Fenwick Employment Brief

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PARTIAL-DAY LEAVE DEDUCTIONS LAWFUL FOR EXEMPT EMPLOYEES

A California court of appeal recently confirmed that employers may require exempt employees to use accrued leave for partial-day absences, even if shorter than four hours. In *Rhea v. General Atomics*, plaintiff Lori Rhea, on behalf of herself and other exempt managers, sued General Atomics claiming its practice of deducting exempt employee's accrued leave for partial-day absences violated California law. Rhea and General Atomics jointly presented the issue to the court for resolution.

By way of background, General Atomics had an annual leave policy under which employees accrued paid time off to be used for vacation, illness and any other purpose. Under the policy, General Atomics required exempt employees to use accrued leave to cover both full- and partial-day absences. If the employee lacked sufficient leave to cover a partial-day absence, she still received her full salary.

Rhea alleged that leave deductions for partial-day absences defeated the salary-basis test for treating the class as exempt since the deductions resulted in an unlawful forfeiture of wages. She reasoned that, although such deductions were permitted under federal law, California law was more protective of accrued leave. While the appellate court agreed that accrued time off constitutes wages and California law prohibits forfeiture of accrued leave or wages, it rejected the further leap that the challenged practice resulted in a forfeiture.

The court distinguished between an unlawful forfeiture and a permissible requirement that an employee use accrued leave: "General Atomics does not *take away* or *reclaim* vested Annual Leave when an employee is absent for a partial day; it merely requires that the employee use the Annual Leave under the terms and conditions that it has created." The court observed that employers are not required to offer vacation or leave, and have significant discretion in dictating use of leave. In support, the court cited *Conley v. PG&E* (reported in July 2005 FEB), which recognized that a policy requiring use of vested time off for partial-day absences "neither impose[d] a forfeiture nor operate[d] to prevent vacation pay from vesting as it is earned. All it [did was] *regulate the timing of exempt employees' use of their vacation time*, by requiring them to use it when they want to need to be absent from work… ."

The court further rejected Rhea's back-up argument that partial-day deductions were only permissible for absences of at least four hours: "We conclude that regardless of whether the absence is at least four hours or a shorter duration, a requirement that exempt employees use Annual Leave time for a partial-day absence does not violate the law."

This decision provides helpful clarification and flexibility for employers in setting terms for use of accrued time off — whether under the rubric of vacation, PTO or leave — for partial-day absences. Other considerations should be taken into account before revising existing accrued time off policies — in particular, concepts of fairness in requiring leave deductions for short absences while not providing additional compensation for late and weekend hours, as well as the potential burden of tracking partial-day absences. Employers considering changes to their policy based on this decision should consult counsel about proper implementation and notice and, in all events, hold such changes until at least August 30, 2014, the deadline for the parties to seek review by the California Supreme Court.

ACTIVITY BEFORE NLRB AND WA SUPREME COURT HIGHLIGHTS JOINT EMPLOYER RISK

A recent announcement by the National Labor Relations Board's (NLRB) General Counsel and a Washington Supreme Court decision underscore the risks of potential joint employer liability:

NLRB General Counsel Seeks to Establish Joint Employer Liability for McDonald's and Franchisees

In a July 29, 2014 press release, the Office of the General Counsel (OGC) of the NLRB announced its intent to file unfair labor practice charges in 43 cases against both McDonald's franchisees and franchisor McDonald's, USA, LLC — as joint employers — due to the franchisees' responses to employee protests. If the charges are filed, the franchisor will be forced to defend — and face liability for — its franchisees' actions which allegedly interfered with employee rights under the National Labor Relations Act.

The OGC did not explain its joint employer rationale in the press release, and its position is not otherwise public at this time. However, the OGC filed an amicus brief in an unrelated action — *Browning-Ferris Industries* — in which the NLRB is considering whether to follow or replace its current joint employer test. There, the OGC argued the NLRB should apply a broader test that looks to whether, under the "totality of the circumstances," the purported joint employer has sufficient influence — direct or indirect — over the working conditions such that meaningful bargaining cannot transpire in its absence. A significant factor for consideration would be the structure of the commercial relationship between the purported joint employers and how the relationship impacts, directly or indirectly, the industrial realities of the direct employer's business. The *Browning-Ferris* case does not involve a franchise business relationship, but the OGC specifically observed that its proposed test would better capture franchisors.

Hopefully, the NLRB's ruling in *Browning-Ferris* will provide much-needed guidance on this issue. In the interim, employers (including private, non-union employers) should be aware that the proposed joint employer test could be quite expansive and, if taken to an extreme, could apply not only to franchise relationships but potentially relationships with contractors and other business partners.

