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LABOR & EMPLOYMENT NEWSLETTER – 2ND QUARTER 2008

CVK SEMINARS: INDEPENDENT CONTRACTOR OR EMPLOYEE?

Shari L. Lane

Some of you have mentioned that it can be difficult to leave work in the middle of the day to attend a seminar, so our second quarter seminar was held on a Friday morning. The majority of attendees were pleased with the change. For those who could not attend, a recap follows.

The subject is complex, and the answer to the question, "Independent Contractor or Employee?" may be different depending on who is asking. A person may be an employee for unemployment insurance purposes but not for workers' compensation purposes, for instance.

The bottom line: The company's right to control the worker is the issue, along with the worker's right to provide similar services to others.

As always, when in doubt, consult an attorney.

CASELAW UPDATE

A Break for Employers

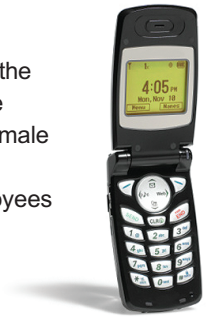
Imagine this: Your employees know they are supposed to take a paid rest break (ten minutes for every four hours worked, according to OAR 839-020-0050), they don't take breaks (whether because they are instructed to skip a break, because they are too busy, or because they simply forget), and later file a claim for hundreds of thousands of dollars in wages. How's that, you ask? This is the theory: Under the administrative regulations, employees work for three hours and fifty minutes, but get paid for four hours; therefore, if they work a full four hours and only get paid for four hours, they've been "cheated" out of ten minutes' pay.

The Oregon Supreme Court recently rejected an attempt by a group of Legacy employees to file a class action wage claim based on this legal theory. *Gafur v. Legacy Good Samaritan Hosp. and Medical Center*, 344 Or 525, 185 P3d 446 (2008). The litigation sent shock waves through the business community, because Oregon wage laws provide for penalties and attorney fees, and permit claims for up to six years back wages (two years for overtime wages)—in other words, if the plaintiffs had been successful, the potential award against the employer would have been substantial.

No dice, our state supreme court said. It is important to understand the court's reasoning, however. The court did not say, "You may deny your employees breaks with impunity." The court said that the policing power for this particular right rests with the Oregon Bureau of Labor & Industries, which is authorized to investigate claims of wage law violations, and assess penalties of up to $1,000 per occurrence.

When you consider that an "occurrence" may be one missed break, the potential consequences are still pretty dire. Nevertheless, this ruling is helpful, as it eliminates the specter of the unscrupulous employee who deliberately skips his breaks without notifying his employer, and later tries to cash in on the missed time.

Privacy in the Workplace



Many companies conduct regular email and voicemail audits, and some employment law attorneys and human resources advisors encourage such audits.

As a practical matter, do you really want to see every email that says, "I'll be home at 6:00—don't forget to pick up the chicken"? On the other hand, if you wait until you suspect a problem to review employee communications, you may be exposing yourself to claims of discriminatory application of your policies (if you only review the communications of a female employee, for instance, or the communications of the employee who recently took medical leave).

Like all employee relations issues, there is no one-size-fits-all answer. The extent to which you provide your employees with electronic communications devices, the make-up of your workforce, the degree to which your employees work unsupervised, the cost of using a third party vendor to audit employee communications, and the size of each worksite—all factors must be considered.

A recent case highlights some of the pertinent issues. *Quon v. Arch Wireless Operating Co.*, 2008 WL 2440559 (9th Cir 2008). In *Quon*, the Ninth Circuit found the Ontario Police Department should not have tried to review the text messages—some of which were sexually explicit—sent and received by its employees on their Department pagers, and the provider should not have provided those archived messages to the Department.

The ruling came as a surprise to the Department, because its employee policies specifically prohibited the use of "inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language," and explicitly retained the right of the Department to review all communications by Department employees.

The issue in *Quon* was the scope of public employees' constitutional right to privacy—not an issue for most recipients of this newsletter. Nevertheless, a few tips for private employers can be gleaned from this decision.

- Make sure your employee handbook includes a policy that clearly states all communication using company equipment and/or on company time is not confidential or private, and states you reserve the right to review all computer files, internet history, cell phone use, etc., at any time.
- Enforce your written policies consistently. The Department's "fatal mistake," apparently, was ignoring its formal policy and implementing an informal policy that pager use would not be audited so long as the employee paid for any overage charges.
- If possible, structure your company-provided cell phones and PDAs such that the communication is routed through your company server—making you the ultimate sender and recipient.
- Have your employees sign a contract authorizing company access to all communications made using company-provided equipment.

Medical Leave/Disability Law

The Eighth Circuit held that employers may not be required to allow unpredictable unscheduled absences as a reasonable accommodation under the Americans with Disabilities Act. *Rask v. Fresenius Medical Care North America*, 509 F3d 466 (8th Cir 2007). The employee in Rask told her employer she was "having problems with [her] medication" and "might miss a day here and there because of it." That was insufficient to put the employer on notice that the employee was disabled under the ADA, the court found, and—even if the notice had been sufficient—the employer would not have been required to permit such absences. The goal of reasonable accommodation, the court pointed out, is to allow the employee to perform the essential functions of her job. The court stated, "[w]e note that Ms. Rask did not have the type of job that could be performed from another site or put off until another time: she cared for seriously ill patients in need of dialysis."

This ruling brings welcome relief to employers struggling with the requirements of medical leave and disability laws.

Caveat: Each situation must be analyzed on its own facts; there may be circumstances under which allowing an employee to take time off, even sporadically and unpredictably, is a reasonable accommodation under the ADA. The Ninth Circuit cautions that "regular and predictable attendance is not per se an essential function of all jobs." *Humphrey v. Memorial Hospitals Ass'n*, 239 F3d 1128, 1135-36 (9th Cir 2001). Once again, when it doubt, consult an attorney.

Reminder: New FMLA laws governing the rights of employees in military service and their families went into effect this year, and employers must post updated notices, or face potential fines. These and other federally-required posters are available at no charge at http://www.dol.gov/esa/whd/regs/compliance/posters/fmla.htm.

If you have questions about these or any other employment law issues, please contact our employment law team at EmploymentLaw@cvk-law.com.

SEMINARS

September 18, 2008:
Hiring and Firing
Susan K. Eggum, Speaker
12:00 – 1:00, Standard Insurance Center
Presented by the Multnomah Bar Association
To register and view other seminars in the series: (503) 243-1881

October 23, 2008:
Religious Accommodation in the Workplace
11:30 – 1:00, World Forestry Center
Shari L. Lane, Speaker
Presented by The Commerce Company
To register and view other seminars in the series:
www.thecommco.com