CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

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Federal Courts

ERISA

Bankrupt Company Breaches Its Fiduciary Duty by Failing to Consider Merger of Pension Plan into Union-Sponsored Multi-Employer Plan. A company that ran paper mills filed for bankruptcy. At issue were the company's pension plans and the manner in which they were terminated. To terminate the plans, the company purchased an annuity rather than merging the plans into a multi-employer plan sponsored by PACE International Union. PACE and several employees sued under ERISA charging that the directors and board breached their fiduciary duties by failing to adequately consider the plan merger proposal. The company argued that the plan merger was an impermissible means of terminating a pension plan under ERISA so its decision not to merge was a discretionary business decision and not subject to fiduciary obligations. The Ninth Circuit disagreed, holding that ERISA did not preclude merger into the PACE plan. Thus the bankruptcy court properly determined that the directors and Board breached their fiduciary duties by failing to thoroughly consider the PACE merger proposal and by failing to discharge their duties "solely in the interest of the participants and beneficiaries." *Beck v. PACE International Union*, 2005 U.S. App. LEXIS 22947 (9th Cir. Oct. 24, 2005).

California Courts

Workers' Compensation Is Exclusive Remedy For Employer's Alleged Disregard of Safety Procedures. Employees sued their employer for infliction of emotional distress after witnessing their co-workers die in an oil refinery fire. The fire was allegedly caused by the employer's intentional or negligent disregard for safety procedures and unsafe working conditions. The trial court granted the employer's motion for summary judgment, finding that the Workers' Compensation Act provided the exclusive remedy.

The Court of Appeal affirmed summary judgment, agreeing that workers' compensation should be the exclusive remedy. The court explained that regulatory crimes, such as an employer's intentional or negligent disregard for safety procedures or violations of health and safety standards, are actions that fall within the normal course of employment, and thus are "squarely within the bounds of the [Workers' Compensation] Act." Furthermore, "the proper inquiry is not the gravity of the misconduct, but whether the employer's acts are of the kind that are within the compensation bargain or a normal part of the employment relationship." The court also addressed and dismissed the plaintiffs' argument that they should be able to maintain their action because the conduct violated public policy. The court explained that all intentional management decisions that create safety hazards are contrary to public policy, but based on state case law, "even injuries caused by intentional creation of a hazardous workplace fall under the Workers' Compensation scheme." *Moylan v. Tosco Operating Co., Inc.* 2005 Cal. App. Unpub. LEXIS 9413 (1st Dist. Oct. 18, 2005).

Illegal Alien Is An Employee For Purposes Of Entitlement To Workers' Compensation. The issue was whether an individual — who was an alien and unauthorized to work in the United States — was an employee for purposes of entitlement to workers' compensation. The employer argued that the Immigration Reform Control Act (IRCA), a federal law, preempted state labor law protections for undocumented workers and that the individual fraudulently obtained employment. The Board rejected that contention and found that the individual was an employee. On appeal, the court ruled that the IRCA does not preempt California law which has declared immigration status irrelevant to the issue of an employer's liability to pay compensation to an injured employee. The Court of Appeal affirmed the finding that the individual was an employee. *Farmers Brothers Coffee v. WCAB*, 2005 Cal. App. LEXIS 1618 (2d Dist. Oct. 17, 2005).

Not Discriminatory To Terminate Injured Worker Who Could Not Perform His Job Without Risk Of Further Injury Or Reinjury. A health therapist sustained an industrial injury when he was assaulted by a violent patient. He returned to work with restrictions but

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eventually was removed from work because, according to the employer, his medical restrictions were inconsistent with the requirements of his job. The WCAB found that the employer discriminated against the employee by terminating him. The Court of Appeal disagreed, finding that the employer had proven its defense of reasonable business necessity. "An employer is not guilty of retaliatory discrimination when the employee cannot perform the customary work without risk of either reinjury or further injury." Thus, the WCAB's finding of discrimination was annulled. *County of San Luis Obispo v. WCAB*, 2005 Cal. App. LEXIS 1637 (2d Dist. Sept. 29, 2005).

