

What's New and What to Expect - Employment Issues for 2010

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I. Uncle Sam Wants You To “HIRE”

Overview of the HIRE Act

- On 3/18/10, President Obama signed the Hiring Incentives to Restore Employment Act (“HIRE Act”)
- The Act provides a limited tax holiday for employers hiring “new” workers and a tax credit for retaining such workers.
- Goal – Stimulate the economy and bring people back to work.

The Tax Holiday Provisions

- Relieves a “covered employer” of its obligation to pay its 6.2% match for Social Security on the first \$106,800 of wages (potential savings of \$6,622)
- Applies to those workers hired after 2/3/10 but before 1/1/11 on wages paid between 3/19/10 and 12/31/10
- The employer must still contribute to:
 - Medicare
 - State and Federal Unemployment

What Is A “Covered Employer”

- Private sector employers
 - Both for-profit and non-profit
- Public higher education institutions
- Coverage does not extend to household employers
- Automatic coverage unless the employer opts out

No Double Dipping

- Employers who participate in the HIRE Act are precluded from availing themselves of the Work Opportunity Tax Credit (“WOTC”)
 - Potentially more lucrative
 - Federal tax credit of up to \$10,000/employee
 - Available if hire workers from targeted groups (unemployed veterans, disconnected youths, food stamp recipients, ex-felons, long-time recipients of government assistance)
 - Must obtain State agency certification

What Is A “Covered Employee”

- Began work after 2/3/10 and before 1/1/11
- Employed a total of 40 hours or less during the previous 60 days
 - Not hired to replace another employee (unless quit or fired for cause)
- Excludes family members
- Covers full-time, part-time, seasonal and temporary employees

The Business Tax Credit

- Rewards employers with a one-time bonus if retain newly hired employees
- Bonus is lesser of \$1,000 or 6.2% of wages
- Conditioned on the employee
 - Being employed on any date during the tax year
 - Continues to be employed for a period of not less than 52 weeks
 - Receives wages for the last 26 weeks of that period that are at least 80% of the wages for the first 26 weeks

Important Considerations

- Don't just hire to get the credit
 - Need continues to be the overriding concern
- Eligibility for the credit should be a factor, but not the overriding one in deciding between various candidates
- Determine which program delivers a better benefit
- Create and retain HIRE specific records for establishing business credit eligibility
- Remember, CPE is here to help.

II. Pigs Do Fly

Health Care Reform Is Here

The Big Picture

- Two bills were signed into law on March 23rd and 26th
 - The Patient Protection and Affordable Care Act
 - The Health Care and Education Affordability Reconciliation Act
 - Both laws have important consequences for employers and group health plans

The Big Picture (continued)

- Major focuses of the legislation:
 - Play or pay mandates
 - Coverage requirements
 - Small employer subsidies
 - Tax withholding and reporting
 - HSA/FSA/HRA limitations
 - Cadillac coverage excise tax

Play or Pay Mandates

- Effective 01/01/2014
 - Employers with 200 or more f/t employees must automatically enroll new hires
 - Employers with more than 50 f/t employees that do not offer coverage, and have at least one employee receiving a tax credit for coverage purchased through an “exchange”, must pay a penalty of \$166/month per employee (exclude first 30)

Pay or Play Mandates (continued)

- Exchanges are State run programs for individuals to purchase insurance if they earn between 133% and 400% of poverty level.
 - Employers offering coverage but have an employee receiving a tax credit and participating in the exchange must pay a penalty equal to \$250/month/employee (excludes employees receiving a free choice voucher).

