

LABOR WATCH

A MONTHLY REPORT ON THE DEVELOPMENTS IN LABOR RELATIONS, EMPLOYMENT LITIGATION, IMMIGRATION, AND HUMAN RESOURCE MANAGEMENT

SCHOOL'S IN SESSION: ARE YOU PAYING TUITION?

It's August. Classes will be starting soon, if they haven't already and tuition bills will be coming due. Will you be paying them? If you're not, you may want to consider it. More and more employers are offering tuition assistance benefits to some or all of their employees who continue education while employed.

According to the March 2007 Bureau of Labor Statistics Survey, an estimated 49 percent of workers in private industry had access to work-related education assistance benefits in 2007.¹ That number increases to 79 percent for "management, professional and related" workers.

Employers offering tuition reimbursement programs are generally not intending to provide additional compensation for an employee's services. Rather, the programs serve employers' interest in maintaining a better-educated

workforce and promoting from within. With this in mind, employers should approve only those courses or areas of study that relate to an employee's present position or anticipated career path within the company. For example, a software company should not pay for an employee to take classes in sports therapy.

Additionally, employers should further ensure that they get some benefit from the education they pay for by requiring an employee to repay the benefit if the employee leaves his or her employment, voluntarily or involuntarily, within a given timeframe. Typical timeframes are one to two years. This requirement serves two purposes: (1) regardless of whether the employee's education proves directly beneficial to the employer, the repayment requirement serves as a retention tool because it creates an economic incentive for the employee to remain in the employer's service until the repayment-period has elapsed; and, (2) it ensures that the employer receives at least some perceived benefit from its educational investment.

Keep in mind that to make the repayment agreement enforceable, the employer should get the employee's promise to repay in writing. We recommend that any employer who is interested in implementing a tuition

reimbursement program create a stand-alone contract that is signed by both the employer and the employee. The contract should set forth all the terms of the program, including (but not limited to) how many credit hours are allowed, the total amount to be reimbursed, which schools, programs and/or courses are acceptable, how payment will be made, and the repayment requirement if the employee leaves within a certain time following receipt of the tuition assistance benefit. It may also be advisable to require the employee to sign a new agreement whenever tuition assistance is disbursed to the employee (e.g., each semester or school year).

Tuition assistance can be a valuable tool for both employers and employees alike. If you are interested in creating a tuition reimbursement program, or would like to have an existing program reviewed, please contact your Berens & Tate attorney.

--JENNIFER M. THIEL
jennifert@berenstate.com

WHAT'S INSIDE

Avoiding Family Responsibility
Discrimination 2

SPECIAL FOCUS:
Using Transitional Duty to Lower
Your Costs 3

Seasonal Hiring 4

The Ten-Minute HR Audit
(Series No. 6) 5

Taking the Call: Regulating
Employee Cell Phone Use While
Driving 6

¹ National Compensation Survey: Employee Benefits in Private Industry in the United States, (U.S. Dept. of Labor, Bureau of Labor Statistics, March 2007).

AVOIDING FAMILY RESPONSIBILITY DISCRIMINATION

Family responsibility discrimination, which is discrimination against employees based on their responsibilities to care for family members, is a growing area of liability. Employees and applicants who are being rejected for employment, passed over for promotion, subjected to a hostile work environment, and terminated based solely on employer's negative assumptions about caregiving responsibilities are successfully suing employers.

While federal EEO laws do not directly prohibit discrimination against caregivers, there are circumstances in which discrimination against a caregiver might equate to unlawful discrimination on the basis of a protected characteristic under Title VII or the Americans with Disabilities Act. Employees and applicants have also successfully utilized the Pregnancy Discrimination Act, the Family and Medical Leave Act, and the Equal Pay Act when an adverse employment decision has been based on parental or caregiver status.

Stereotyping is the most common feature present in family responsibility cases. Employers have made incorrect assumptions about how a parent or other caregiver will act or should act when making personnel decisions. These incorrect assumptions include the notions that a man should be the breadwinner rather than caring for children, a mother cannot focus as well or will be less committed to her job, productivity or attendance problems will surface because of caregiving responsibilities, or a parent with young children does not need to take on additional responsibilities. Even if an employer thinks he or she is acting in the best interest of the employee, adverse actions based upon such stereotyping can violate federal or state laws.