Joint Employer Liability Under WA Wage Statutes; Supreme Court Articulates Test

In *Becerra v. Expert Janitorial, LLC*, plaintiff night janitors filed a class action alleging failure to pay minimum wage and overtime as required by Washington's Minimum Wage Act (MWA). In addition to their direct employers, plaintiffs named as defendants Fred Meyer Stores Inc., the ultimate beneficiary of their services, and Expert Janitorial LLC, Fred Meyer's general contractor that oversaw various subcontractors including plaintiffs' employers. Plaintiffs claimed that, "as a matter of economic reality, they were Expert's and Fred Meyer's employees; and that both companies knew the plaintiffs were misclassified and improperly denied overtime wages." Fred Meyer and Expert moved for summary judgment, arguing they were not plaintiffs' employers. The trial court agreed, and plaintiffs appealed.

The Washington Supreme Court reversed the trial court judgment, recognizing that liability under the MWA may be based on a joint employer theory and articulating a non-exhaustive 13-factor "economic reality" test. In doing so, the court observed that other factors were also relevant to the inquiry, including whether (1) a putative employer had knowledge about alleged violations, (2) the amount paid to the subcontractor allowed for a lawful wage, or (3) the arrangement was a "'subterfuge or sham.'" The supreme court determined the trial court had applied the wrong test and remanded the case for further assessment of the joint employer issue, although it also expressed doubt that summary judgment would be appropriate on the record before it.

NEWS BITES

Court Enforces Arbitration and Class Action Waiver Policy, but Allows Time to Assert PAGA Claims

Following the California Supreme Court's decision in *Iskanian v. CLS Transportation* (reported in the July 2014 FEB), a California federal district court ruled that plaintiff Faine Davis must arbitrate her individual wage-related claims and she waived related class action claims. Davis sued Nordstrom on behalf of herself and a putative class of salaried managers for failing to pay overtime, missed meal and rest periods, and other Labor Code violations. Nordstrom unsuccessfully moved to enforce its policy that required Davis to arbitrate her individual claims and that barred her from pursuing most class actions. On remand after appeal and following the *Iskanian* decision, the district court recognized that the arbitration provision, including its class action

waiver, was enforceable. Still, the court allowed Davis 28 days to amend her complaint should she wish to pursue claims in court on behalf of the state under the Private Attorney General Act.

Office Employee May Pursue Same-Sex Harassment Claims Based on Gender Stereotypes

A recent decision from a Pennsylvania federal district court provides an important reminder that hostile work environment claims can arise from same-sex harassment based on gender stereotypes. In *Barrett v. Pennsylvania Steele*, a male operations specialist sued his employer claiming male coworkers sexually harassed him because he did not fit their male stereotype of being sexually explicit and crude. The harassment included overt verbal attacks, sexually explicit commentary and jokes, and physical threats. After Barrett complained, the conduct reportedly escalated, resulting in several workplace incidents. Barrett alleges the employer terminated him "for 'being the common denominator' in many workplace incidents" which he attributed to the harassment.

The Court rejected the employer's bid to dismiss the action. Among other things, the court found Barrett sufficiently stated facts showing male coworkers considered cursing and crude behavior to be normal and stereotypical male behavior, and Barrett's "lack of perceived maleness" motivated their conduct toward him. Further, Barrett's allegations showed that management knew of the behavior and failed to adequately address it, culminating in Barrett's termination.

Goodwill Pays $100K, Other Relief to Settle EEOC Retaliation Suit

In September 2011, the Equal Employment Opportunity Commission filed suit against Goodwill Industries for alleged retaliation. According to the EEOC, Goodwill fired a 13-year employee following her testimony — adverse to the company — in another employee's sex and age bias action. In addition to the $100K payment to the employee, Goodwill is entering into a consent decree that provides for injunctive relief including employee training, revision and distribution of anti-discrimination policies and certain employee notifications.

NY DOL Improved Policies and Process Fuel Record Wage Recovery in 2014

On July 24, 2014, the New York Department of Labor released a mid-year update on its progress in fighting wage theft. According to the press release, between January and June 2014, investigators recovered more than $16.4 million in wages, interest and damages, which was disbursed to 21,050 workers. In the same timeframe, the DOL completed nearly 5,000 investigations — a 45 percent increase over the same period in 2013 — and collected about $850,000 in penalties. The disbursements thus far have the DOL on track to surpass all prior years.

The DOL cites policy and operational improvements, including referral of cases to compliance conferences that expedite resolution, for a marked downturn in the number of pending cases overall. The DOL has reportedly completed its investigation of 74 percent of its 2014 cases and nearly all of its pre-2012 cases.

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