Pay or Play Mandates (continued)

- A free choice voucher is available to employees earning less than 4X the poverty level where
 - The premium is 8 to 9.8% of an employee's income and employee opts to participate in the exchange
 - Employer contributes less than 60% of the value of the coverage

Coverage Mandates

- Plan year beginning on or after 09/23/10
 - Must treat children up to 26 as dependents
 - Cover preventative services such as immunizations and mammograms
 - Provide emergency service benefits without requiring pre-authorization and outright prohibition on additional cost sharing if out of network
 - No imposition of pre-existing condition exclusions on enrollees under 19 (total prohibition after 2013)
 - No rescission of coverage unless fraud or intentional misrepresentation of material information

Coverage Mandates (continued)

- Effective 01/01/2011
 - No annual or lifetime limits on “essential health benefits” (ambulatory patient services, emergency services, hospitalizations, maternity and newborn, mental health and substance abuse, drugs, rehab services, preventive lab services, chronic disease management)
 - Waiting periods for coverage cannot exceed 90 days

Small Employer Subsidies

- Employers with no more than 25 employees and average wages below \$50,000 are eligible for a tax credit for providing health coverage
 - Through 2013, credit is up to 35% of the employer's contribution if it contributes 50% of the premium
 - After 2013, credit of up to 50% of contribution for coverage if purchased through an exchange (2 years only)

Tax Withholding and Reporting

- Effective 01/01/2011, employers are required to report aggregate value of health benefits on W-2
- Effective 01/01/2013, Medicare portion of FICA tax increases to 2.35% from 1.45%

FSA/HSA/HRA

- Effective 01/01/2011, prohibition on tax free reimbursements for over-the-counter drugs
- Effective 01/01/2013, employee contribution to FSA limited to \$2,500
 - Does not include an amount employer may contribute

Cadillac Coverage Excise Tax

- Effective 01/01/2018, employers must pay a 40% excise tax on
 - Single coverage valued at \$10,200
 - Family coverage valued at \$27,500
 - Higher for individuals over 55 and those in high risk occupations (\$1650 / \$3450)
 - Includes FSA, HRA, HSA contributions

III. Disability Discrimination – More Headaches Courtesy of Our Friends in the California Courts

Employer Has A Continuing Duty to Inform Supervisors of Accommodations Previously Granted

- Plaintiff was 16-year employee of Albertsons
- Diagnosed with cancer but the treatment was successful
- Side effect was chronic dry mouth
- Plaintiff needed to drink constantly and take frequent breaks which Albertsons permitted.
- New supervisor placed in store who was unaware of the accommodation granted plaintiff – He refused to give her a break when short staffed
- What was totally predictable occurred

Employer Has A Continuing Duty to Inform Supervisors of Accommodations Previously Granted

(continued)

- Plaintiff sued alleging disability discrimination
- Albertsons argued: (a) acted in good faith; (b) this was a one time incident; (c) interactive process is a two-way street

Employer Has A Continuing Duty to Inform Supervisors of Accommodations Previously Granted

(continued)

- Court of Appeal upheld verdict in favor of plaintiff, holding:
 - A single instance of failure to provide the agreed upon accommodation constitutes a FEHA violation despite the employer's spotless prior record.
 - Once an accommodation has been granted, an employee has no continuing obligation to remind the employer of the disability or accommodation. Rather, the burden is on the employer to make sure the accommodation is given to the employee.

Employers Are Required to Identify and Offer Available Positions to Disabled Employees

- Case involved a long time employee of Time Warner Cable
- Very sympathetic plaintiff – military reservist – served in Iraq
- After injury to his back, could no longer work as a cable installer
- Company engaged in the interactive process
- However, it failed to search for and identify alternative positions. Rather, it simply allowed the plaintiff to apply

Employers Are Required to Identify and Offer Available Positions to Disabled Employees (continued)

- Plaintiff sued for disability discrimination and the Court found in his favor.
- Merely allowing employee to compete for job does not constitute reasonable accommodation
- Obligation was on the company to identify and offer him a job
- In other words, to prevail in such claims, the employer must show
 - Identified and offered reasonable accommodation
 - No vacant positions employee was qualified to perform
 - Employee failed to cooperate in the interactive process

Limitations on Fitness for Duty Exams

- Paper mill worker who injured his knee and took a leave of absence
- After completing rehabilitation, the employer requested he undergo fitness for duty examination
- Employee sent to 2 day exam. Undergoes a battery of tests, including:
 - Cognitive ability
 - Vision
 - Attitude

Limitations on Fitness for Duty Exams (cont'd)

- Plaintiff subsequently terminated and brought a claim for disability discrimination
- Without ever establishing he was a qualified individual with a disability, plaintiff prevailed due to the scope of examination
- The employer was not in a position to defend all aspects of the physical evaluation, or demonstrate each aspect was job related and consistent with business necessity.