Recent discrimination case decisions demonstrate the need for employers to be cautious when making incorrect assumptions or adverse employment decisions based upon pregnancy or caregiving responsibilities.

- In *Lopez v. Bimbo Bakeries*,¹ a four-year employee was placed on involuntary and unpaid medical leave approximately one hour after informing her employer that she was pregnant. The employer assumed the pregnant employee could not perform her job despite only moderate work restrictions. After applying for and being denied another position, Mrs. Lopez considered an abortion but changed her mind when she discovered she was carrying twins. The employer sent a demand letter while Mrs. Lopez was out of town and Mrs. Lopez was subsequently terminated. The jury awarded the employee over two million dollars in compensatory and punitive damages.

- In *Frederickson v. Noble Venture*,² a pregnant woman was terminated shortly after beginning employment for arriving late and failing to communicate with her supervisors. The employee alleged she was terminated because her supervisor did not approve of her pregnancy as evidenced by comments indicating the supervisor would not have hired her had he known she would be taking maternity leave so soon and he did not think she would return after her maternity leave. A lower court granted summary judgment for the employer, but the appellate court reversed, finding enough evidence to create a *prima facie* case and sufficient evidence to contest credibility as to the real reason for the termination.
- In *Lehman v. Kohl's Dept. Store*,³ a state jury awarded an assistant store manager \$2.1 million in lost wages and punitive damages after she was repeatedly passed over for store manager jobs. Testimony established that those jobs were given to less experienced men, women without children, or women who assured the store that they would have no children. She also received less favorable job performance ratings when she was on maternity leave, was asked about breastfeeding, birth control and whether she planned to have more children, and was transferred to less profitable stores after each of her three pregnancies.

Employers can reduce their likelihood of being sued for family responsibility discrimination by closely examining policies including attendance and leave, hiring and promotion, work assignment, and pay to ensure decision making is not affected by parental or any other family caregiving obligations. Employers can protect themselves both by eliminating stereotypes about caregivers from personnel decisions and by proactively creating policies that provide support to employees who have caregiving needs.

--SUSAN M. SCHNEIDER
susans@berenstate.com

¹ *Lopez v. Bimbo Bakeries USA, Inc.*, Cal. Super. Ct., No. CGC-05-445104, (5/22/07).

² *Frederickson v. Noble Venture*, 2006 Minn. App. Unpub. LEXIS 252 (Minn. Ct. App. 2006).

³ *Lehman v. Kohl's Dept. Store*, Ohio Ct. Common Pleas, No. CV-06-581501 (5/25/07).

USING TRANSITIONAL DUTY TO LOWER YOUR COSTS

Often when a company wishes to reduce its workers' compensation costs, the focus on reducing the number of accidents takes precedence. Obviously, implementing and enforcing safety rules and instilling a safety culture in the workplace go a long way to help prevent accidents. As Benjamin Franklin once said, "An ounce of prevention is worth a pound of cure." However, regardless of how much your employees and management are committed to safety, by the law of averages, you will experience a workplace accident at some point, including the possibility of a claim involving lost time from work.

According to the National Council on Compensation Insurance, lost time reflects about 50% of the total costs of the average claim (with medical expenses comprising the remaining costs). One useful method to reduce lost time and the overall costs of a claim is to enact a "Transitional Duty," "Light Duty," or "Return to Work Program." When you bring an injured employee back to work, you eliminate lost time and reduce the chances the employee will seek an attorney. You also gain the opportunity to see the injured employee each day, which reduces the possibility of fraud and the need to hire a private investigator; not to mention, the injured employee is more likely to recover quicker while continuing to work as opposed to sitting at home. This can translate into less treatment, savings in medical costs, and a shorter claim period, all of which help reduce your insurance experience rating and premiums.

In addition to the obvious cost savings to the company, return to work programs provide other benefits, such as:

- Enhance communication with employees so they know what happens when an injury occurs and what to expect from the company;

- Reduce employee stress because they know work is available and they will be returned to normal wages as soon as possible;
- Increase employee morale and productivity;
- Give employees a sense of belonging to the company;
- Maintain workplace seniority;
- Maintain job skills;
- Prevent loss of physical fitness and muscle tone; and,
- Preserve employee benefits such as vacation and sick pay.

