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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *March 2013*

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I.

LEGISLATIVE/ADMINISTRATIVE

Federal

U.S. Department of Labor Issues Final Rule Expanding Family and Medical Leave Act Protections

The U.S. Department of Labor ("DOL") has issued a final rule expanding military family leave provisions as well as eligibility provisions for airline flight crew employees under the Family and Medical Leave Act ("FMLA"). The new rule implements and interprets two statutory amendments to the FMLA: the National Defense Authorization Act for Fiscal Year 2010 and the Airline Flight Crew Technical Corrections Act.

Among other things, the final rule expands the definition of "serious injury or illness" for service members to include injuries or illnesses that existed prior to the service member's active duty that were thereafter aggravated in the line of duty; expands the amount of leave available to an eligible employee to spend time with his or her military family member on rest and recuperation leave; and permits eligible employees to use FMLA leave to care for veterans who have been discharged within the previous five years and who have a serious injury or illness incurred or aggravated in the line of duty where that injury or illness manifested before or after the veteran left active duty.

The final rule took effect on March 8, 2013. Additional information, as well as frequently asked questions, can be found on the DOL's website at http://www.dol.gov/whd/fmla/2013rule/militaryFR_FAQs.htm. In conjunction with issuing the final rule, the DOL has also updated its "Employee Rights and Responsibilities Under the Family and Medical Leave Act" poster, which employers with fifty or more employees are required to display. The updated poster can be found at http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf.

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II.

JUDICIAL

California

California Supreme Court Grants Review of Decision Allowing Class Treatment of Independent Contractor Misclassification Issue

The California Supreme Court granted review in *Ayala v. Antelope Valley Newspapers, Inc.* The Supreme Court will review the Second District Court of Appeal's finding that whether newspaper delivery carriers are independent contractors or employees is a question amenable to class treatment.

Maria Ayala, Rosa Duran, and Osman Nuñez worked as newspaper carriers (collectively, the "carriers") for Antelope Valley Newspapers, Inc. ("AVP"). They entered into Independent Contractor Distribution Agreements ("Agreements"), which set forth various newspaper delivery requirements. Among other things, the Agreements required the carriers to pick up the newspapers at a specified time, deliver the newspapers in a safe and dry condition, and use certain colors of bags for certain products. The carriers were required to furnish their own vehicles and provide AVP with copies of their driver's licenses, social security numbers, and proof of automobile and workers' compensation insurance. The carriers alleged that AVP incorrectly classified them as independent contractors and asserted claims for various Labor Code violations, including claims for unpaid overtime, meal and rest period violations, failure to reimburse for business expenses, unlawful wage deductions, wage statement and payroll records violations, and unfair competition. The carriers moved for class certification and argued that the central issue — whether they were employees or independent contractors — was amenable to class treatment. The trial court denied the request for class certification and the carriers appealed.

The issue before the appellate court was whether common issues regarding the carriers' employment status predominated, and thus whether class treatment was appropriate. To determine whether the carriers were employees or independent contractors, the appellate court primarily examined "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." Examining the Agreements and other AVP policies, the appellate court concluded that common questions existed as to whether AVP exercised sufficient control over the carriers' work, and when, where and how the carriers performed the services required of them.

The appellate court found that "much of AVP's evidence, upon which the trial court relied, merely contradict[ed] [the] plaintiffs' allegations that AVP had policies or requirements about how carriers must do their jobs." Although there may have been conflicts in the evidence regarding whether certain policies existed, that issue itself was common to the class. Accordingly, the appellate court determined that the carriers' claims for failure to reimburse for business expenses, unlawful wage deductions, and payroll records violations hinged on whether the

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carriers were employees, and thus were appropriate for class treatment. However, the appellate court agreed with AVP that individual questions of fact predominated with respect to the carriers' claims for unpaid overtime and meal and rest period violations, because the number of hours that each carrier worked each day and week varied significantly. As such, the appellate court affirmed the trial court's ruling with respect to those claims.

If the Supreme Court upholds the appellate court's finding that misclassification issues are subject to class treatment, employers can expect to see a surge of new class action filings. Employers should review their classification guidelines and systems now to ensure that all individuals performing work on their behalf are properly classified.

California Court Holds that Employee's Exhaustion of Pregnancy Disability Leave Rights Does Not Automatically Abolish Employer's Obligations Under the Fair Employment and Housing Act

In *Sanchez v. Swissport, Inc.*, a California Court of Appeal held that an employee who has exhausted her leave rights under California's Pregnancy Disability Leave ("PDL") laws may still assert claims for discrimination, failure to accommodate, and retaliation under the Fair Employment and Housing Act ("FEHA").

Plaintiff Ana Sanchez ("Sanchez") was employed by Swissport, Inc. ("Swissport") as a cleaning agent. During February 2009, Sanchez was diagnosed with a high-risk pregnancy, requiring bed rest. Sanchez requested and received approximately nineteen weeks of leave, which included her accrued vacation time as well as the time allotted under the California Family Rights Act ("CFRA") and PDL laws. At the end of the nineteen weeks, Swissport terminated Sanchez's employment. Sanchez alleged that she was fired because of her pregnancy, her pregnancy-related disability and/or her request for accommodations. She brought claims against Swissport for pregnancy, sex, and disability-based discrimination under the FEHA, failure to accommodate and engage in a good faith interactive process, retaliation, and wrongful discharge.

Swissport challenged Sanchez's complaint, arguing that because it provided Sanchez with all of the leave mandated by the PDL laws and the CFRA, it satisfied all of its obligations under the FEHA. The trial court dismissed the claims, and Sanchez appealed.

In reversing the trial court's ruling, the appellate court confirmed that an employee disabled by pregnancy is entitled to up to four months of disability leave, regardless of any hardship to her employer. Moreover, under the FEHA, a disabled employee is entitled to reasonable accommodation — which may include leave of no statutorily defined duration — provided that such accommodation does not impose an undue hardship on the employer. The appellate court additionally confirmed that the PDL rights afforded to an employee are *in addition* to her rights under the FEHA, and therefore rejected Swissport's argument that PDL laws contain the exclusive remedy for an employee seeking reasonable accommodation of her pregnancy-related disability. As the appellate court made clear, a finite leave of greater than four months may be a reasonable accommodation for a known

disability under the FEHA. Thus, the trial court erred when it accepted Swissport's contention that it had no further obligations under the FEHA once it provided Sanchez with four months of PDL leave.

This case serves as an important reminder that even when an employee has exhausted her PDL rights, the employer may still be obligated to engage in a good faith interactive process to determine if there is a reasonable accommodation (which may consist of additional leave) that can be provided under the FEHA.

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