the employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable.

To help a court decide for the company on this issue, have a written agreement with employees who drive company vehicles home that states that commuting in the company vehicle is primarily for the employee's benefit and that the employee can elect to drive his or her own vehicle between home and work, but that the company will not cover gas, repairs or any other expense incurred by the employee for use of their own vehicle. State in the agreement that the commute between home and work is not work time regardless whether the employee elects to use the company vehicle or the employee's own vehicle for commuting. 2009 WL 847785.