EEOC Challenging Rigid Return to Work Guidelines

- 8/09 – Filed suit against UPS challenging policy terminating all employees absent 12 months
- 9/09 – Filed suit against Sears challenging policy terminating employees who had exhausted workers' compensation leave
- Eliminate policies that terminate employees based on arbitrary deadlines

IV. The New Face of Harassment Claims – The Impact of Roby v. McKesson

Roby v. McKesson

- Changes way we think about harassment
- Roby afflicted with panic disorder
 - Breaks out in sweat
 - Difficulty interacting with coworkers
 - Ultimately terminated for violating attendance policy which required 24 hours advance notice if miss work for any reason

Roby v. McKesson (continued)

- Manager demonstrated particular hostility to plaintiff
 - Ignored plaintiff
 - Prohibited plaintiff from attending office parties
 - Disciplined her in public
 - Chastised her
 - Described her job as a “no brainer”
 - Not say hello or goodbye
 - Turned her back when asked questions

Roby v. McKesson (continued)

- Roby sued for disability discrimination and harassment
- McKesson hit with \$2.8 million in compensatory damages, and \$15 million in punitives

Roby v. McKesson (continued)

- McKesson appealed the harassment verdict
- Argued harassment only applies to actions outside the course and scope of employment
- Should not apply to day to day actions of supervisors
- Court of Appeal agreed and threw out the verdict

Roby v. McKesson (continued)

- Supreme Court reversed
 - Harassment and discrimination separate causes of action
 - However, evidence often overlaps
 - A supervisor's actions even if falling within his/her personnel management responsibilities can be considered part of the totality of the circumstances allegedly creating a hostile work environment.

V. One More Impediment to Defending Discrimination Cases

Johnson v. United Cerebral Palsy

- One of the first cases to test the admissibility of “me too” evidence in discrimination case in California in light of Supreme Court decision in Sprint v. Mendelsohn
- U. S. Supreme Court held such evidence not subject to per se rule of inadmissibility. Rather examine on a case by case basis
- The more closely related, the more likely it is admissible

Johnson v. United Cerebral Palsy

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- Plaintiff fired one week after returning from pregnancy leave
- In opposition to summary judgment motion, plaintiff offered the declarations of 3 other employees
- All claim they became pregnant and were fired
 - Trial court excluded the declarations

Johnson v. United Cerebral Palsy

(continued)

- The Court of Appeal reversed. It found the declarations admissible because the 3 women
 - Worked at the same facility as the plaintiff
 - At the same time as the plaintiff
 - And for the same supervisor as the plaintiff

VI. Good News for Employers on the Arbitration Front

Existing Law

- General presumption that arbitration is a better forum for employers
- Agreements to refer employment disputes to arbitration are binding if:
 - Allow for the selection of neutral arbitration
 - Permit sufficient discovery to allow the parties to analyze the merits of the dispute
 - No limits on recovery
 - Employer pays the cost
 - Written award that can be reviewed by the Court
 - Mutuality

Sonic-Calabasas A. Inc. v. More

- General presumption that agency claims exempt from arbitration no longer the case
- The Court in Sonic – Calabasas found that:
 - An employee may sign an agreement waiving his right to relief before the Labor Commissioner
 - Doing so is not unconscionable, despite the fact plaintiff alleged he was deprived of certain rights before the Labor Commissioner

Sonic-Calabasas A. Inc. v. More (cont'd)

- Case does not hold but suggests may extend to claims employees file with DOL, DFEH, EEOC
- Beware of Congress. Legislation pending barring arbitration of employment disputes.

