MURCHISON & CUMMING LLP

EMPLOYMENT NEWSLETTER

SPRING | 2010

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M&C'S EMPLOYMENT LAW PRACTICE GROUP

The Employment Law Practice Group advises clients in a wide range of employment matters, including wrongful termination, employment discrimination, wage and hour practices and disputes, compliance issues, non-competition violations, workplace policies, hiring and termination practices, drafting employment contracts and other transactional aspects. Our employment attorneys also provide clients with pre-litigation investigation services, review of policies and procedures, counseling, and quarterly updates on recent cases and changes in statutory, administrative, and regulatory law. Furthermore, our attorneys have substantial experience in litigating employment matters in state and federal courts.

Partial Day Absences and the Exempt Employee: DLSE Issues Opinion on Allowable Deductions from Leave Banks

On November 23, 2009, the California Division of Labor Standards Enforcement ("DLSE" or "Agency") issued an opinion letter which represents an adjustment in the Agency's position on deduction of accrued leave for partial day absences by exempt employees. The Opinion brings California into alignment with the position taken by the U.S. Department of Labor ("DOL") under the Fair Labor Standards Act ("FLSA").

Deduction for partial-day absence cannot result in reduced pay

In short, the Agency's Opinion states that an employer may deduct any increment of time from accruals in vacation or sick leave banks for an exempt employee's partial day absence without jeopardizing the employee's status as an exempt employee. The critical element in making such deductions is ensuring that the employee nonetheless receives the complete salary for the day on which he or she has a partial absence.

Exempt employees must meet both a salary and a duties test. The salary test requires that the employee is paid the full salary for any week in which work is performed. However, there are exceptions to the "no deductions" rule set forth in the Code of Federal Regulations, which guide employer compliance both under the FLSA and California law. The most significant is that deductions can be made for full-day absences when no leave is available.

The salary rule should be taken extremely seriously. If it is found that the employer's intent or practice did not provide for a true salary, the employer will have liability for unpaid overtime for at least three (and usually four) years, and may have additional liability for wage violations applicable to nonexempt employees, such as meal periods and rest breaks. Further, California has multiple layers of penalties which may be imposed on employers who fail to pay all wages owed in a pay period, and attorneys who represent such employees are entitled to reasonable attorneys fees.

PTO banks have advantage in administering rules

The Agency's Opinion is 13 pages long, and analyzes 15 different partial-day absences and various levels of banked sick leave and vacation time in order to make the point. But the take-away for employers in California is that (1) hours on a partial workday can be apportioned between regular salary and debits to leave banks, (2) there is no minimum amount of time that may be deducted from a leave bank for a partial-day absence, and (3) the employer must act in careful accordance with company policy in making deductions for partial-day absence.

Many employers now utilize a combined Paid Time Off ("PTO") bank in lieu of separately accruing vacation and sick leave banks. While PTO policies carry certain disadvantages, the sheer numerosity of the examples which the Agency marched through in order to demonstrate the acceptable treatment of partial-day absences for companies with both vacation and sick leave banks suggests that PTO banks are advantageous in this context.

Review policies for best practices

Additional points which employers need to keep in mind in administering time off for exempt employees:

- If your company uses separate banks for vacation or personal leave and sick leave, ensure that the policy does not limit application of leave time to absences of any particular length. Employer policies commonly require vacation to be taken in increments of a four-hour minimum. Such a policy would prevent deduction from vacation leave for an exempt employee who is taking repeated partial-day absences of less than four hours.

- Additionally, if separate banks are used, make sure that your policies provide for application of accrued vacation to absences for illness if sick leave has been exhausted. Note that employers have a right to require exhaustion of paid leave which may lead to unpaid leave.

- Final pay may not be reduced for negative balances in leave banks, as this would be considered a delayed deductions for partial-day absences and would violate the salary rule.

Employers who may wish to make use of available leave for exempt employees on days of partial-absence should consult counsel knowledgeable on the subject if there is any uncertainty on the correct treatment in a specific situation.

