# employment brief

Legal Developments Affecting Employers
Murchison & Cumming, LLP Management Advisors

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## Use Common Scents

*Employers are wise not to dismiss an employee's complaints regarding co-workers' fragrances, even if the employer thinks the complaints are unreasonable*


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We've all seen the signs reading "thank you for not smoking here." But how many times do we come across signs that read "thank you for not wearing fragrances here," or "this is a scent-free workplace?" Well, the latter is one that is becoming increasingly common, and the *drama* that prefaces such signs follow this general script:

> Employee 1 ("E1") informs employer ("E") that employee 2's ("E2") cologne is making her sick – causing her to cough, gag and have difficulty breathing. E asks E2 to use less cologne and E2 complies, but E1's condition worsens so E2 again reduces her cologne. Still E1 claims no improvement and has now missed several days of work, and there is a decline in her work

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> product [never mind that E1 has been preoccupied running her personal catering business while at her day job]. E1 then seeks an accommodation of her workspace, so E allows her to leave her cubicle and occupy an office. E1 also demands that E send a note to all employees, forbidding the use of perfume or cologne at the office. E1 then takes it upon herself to create signs

for each door to the office, warning all employees and visitors that the office is a "scent-free" zone. Though employees and visitors alike express disdain at such prohibitive language, E allows the signs to remain.

Did the employer in the above scenario do the right thing? Surprisingly, the answer is yes. The trend in employment law appears to be that the plaintiff/claimant generally prevails in cases alleging failure to accommodate an employee who is reacting negatively to fragrances and everyday household/office cleaning products – a reaction that is conveniently termed Multiple Chemical Sensitivity ("MCS"). Many individuals with underlying allergies or asthma believe they also suffer from MCS. MCS (also known as environmental illness) is defined generally as an inability to tolerate an environmental chemical or class of foreign chemicals. An individual who experiences limitations due to MCS may experience symptoms or reactions after being exposed to fragrances, cleaning products, smoke, pesticides, molds, office machines, exhaust from cars, paint and poor indoor air quality. The American Medical Association does not recognize MCS as an established organic disease because of the lack of scientific evidence. But is MCS a disability under the ADA, and in California under the Unruh Civil Rights Act? It can be for some, but not for others. That's because there are no "lists of disabilities" provided by either act. Instead, employers must make case by case determinations using the general definition contained in the act, while referencing the EEOC guidelines.

When a California employer is placed in a position of having to decide whether or not an employee's accommodation request should be granted, the employer should recognize that the definition of disability in California is broader than the definition contained in the ADA. The ADA defines disability as a "physical or mental impairment that substantially limits one or more major life activities;" whereas the California law defines disability as "an impairment that makes performance of a major life activity 'difficult.'" And performing one's job is considered a major life activity. The scenario involving "employee 1" and "employee 2" is one that raises some uncomfortable issues for the supervisor, as "employee 2" will likely take the position that she is being picked on, harassed and deprived of her personal rights. While the employer can certainly sympathize with "employee 2," the reality is that there is no guaranteed personal right to use fragrances. And if "employee 2's" decision to wear a certain fragrance or a certain amount of fragrance impacts "employee 1's" major life activities, such as breathing or being able to do her job, the employer is better served contending with the complaints of "employee 2."

A 2010 Michigan district court case, *McBride v. City of Detroit*, Case No. 07-12794 (E.D. Mich., 2008), is currently the most relevant case in point. Plaintiff's supervisor here failed to implement a "no fragrance" policy in the workplace, or to reasonably accommodate Ms. McBride after her numerous complaints that a co-worker's fragrances made it difficult for her breathe at work. Ms. McBride sued the City under the ADA and the parties settled for $100,000 after the City's Motion for Summary Judgment was denied.

Whether this trend is right or wrong, the employer may be best served by simply accepting the realization that it is a lot easier for a plaintiff to sue an employer for failure to accommodate than it is to sue the perfume industry.

# Court Refuses to Trim Claws Back: Commissions Advanced for a Failed Sale are Subject to Claw Back

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*California Labor Code* section 223 has long prohibited employers from "clawing back" *wages* that have been *earned* by non-exempt employees. In this regard, *commissions* are defined in *California Labor Code* section 200 as "wages" which, when earned, cannot therefore be clawed back. But, what about *monetary advances* made to sales representatives on sales which have been made but which are not ultimately consummated because the customer fails to make payment or because the sale is lawfully canceled by the customer? Does section 223 prohibit employers from clawing back commission advances paid to sales representatives on sales which have failed?

The simple answer to this question is *no*, ***if*** (1) the employer has a clearly written policy in place before the sale is completed; (2) the employee on notice of the policy; and (3) the policy expressly states commission payments are *advances* which are not deemed earned until all conditions set forth in an applicable Compensation Plan has been satisfied. This is the holding of a relatively recent California Court of Appeal opinion in *Deleon vs. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800.

In *Deleon*, the plaintiff was a retail sales representative, who was entitled to receive commission advances pursuant to the terms and conditions of Verizon's various Sales Compensation Plans for Retail Sales. Contained within these Compensation Plans were what the trial court branded as "*crystal clear*" conditions placing its sales representatives on notice that commission payments were considered *advances* and not earned unless the customer kept his/her cell phone service in force for a defined "*chargeback period*." Because the claw-back provisions of Verizon's Compensation Plans plainly defined reasonable conditions which had to be satisfied before a commission would be deemed "earned," Verizon's ability to claw back commissions advanced on failed sales was deemed lawful. Recognizing an obvious reality in retail sales, the court in *Deleon* opined that if it were to hold commission advances unlawful, "*the likely result would be the elimination of commissions. . . . It would make no business sense to pay a commission when a retail representative has not made a commissionable sale*." Similarly, the court recognized the societal importance of encouraging employers to make commission advances to it sales representatives: *Without a chargeback policy . . . retail sales representative would have to wait for . . . years to earn commissions*."

There are some cautionary points which must be kept in mind if an employer is desirous of establishing an enforceable claw-back policy. First, while the court in *Deleon* did not require the employee to execute a written acknowledgement vouching for the fact that he understood the terms and conditions of Verizon's claw-back provisions, best practice would require the claw-back provision be acknowledged in writing by each sales representative subject to it provisions. Second, the question of whether a commission can be "clawed back" should be tied directly to the success or failure of the sale in question. It should not be linked to any other aspect of the employee's employment. Finally, the terms and conditions of a valid "claw-back" provision cannot be *unconscionable*. A claw-back provision is in jeopardy of being classified as being unconscionable if the time period in which the claw back can be sought is unlimited or is unreasonably delayed.

The court's opinion is *Deleon* is a step forward in recognizing the realities which shape the contours of the relationship between an employer and its retail sales representatives.

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# H.R. TIPS

## Policies Your Employee Handbook May Not - But Should -- Have

**Prohibition Against Off-the-Clock Work**

Handbooks usually cover the company's time-keeping procedures, which spell out the employees' obligations to accurately record the beginning and end times of their work day. However, this section in many frequently neglects an explicit prohibition against performing any work which is "off the clock," or not recorded. A handbook should ideally address off-the-clock work as a separate topic and should inform employees:

- Employees are prohibited from working off the clock, and they should not perform any work before clocking in or after clocking out.
- If they need to perform any task before they have clocked in or after they have clocked out, they must seek a time adjustment.
- Working off the clock will be considered a breach of policy and may warrant disciplinary action.

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