Once you decide that a return to work program is right for your company, consider the following to help develop, implement, and sustain your program:

According to the National Council on Compensation Insurance, lost time reflects about 50% of the total costs of the average claim (with medical expenses comprising the remaining costs). One useful method to reduce lost time and the overall costs of a claim is to enact a "Transitional Duty," "Light Duty," or "Return to Work Program."

1. Organize your team. An effective return to work program involves management, employees, medical provider(s), and your insurer's team (risk control, claims and possibly a case manager). Each group must know their specific roles and responsibilities and work together. You need designated individuals to coordinate the program, monitor assignments, track reporting and record keeping, and communicate with the medical provider and injured employee.

2. Review your jobs and determine the physical requirements of each job. Prepare written descriptions so the medical provider can assess the injured worker's ability to do the job. You should also identify and create a light duty job inventory with descriptions available in the event the employee is unable to perform the essential functions of the regular job. Every injury is unique, as will be the injured employee's restrictions. Therefore, you will want flexibility in the light duty tasks or jobs to ensure availability of work and compliance with the individual's restrictions.

(Continued on Page 4)

USING TRANSITIONAL DUTY TO LOWER YOUR COSTS *(Continued from page 3)*

3. Develop a written company policy and procedure which embodies the goal of the program as well as the components for carrying it out. Be sure to provide the policy to all employees through the company handbook and obtain a written acknowledgment evidencing that they understand the program.

After an injury, you should obtain confirmation from the medical provider that the injured employee is capable of performing one or more of the light duty jobs. Thereafter, you should mail a letter to the injured employee stating that transitional duty is available and failure to contact the company by a specified date may result in forfeiture of workers' compensation benefits.

4. As part of your policy, develop and include a list of preferred providers or facilities to offer to injured employees. Utilizing a provider or facility that specializes in occupational injuries and rehabilitation will help expedite the employee's return to work and reduce unnecessary medical costs.
5. Follow your procedures and enforce the policy consistently. If you have light duty work available, offer

it to every injured employee. Treat all injured employees equally to avoid the appearance of workers' compensation retaliation.

6. Hold all parties accountable, including both your employees and management. You can evaluate your managers and supervisors based on their compliance with the program elements and, in particular, how they accommodate employees in transitional work. You can hold injured employees accountable by offering the transitional duty, and if they fail to utilize it, following through with discipline for failure to report to work. Furthermore, you can ask your insurance company to suspend temporary total disability benefits because work is available.

With the cost of workers' compensation insurance rising steadily, every step you take to reduce workers' compensation claim costs will greatly benefit your bottom line.

-- PAUL E. LARSON
paul@berenstate.com

SEASONAL HIRING

It may seem strange to think of holiday hiring in the middle of August; however, it is never too early to begin the annual process of hiring holiday help. In fact, by starting early, employers may even be able to avoid some of the most common hiring mistakes that can cost employers headaches, lost efficiency, and, worst-case scenario, lost customers. When hiring temporary, seasonal help, employers should keep in mind the following pointers:

- **Draft a hiring plan** - Before any employees are hired, employers must make a forecast of how many positions must be filled. Employers should ask the question, "Is it more economical to offer overtime to my present staff?" If so, clearly fewer temporary employees need to be recruited, hired, supervised, and trained. Also, determine which available seasonal positions can be cross-staffed and which positions require experience. A hiring plan should drastically reduce unnecessary hires and, consequently, unnecessary costs.
- **Start early** - The hiring process can be analogized with holiday gift shopping. If you wait until the last minute to make your purchases, much of the merchandise is picked over. There are a finite number of available temporary employees. Human resource managers know their labor market and, thus, must gauge when to start recruitment based on the demand for these employees.
- **Repeat business** - If the company has used temporary employees successfully in the past, it should not be afraid to contact past years' seasonal employees. Less training and supervision is required of former

seasonal employees. Additionally, employees retired from the company are a good source of seasonal help. Furthermore, these former employees are available for sensitive positions that generally should not be awarded to one-time temporary employees.

- **Do not take shortcuts** - Seasonal employees should be hired using the same processes that regular employees go through. These employees will likely interact with customers and coworkers and have access to company property. Poor hiring decisions create the risk of high turnover, workplace misconduct, and lost revenue. Seasonal hiring is a costly endeavor but even more so if it must be done two or three times in a season.
- **Orientation** - Seasonal employees need an orientation in the same way that regular employees do. It is acceptable to provide an abbreviated version of the regular orientation, but it should not be eliminated. Seasonal employees should be clearly informed of expectations, company policies, and safety issues.

