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COUNSELORS AT LAW

Employment Law Letter

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Labor & Employment Law Department

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Devil's In the Details of New Sick Leave Law

Employer groups have strongly criticized Connecticut's new sick leave mandate because of its cost and the message it sends about the business climate in the state. However, as the January 1 effective date gets closer, it's likely that attention will focus on exactly how to comply with the law. Although guidance from the Department of Labor is expected, some of the following questions don't yet have definitive answers.

Which employees are covered? Generally, service workers are covered, but there are 68 specific job titles referenced in the statute, which are in turn defined in a classification system maintained by the federal Bureau of Labor Statistics. Many categories, such as health care workers, crossing guards, restaurant employees, taxi drivers and janitors, seem to have been selected because it wouldn't be practical to move their jobs out of state. Others, such as computer operators and proofreaders, don't seem to have the same logic. (For a complete listing, visit http://www.shipmangoodwin.com/files/upload/PaidSickLeaveChart.pdf.) Executives, professionals, administrative and other employees exempt from minimum wage and overtime requirements are not covered by the law.

What employers are covered? Most employers with at least 50 employees are covered. Although the statute doesn't mention public employers, state officials say the legislature intended to include them. Manufacturers are clearly excluded, which means for example that secretaries and other office workers in most businesses are covered, while those in industrial firms are not. Certain charitable organizations are excluded, but only if they are "nationally chartered" and provide recreation, child care and education services.

How about per diems and temps? The law does not cover "day or temporary workers," which is defined to mean people who work only when needed or for a specific limited period of time. However, given how broadly some employers interpret these terms, there are sure to be arguments about who is covered and who is not.

Do part-timers get sick leave? Even a covered employee who works only a few hours a week *accrues* sick leave, provided those hours are regularly scheduled.

However, no employee can *use* accrued sick leave unless they have worked an average of at least ten hours a week during the preceding calendar quarter. Accrual is at the rate of one hour of leave for every 40 hours worked (presumably including overtime), up to a maximum of 40 hours per year.

What can leave be used for? In addition to the employee's own illness or injury, leave can be used for preventive care, the illness or injury of a child or spouse, or issues relating to sexual assault or family violence. If an employer doesn't currently provide paid time off for these purposes, it will have to adjust its policy, or face the potential that the newly mandated leave must be offered in addition to the employer's current benefit.

Can unused leave be carried over? Up to 40 hours of accrued unused sick leave can be carried over from one year to the next, but no more than one year's worth of accrued leave can be used in any year. Apparently the carryover provision was not intended to allow additional time off in a given year, but rather to allow employees to save some leave from one year so that it is available on the first day of the next year. Again, some employers may have to adjust their existing policies to comply with this requirement.

What does "no retaliation" mean? The law says an employee can't be disciplined or discharged for using sick leave in accordance with the statute "or in accordance with the employer's own paid sick leave policy." Does that mean an employee can't be disciplined for using every available sick day every year? At least if an employer provides more than the required five days of sick leave, its policy should prohibit excessive use or misuse of the benefit.

When does all this start? The law is effective on January 1, 2012, or the later expiration of a union contract that is in effect prior to that date. Although sick leave accrual starts then, accrued leave can't be used until the employee has worked 680 hours (about four months for full-timers) after that date. For some, that could mean a wait of more than a year.

There's lots more detail; the statute is six pages of fine print! Stay tuned for further developments.

Millions Awarded in Free Speech, Whistleblower Suit

Has this happened to you?

An employee complains about an odor in the workplace, and placement of her desk in an area she considers unsafe. She takes a medical leave to deal with an illness that may or may not be related to the odor. When her doctor says she can return, she refuses unless certain health and safety conditions are established. Negotiations ensue but ultimately break down, so the employee is terminated.

That's what Pfizer did when it couldn't reach an accommodation with a molecular biologist, who responded by filing a "kitchen sink" lawsuit. Most of her charges were thrown out, but claims under Connecticut's whistleblower and free speech statutes went to a jury, which awarded her a whopping $1.37 million in economic and compensatory damages for pain and suffering, plus punitive damages to be determined by the judge.

Pfizer moved to set aside the verdict on various grounds, including the fact that the employee's concerns about odors in the workplace and the fact that her desk was too close to laboratory experiments were personal gripes, and not matters of public interest. "Safety in the workplace is a matter of public concern," the judge responded, quoting from a 2002 federal appeals court decision. Pfizer also said its decision to terminate the employee had nothing to do with her complaints, but rather her unwillingness to return to work. However, the judge said her absence may have been due to an illness caused by the workplace conditions she had complained about.