VII. Spying on Employees Might Be OK

Limited Surveillance Found To Be Legal

- Until recently, lack of clarity regarding employer's ability to secretly tape employees' activities at work
- Unclear whether employees' constitutionally guaranteed right to privacy trumped employer's legitimate interest in running its operations
- Court of Appeal in *Hernandez v. Hillsides* provided much needed guidance

Limited Surveillance Found To Be Legal

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- Employer ran a residential facility for neglected/abused children
- Hillsides had an email/computer policy which prohibited accessing offensive websites, and displaying/downloading/distributing sexually explicit material

Limited Surveillance Found To Be Legal

(continued)

- Employees were warned (a) no expectation of privacy; (b) company would monitor and record their activities
- Hillsides became aware of inappropriate websites access and installed hidden cameras
- Employees sued: (a) invasion of privacy; (b) intentional infliction of emotional distress

Limited Surveillance Found To Be Legal

(continued)

- California Supreme Court held:
 - Plaintiffs had reasonable expectation of privacy in office and that they would not be recorded without their consent
 - However, intrusion not unreasonably offensive and therefore not actionable because
 - Employer's policies created a diminished expectation of privacy
 - Purpose of surveillance appropriate

Caveats

- Never record audio without permission – Prohibited by California Law
- Video – best to notify employees

VII. A Further Blow to Employer's Ability to Protect Their Trade Secret

The Starting Point

- California Business & Professions Code §16600
 - “Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”
 - Strong public policy protecting employee freedom to compete with the employer.
 - Essentially prohibits non-competes unless certain exceptions apply.

What The Law Does Allow

- Courts in California have upheld post-termination employee restrictions designed to protect legitimate trade secret information
 - Agreement not to use employer's confidential lists to solicit customers for a period of one year following termination of employment was valid and enforceable and did not violate § 16600.
 - Non-solicitation covenants are enforceable only to the extent necessary to protect for employer's legitimate trade secrets.

The Narrow Restraint Doctrine

- Federal court decisions had adopted a “narrow restraint” doctrine – Employee restriction as to only a small or limited part of the business, trade, or profession would not violate § 16600.

Examples:

- Restrictions as to working with only one particular customer upheld.
- Contract prohibiting employee from going to work for a competitor within six months after exercising stock options was enforced by the court.

Impact of Edwards v. Arthur Andersen

- As an employee of Arthur Andersen, Edwards was required to sign agreement stating:
 - For 18 months, he would not perform professional services for any client he worked for during the 18 months prior to his termination.
 - For 12 months, he would not solicit any client he was assigned during the 18 months preceding his termination.
 - For 18 months post-employment, he agreed not to solicit any employee.

The Supreme Court's Ruling

- The Court rejected any post-employment non-compete restrictions, except those that fall within the express statutory exceptions (e.g., “sale of business” exception, or dissolution or withdrawal from partnership of LLC)
- The Court expressly rejected the “narrow restraint” doctrine.

More Detail

- “The Agreement restricted Edwards from performing work for Andersen’s Los Angeles clients and therefore restricted his ability to practice his accounting profession. The non-competition agreement that Edwards was required to sign before commencing employment with Andersen was therefore invalid because it restrained his ability to practice his profession.
- Accordingly, Edwards holds that a restriction that prohibits an employee from performing work even for just some clients or customers, is a sufficient “restraint” under § 16600 and is therefore void.

Non-Solicitation of Customers & Employees

- A broad non-solicitation clause with respect to customers would be unlawful, unless specifically limited to protecting confidential, trade secret information.
- Restriction limiting use of confidential information to solicit customers should be permissible, but merely labeling something “confidential” does not make it so.

Non-Solicitation of Customers & Employees (continued)

- Broad “no-hire” provision held unenforceable, but indication that narrowly tailored non-solicitation provision that does not impinge on policy favoring employee freedom of mobility may be enforceable.

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