These planning, recruiting, and hiring guidelines are but one aspect of maintaining a viable seasonal workforce. However, proper hiring is the first and most important step in the process. If employers concentrate on hiring capable, trustworthy seasonal employees, training and retention through the holiday season should come relatively easy.

--TOM C. ANSCHUTZ
toma@berenstate.com

THE TEN-MINUTE HR AUDIT *(Series No. 6)*

As employees spend more of their paycheck for gas and food in today's environment of rising prices, many employees seek a second job with their employer to help ends meet. Unfortunately, many employers, in an effort to be helpful to their employees, have said "yes" to this reasonable request only to find themselves in hot water for wage and hour violations. If you have employees working two different jobs at your company, or if you may be faced with such a request in the future, this ten-minute audit is for you.

Do you have exempt employees performing a second nonexempt job? Allowing an exempt employee to perform nonexempt work has the potential to jeopardize the employee's exempt status which, in turn, makes them eligible for overtime. However, if the jobs are structured correctly, this potential problem need not come to fruition. The key is to examine the position in light of the job duties of both the exempt and nonexempt positions. If the employee still meets the eligibility requirements for exemption even considering the additional nonexempt tasks, the employee remains exempt and can work the second job without being eligible for overtime. In other words, if the employee's primary duty is exempt work, he or she will not lose the exemption. However, if the second job results in the employee performing more nonexempt work than exempt work, the exemption will likely be lost. Consider the following example:

Example: John Doe, your production manager, wishes to earn additional money by working eight hours on the production line on the weekend. The Company plans to pay him an hourly wage for the eight hours worked on the weekend plus his regular weekly salary. John usually works approximately 45 hours per week in his management position and very little of that position involves anything but exempt management work. In this case, since the nonexempt production work is such a limited amount of time, John remains exempt. However, if John decided to work every night and weekend performing production work, the result would be different, and his primary duty may shift to nonexempt production work making him eligible for overtime pay.

Do you have nonexempt employees performing two different jobs? Many employers mistakenly believe that as long as the two jobs are totally different, the time worked at both need not be added together when computing overtime. This is not the case unless the jobs are for two completely different employers. Rather, an employer must add the hours worked at both jobs and pay overtime for any hours worked over 40 in the work week.

If the wage rates for the two jobs are the same, the calculation of overtime is simple and is done in the same fashion as when the employee works only one job there are just more overtime hours. However, if the wage rates for the two jobs differ, the employer has two options for calculating overtime as described below.

Option 1: Pay overtime based on a weighted average.

Example: Jane Doe works 40 hours at her first job which pays \$15 per hour. She works 10 hours at her second job which pays \$10 per hour. Her overtime rate is calculated as follows:

$$\begin{aligned} \$15 \times 40 \text{ hours} &= \$600 \\ \$10 \times 10 \text{ hours} &= \$100 \\ \$700 \div 50 \text{ hours} &= \$14 \text{ regular rate} \\ \$14 \times 1.5 &= \$21 \text{ overtime rate} \end{aligned}$$

Option 2: Pay overtime based on the wage rate paid at the time the overtime hours are worked.

Example: Jane Doe works Monday through Friday at her first job for 40 hours at \$15 per hour. She performs custodial work for her employer on Saturday for 8 hours at \$10 per hour. Her overtime rate would be 1.5 times the \$10 rate (\$15) because the hours worked over 40 hours all fell during Saturday when her job paid \$10 per hour.

Example: Jane Doe works Monday through Friday from 8 a.m. to 5 p.m. at her job that pays \$15 per hour. She performs custodial work at \$10 per hour after her regular shift from 5 p.m. to 7 p.m. Monday through Friday. She will have worked 40 hours as of Friday morning. Therefore, she would receive \$22.50 ($\15×1.5) for the first eight hours of overtime on Friday for the work performed from 8 a.m. to 5 p.m. and \$15 per hour ($\10×1.5) for the last two hours of overtime for the work performed from 5 p.m. to 7 p.m. on Friday.

Keep in mind that the option of paying overtime at 1.5 times the rate paid for the work performed during the overtime hours is only allowed with the agreement of the employee prior to the work being performed.