Recent S&G Website Alerts

Connecticut Legislature Passes First in the Nation Paid Sick Leave Law, Published June 2011

Supreme Court Scratches the Surface of Discrimination Claims with "Cat's Paw" Theory of Liability, Published April 2011

The court found the jury's award was not clearly erroneous or manifestly unjust. Attorney's fees equal to one-third of the jury's award were assessed against Pfizer, plus an equal amount in punitive damages, which the judge said a reasonable jury could find to be justified if it believed Pfizer's attempts to address the employee's concerns were inadequate. The total judgment came to almost $2.3 million. No decision regarding a possible appeal has been announced.

Our opinion is that while whistleblower and free speech claims are hard to prove, and employees don't often win, when they do the cost for the employer can be hefty. Furthermore, juries add an unpredictable element that often leads defendants to conclude that even paying a substantial settlement may be preferable to rolling the dice in a trial.

How Fast Must a Corrections Officer Run?

A federal judge has ruled that a 1.5 mile run required as part of the application process for the state's corrections officers had a disparate impact on females, and since it was not proven to be an essential element of the job, it constituted discrimination on the basis of gender. The ruling may mean that the state is on the hook for money damages payable to any female applicant who can show that she would have been hired for a correction officer position if it were not for the running test. Nobody argued that physical fitness was not important for correction officers. However, there was no showing that it was essential for an officer to be able to run a specific distance in a specific period of time. In fact, the state had in effect conceded this point by establishing different pass/fail standards for different age groups in both genders. For example, a 21- to 29-year old female was required to cover the 1.5 miles in 14 minutes 45 seconds, but for a male the requirement was 12 minutes 25 seconds.

Since a specific pace was not an essential element of the job, the state was required to set standards that were gender-neutral. The problem was that even with the different time requirements, 20% more men than women passed the running test, and this was not explainable based on objective factors, such as more overweight female applicants than males. Therefore the running test had an impermissible disparate impact on women.

Our advice to employers is to periodically review the requirements for each job in the workplace to assure that they are both job-related and gender-neutral, especially where the requirements are physical rather than intellectual. If there is a job qualification that screens out more women than men, it's important to be able to demonstrate that it reflects an essential function of the position, not just a desirable attribute.

Legal Briefs
and footnotes...

180 Days Means Just That: USERRA requires that an employee who joins the military and requests reinstatement upon his discharge from service must be rehired for at least 180 days. A reservist called to active service in Iraq was rehired upon his return, but fired as soon as the 180-day requirement was fulfilled. He sued, but lost, and that decision

was upheld by a federal appeals court. Apparently 180 days means just that and no more.

Willful Misconduct Hard to Explain: Recently, an unemployment compensation applicant was denied benefits because he was fired for insulting his boss, telling her she didn't have the "accounting skills to be a supervisor." Another applicant was denied benefits after he was fired for slugging a co-worker, but that decision has now been reversed by a judge who found the employee had been provoked. How the second situation could not constitute willful misconduct when the first one did is difficult to explain.

What Constitutes a Family? In our last issue we reported on a case in which the live-in girlfriend of one of the Hartford Distributors shooting victims was claiming workers' compensation benefits normally available only to a spouse. We said if the law is to be expanded to award benefits to people not related to the decedent by blood or marriage, it ought to be the legislature that does it, so specific standards can be established. A workers' compensation commissioner has decided otherwise, and has awarded benefits to the claimant. He said although she was not related to the employee, she was a "dependent in fact." Some observers think this decision says more about a change in our society than a change in the law.

Foxwoods Union Squabble Settled: This spring we reported that the NLRB had certified a third union at Foxwoods, after the UFCW won an election to represent 300 beverage workers. However, Foxwoods refused to recognize the union because it claimed the NLRB did not have jurisdiction over a tribal enterprise. Subsequently, another election was conducted under tribal law, and when UFCW won that one too, Foxwoods agreed to enter into negotiations.

Who is Available For Work? Even an employee who is terminated through no fault of his/her own must be available for and actively seeking work to be eligible for jobless benefits. Two recent decisions are illustrative. In one case, an applicant was disqualified from benefits by the Board of Review because she conducted only a minimal job search, contacting only about one employer per week. A reviewing court affirmed that decision. In the other case, a teacher was denied benefits when she applied only two days after giving birth by Caesarian Section. Her doctor's opinion releasing the claimant to work did not accord with "reason and common sense," said an Appeals Referee, whose decision was upheld by the Board of Review and the Superior Court.

Save the Dates

We will offer 3 Sexual Harassment Prevention Training seminars on the following dates:

October 12th - Hartford
8:00 a.m. - 10:00 a.m.

October 13th - Stamford, CT
1:30 p.m. - 3:30 p.m.

October 25th - Hartford
8:00 a.m. - 10:00 a.m.
To register, visit www.shipmangoodwin.com.

Our annual Fall Seminar is scheduled for Wednesday, November 2, 2011 at the Hartford Marriott Downtown.

Please mark your calendars and join us.

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Stamford, CT 06901-3522
203-324-8100

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