

UPCOMING SEMINARS

Hiring and Firing

Susan K. Eggum

CVK Employment Litigation Partner,
Speaker

September 18, 2008, 12:00-1:00 pm
Standard Insurance Center

Presented by the
Multnomah Bar Association
To register and learn about other
seminars: (503) 243-1881

Occupational Safety and Health

David Sparks

Oregon OSHA Liaison, Speaker
October 10, 2008, 7:30-9:00 am
805 SW Broadway, 8th Floor

Presented by
Cosgrave Vergeer Kester, LLP
To register: (503) 276-6070 or
EmploymentLaw@cvk-law.com

Religious Accommodation in the Workplace

Shari Lane

CVK Employment Advice & Counsel,
Speaker

October 23, 2008, 11:30-1:00 pm
World Forestry Center
Presented by
The Commerce Company
To register: (503) 203-8585 or
series08@thecommmco.com

Other seminars hosted by
The Commerce Company, see attached flyer.

AFTER THE BREAK-UP: UNEMPLOYMENT BENEFITS



Shari L. Lane

True Story: You fire an employee who stole company equipment, decide to forego a criminal investigation, and begin to move past the feelings of anger and betrayal that are inevitable in this situation. And then you receive a notice from the Oregon Employment Department, notifying you that he's seeking unemployment benefits. (Printable) words cannot begin express your reaction.

Keep in mind that an employee is entitled to unemployment benefits unless s/he:

- *Committed misconduct related to work.* This is a pretty high standard—even blowing up at the boss and swearing at him or her may not be sufficiently egregious misconduct to warrant denial of unemployment benefits. See, e.g., *Double K Kleaning Service, Inc. v. Employment Dept.*, 191 Or App 374, 82 P3d 642 (2004). Stated another way, an “isolated instance of poor judgment” is not “misconduct related to work.” OAR 471-030-0038.
- *Refused to take a drug test.* Pursuant to OAR 471-030-0125, the employer must have a “reasonable” drug testing policy i.e. the policy must be in writing, disseminated to all employees, and provide for random testing and/or testing where there is “probable cause” to believe an employee is impaired at work.
- *Quit without good cause.* Good cause exists when an employee has “no reasonable alternative but to resign.” ORS 657.176(2)(c)

A recent case highlights the parameters of “good cause” in this context. *Sen v. Employment Department and Garmin, Inc.*, 218 Or App 629, 180 P3d 95 (2008). In *Sen*, the employer offered its employee a severance package, warned him that if he committed any misconduct in the future he would probably be fired, and told him if that occurred he would not be offered any severance. Because he was given the option of continuing to work without reduction in pay or other adverse change in the terms of employment, he was not forced to resign, and he was therefore not entitled to unemployment benefits.

Important Note: Employers are not required to pay unemployment insurance premiums for independent contractors, and independent contractors are not generally eligible for unemployment benefits. However, in practice, many individuals designated “independent contractors” by mutual consent of the parties do not actually qualify as such under the statute, which applies only to an individual who is:

- Free from direction and control over the means and manner of providing the services;
- Licensed, if he/she provides architectural, landscaping, or construction work;
- Provides similar services or advertises to provide similar services to others;
- Customarily engaged in an independently established business, which means at least three of the following are true:

- Maintains a separate business location;
- Bears the risk of loss related to the provision of services (fixed price contract, guarantees work, indemnifies other party to the contract, etc.);
- Provides contracted services for two or more different persons within a 12-month period, or routinely engages in business advertising, reasonably calculated to obtain new contracts to provide similar services;
- Makes a significant investment in the business (purchases tools, rents office space, pays for training, etc.);
- Has the authority to hire and fire others to provide or to assist in providing the services under the contract.

As noted in the last CVK seminar, this is an extremely complex analysis, and we encourage you to consult an attorney if you employ any independent contractors. The risk of an audit that will assess premiums, interest, and penalties is very high.

When Is an Injury Work-Related For Workers Compensation Purposes?

When an employee tears a tendon while jostling the vending machine in the company lunch room to help a co-worker dislodge a candy bar? *Washington Group International v. Barela*, 218 Or App 541, 180 P3d 107 (2008).



When a tow-truck driver hurts his neck trying to punch the police officer who pulled him over for speeding? *Sisco v. Quicker Recovery*, 218 Or App 376, 180 P3d 46 (2008).

The reality is this: most injuries that occur at work, on the job, or while in transit on the employer's behalf are considered "work related," and will give rise to workers compensation benefits.



Federal minimum wage increased to \$6.55 on 7/24/08 (applicable only to employees who are exempt from Oregon minimum wage requirements).



Reminder: If you have at least 100 employees (in the aggregate, for all worksites under centralized control), or you are a Federal contractor with at least 50 employees, you must submit an EEO-1 survey form by September 30. Make sure you use the new form, which can be viewed at

http://www.eeoc.gov/eeo1survey/instructions_form.pdf.

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

Disclaimer *The information contained in this Newsletter is intended for general information purposes only, and is not legal advice. We encourage you to contact our employment law team regarding specific situations.*