If you have employees working two different jobs for your company, check your payroll records now to save a costly headache later. If you don't have any employees working two jobs now, prepare for future requests and ensure that the added cost of paying overtime does not place your business in a financial predicament.

--ANNETTE K. BURWELL
annetteb@berenstate.com

TAKING THE CALL: REGULATING EMPLOYEE CELL PHONE USE WHILE DRIVING

Your employee is driving to a sales meeting while talking on his cell phone on a work-related conference call when he strikes and kills a bike rider. Now the family of the biker has sued the employee-driver and your company for millions. Lawsuits like these filed against employers and employees who have harmed someone because they were simultaneously driving and on a business call are on the rise. In 2001, the city of Honolulu was ordered to pay \$1.5 million to a pedestrian who was struck by a state employee using a cell phone while driving. In another case, Smith Barney paid \$500,000 to settle a lawsuit in which an employee tried to make a work-related call on his own personal cell phone and struck and killed a motorcyclist. Finally, a lawyer talking on his cell phone--allegedly with a client--struck and killed a teenage girl. The employer was brought into the \$30 million lawsuit with the allegation that the law firm was negligent in failing to provide a cell phone safety policy.

Employer liability in such cases is based upon the fact that the employee-driver is acting within the scope of his or her employment, and that the employer benefits from the conversation and is liable for the conduct. Surprisingly, it doesn't even matter if the call is being made during business hours. Additionally, the lawsuits usually allege negligence by the employer for permitting employees to use cell phones without a proper cell phone use policy, training, and failing to provide safe equipment to employees for vehicular cell phone use. An increase in state laws banning or restricting cell phone use while driving only increases the potential liability faced by an employer.

As of July 1, 2008, 27 states and the District of Columbia have passed laws limiting cell phone use by drivers. State laws include bans on using cell phones while driving unless using a hands-free device,¹ sending text messages while

driving,² and banning some drivers from using cell phones altogether,³ including school bus drivers and drivers under 18. Employers whose employees use cell phones while driving should ensure that their company cell phone usage policies fully comply with these laws.

Creating or modifying a cell phone policy does not guarantee a defense to liability, but it may minimize the liability risk. Before drafting a cell phone policy, employers should examine the risks and benefits to cell phone use by its employees. It is important that any cell phone policy be enforceable and specific to the business of the company. For example, some employers have policies that completely ban cell phone use while driving, while others require employees to pull over to take a call or send a text message, or simply direct employees to use hands-free devices. At the very least, the policy should track the law of the state or states in which the employees will be traveling. Policies can also emphasize the importance of safety in taking cell phone calls or sending text messages on the road.

After settling on the policy, it is just as important to include the policy in your employee handbook and to educate and train your employees on the policy and the dangers of talking on a cell phone while driving. Doing so can not only protect your company from lawsuits, but improve the safety of the roads.

--KENNETH M. WENTZ III
kenw@berenstate.com

¹ CA, DC, NJ, UT, WA

² AK, CA, CT, DE, DC, ME, MD, MN, NE, NJ, NC, OR, TX, VA, WA, WV

³ AZ, AR, CA, CO, CT, DE, DC, GA, IL, KY, ME, MD, MA, MN, NE, NJ, NC, OR, RI, TN, TX, VA, WV

BERENS & TATE
YOUR EMPLOYMENT LAW SPECIALISTS

LABORWATCH (ISSN 1084-2160)
is published monthly.

To order, write:

Laborwatch Circulation Dept.,
10050 Regency Circle, Suite 400,
Omaha, NE 68114

call: (800) 729-1441 or (402) 391-1991

fax: (402) 391-7363

email: Laborwatch@Berenstate.com

visit our website: www.Berenstate.com

© 2008 Berens & Tate, PC, LLO,
10050 Regency Circle, Suite 400,
Omaha, NE 68114 (402) 391-1991.
Berenstate, PC, LLO is a law
firm with a nationwide practice
specializing in labor relations,
employment litigation, immigration,
and human resource management.

Publisher:

Kelvin C. Berens

Legal Content Editor:

Jennifer M. Thiel

LABORWATCH is designed to provide general information regarding recent developments in labor and employment law as well as human resources issues. It is not intended to substitute for legal advice based on specific facts in any individual case. For further information regarding any matters discussed in this publication, or on any labor or workplace issues, please feel free to contact any of the attorneys at the address above or e-mail us at berens@berenstate.com.