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The Mixed-Motive Jury Instruction is Reincarnated in California Pregnancy Discrimination Cases

Harris v. City Of Santa Monica

A. The Facts

Wynona Harris was a part-time bus driver employed by the City of Santa Monica. During her probationary period, Ms. Harris had a checkered driving history: she was involved in causing what the City concluded were two "preventable" accidents and had attendance problems. Despite this history and despite the fact that the bus driver's supervisor noted that Harris required "further development," Harris's efforts were extolled in a note on her Performance Evaluation which read, *"keep up the good work."* One month later, Harris missed another shift, which prompted the City to consider whether her employment should be terminated. Before a decision could be made, Harris had a "chance encounter" with her supervisor. During this impromptu meeting, Harris casually disclosed that she was pregnant. Upon hearing this news, Harris's supervisor was reported to have remarked, *"Wow. Well, what are you going to do?"*

Four days later, after Harris had given her supervisor a physician note allowing her to work with some restrictions, Harris's supervisor received a list of probationary employees from his management identifying those employees who were not meeting the City's standards for continued employment. Harris was then summoned to attend a meeting at which she was informed that although the City had heard *"a lot of good things about her,"* the City had no choice but to terminate her employment.

Harris then sued the City alleging Pregnancy Discrimination. During trial, the City requested the court to give the "Mixed Motive" jury instruction set forth in the now abandoned BAJI Jury Instruction No. 12.26 which reads, in pertinent part, *"If you find that*

the employer's action . . . was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision."

The court refused to instruct the jury with the language set forth in BAJI No.12.26. Instead, the court read to the jury an instruction contained within the Judicial Council's California Civil Jury Instructions ("CACI") identified as CACI No. 2500 -- generally referred to as the *Motivating Factor* instruction. In pertinent part, this jury instruction informed the jury that the City was liable for Pregnancy Discrimination if Harris's pregnancy, *"was a motivating reason/factor for the discharge."* The difference between these two instructions meant the difference between a plaintiff or defense verdict. Why? Because the CACI instruction did not provide the City with a complete defense if the jury found that the City would have terminated Harris for performance reasons even if she had *not* been pregnant.

Guided by the CACI Instruction 2500, the jury found for the plaintiff and awarded Harris $177,905. The trial court then made an award of attorneys fees to Harris's lawyer in an amount more than double the damages awarded to Harris: her lawyer was awarded a jaw dropping $400,000.

The City appealed. The City won.

B. Instructional Error Requires Reversal

While acknowledging that CACI civil jury instructions are now favored over BAJI Instructions, the Court of Appeal reasoned that just because CACI no longer offered employers a *Mixed Motive* jury instruction, that omission could not be used as an excuse to deprive the City of Santa Monica from a viable defense to Harris's pregnancy discrimination claim. Citing *Arteaga v. Brink's Inc.* (2008) 163 Cal App.4th 327, 344, the court opined that, *"the Mixed Motive defense remains good law available to employers in the right circumstances."* Accordingly, the court reversed the jury verdict and by so doing wiped out the $177,905 verdict entered in favor of Harris and the $400,000 attorneys fee award. The case was ordered to be re-tried with the jury to be instructed in conformance with BAJI 12.26.

The court's opinion in *Harris* is an archetypical example of effective lawyering. The City's attorneys wisely pressed the trial court to use what looked from all appearances to be an outmoded jury instruction. But it was a correct statement of law. By presenting the argument to the trial court, the City preserved its ability to utilize this argument as a ground for reversal. And, because of the City's efforts, California employers are now entitled to request a *Mixed Motive* instruction in appropriate cases.

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Case Watch: Age Discrimination Claim Against Google

The California Supreme Court is expected to set hearing soon on a case which could have high impact on claims of age discrimination in the workplace. The Court will consider whether isolated discriminatory remarks unrelated to decision-making about a plaintiff's employment status may be disregarded for the purpose of determining whether sufficient evidence exists to prevent summary judgment in the employer's favor. As for the remarks, which were disregarded by the trial court as "stray remarks" in granting dismissal of the case? Plaintiff claims that his colleagues referred to him as "old man" and "fuddy-duddy." *Reid v. Google, Inc.*, No. S158965 (Jan. 30, 2008).

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SEXUAL HARASSMENT TRAINING

Government Code section 12950.1 requires California employees to provide training and education regarding sexual harassment to all supervisory employees.

California state requires at least two hours of sexual harassment training for all supervisors employed as of July 1, 2005. New hires and individuals promoted to a supervisory position must be trained within six months of assuming their position. Follow-up training is required once every two years.

Murchison & Cumming provides the necessary sexual harassment and prevention training for employers within California, including:

Information and practical guidance regarding statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and discrimination. Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.

To schedule an interactive training seminar, or for any other questions regarding employment practices, please contact Pamela J. Marantz at (213) 630-1070 or pmarantz@murchisonlaw.com.

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