Legislative Updates

Federal Developments

DOL Offers Guidance On Qualifying For Learned Professional Exemption. The U.S. Department of Labor (DOL) recently issued an opinion letter indicating that sales engineers who primarily perform engineering tasks qualify for the learned professional exemption under the FLSA even though they might also do some nonexempt sales work. The letter responded to an inquiry about sales engineers who are engaged in the production and distribution of motors for automotive components, audio and visual products, information and communication equipment, and home industrial products. As noted in the DOL letter, the company's sales engineers are required to have at least a four-year degree in mechanical or electrical engineering, and their work involves a combination of sales and applications engineering activities. While the engineers must increase sales, they also provide technical support, including resolving engineering related problems with customers and processing necessary engineering approvals. In addition, the sales engineer works on developing the next generation motor design. Based on these factors, the DOL opined that the sales engineers qualified for the learned professional exemption. (Wage and Hour Opinion Letter, FLSA 2005-28, 8/26/05 [released 10/17/05]).

DOL Offers Guidance On Recertification Of FMLA Eligibility. The DOL recently issued an opinion letter regarding recertification of FMLA eligibility in a new 12-month calendar year. According to the DOL, employers can request new medical certification when an employee seeks FMLA-qualifying leave for the first time in a new leave year. The letter was in response to an employer's question about whether an employee who qualified for FMLA leave for his own serious health condition may be asked to provide a new medical certification and not just a recertification for the first FMLA-absence in a new leave year. The employer also sought clarification of whether an employer could request a second and third opinion on this new certification, even though the employee's serious health condition was previously certified. The DOL stated that, "It is our opinion that an employer may reinstate the medical certification process with the first absence in a new 12-month leave year." The DOL further clarified that "A second and third medical opinion, as appropriate, could then be requested in any case in which the employer has reason to doubt the validity of the new medical certification." (Wage and Hour Opinion Letter, FMLA 2005-2-A, 9/14/05 [released 10/17/05]).

New IRS Guidance On Deferred Compensation. The IRS has issued long-awaited proposed regulations under new Internal Revenue Code Section 409A, relating to non-qualified deferred compensation. The new proposed regulations provide comprehensive, substantive guidance for complying with Section 409A. Seyfarth Shaw has written a *Management Alert* on the specifics of the proposed regulations. To view this October 17th alert, please visit our website at www.seyfarth.com.

OFCCP Issues Final Rule On Definition Of An Internet Job Applicant. On October 7, the OFCCP published its final rule on who satisfies the definition of an Internet job applicant for covered federal contractor recordkeeping and data collection. The new rule goes into effect on February 6, 2006 and will require all contractors to identify, where possible, the gender, race and ethnicity of each job applicant, regardless of the method used in applying for the position. To be an Internet job applicant, an individual must meet four criteria: 1) the individual submits an expression of interest in employment through the Internet or related electronic data technologies; 2) the contractor considers the individual for employment in a particular position; 3) the individual's expression of interest indicates the individual possesses the basic qualifications for the position; and 4) the individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position. The final rule makes clear that even job applicants who utilize traditional methods to respond to a job posting (e.g., mail, facsimile or personal delivery) will be treated as Internet Applicants if they learned of the vacancy on the employer's website and the employer advised potential applicants that they could submit a resume via these traditional avenues. An Internet Applicant would also include individuals who submitted unsolicited resumes by mail that were subsequently reviewed by the employer for a position it had posted on its website.

In addition, the rule requires that an employer retain records pertaining to any expression of interest made by an individual, through the Internet or related electronic data technologies, which the employer considered for a particular position. The rule distinguishes what records must be maintained by the employer if it is utilizing an internal resume database versus an external resume database, such as Monster.com. If the employer utilized an **internal** resume database, the following information must be retained: 1) a record of each resume added to the database; 2) a record of the date the resume was added to the database; 3) the position for which each search of the

database was made; and 4) for each search conducted, the date of the search and the search criteria used. If, on the other hand, the employer utilized an **external** resume database, the following information must be retained: 1) a record of the position for which each search of the database was made; 2) for each search conducted, the date of the search and the substantive search criteria used; and 3) the resumes of all job seekers who met the basic qualifications for the particular position and were considered by the employer, without regard to whether the individual met the definition of an Internet Applicant, along with any tests, test result, and interview notes.

California Developments

Gov. Schwarzenegger Signs One But Vetoes Several Other Employment Bills. Gov. Schwarzenegger signed Assembly Bill 1734, which exempts the motion picture and broadcasting industries with valid collective bargaining agreements from complying with the state's employee meal period law. In addition, the Governor vetoed Senate Bill 174, a bill that would have created a cause of action allowing employees to sue their employers if they are paid less than twice the state minimum wage for overtime compensation. He also vetoed AB 169, which would have created stiffer penalties for employers who violate state laws regarding sex-based pay discrimination.

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents please contact the firm's Labor & Employment Law Practice Group.

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