RECENT DEVELOPMENTS IN EMPLOYMENT LAW

It has been a busy few months on the employment law scene with two lawsuits of note to pass your way and a recent Appellate case that will impact the way you handle employees out on medical leave and their subsequent re-employment. The moral to each is that early identification of the a potential problem and then proper planning can save a business tens of thousands of dollars.

1. Wage & Hour Lawsuit - Proper Classification of Exempt Employees

Jim Ballard and Sarah Evans recently defended an Investment Securities Firm charged with violating State and Federal wage laws. More specifically, the plaintiffs attempted to certify a wage & hour class action that would have included over 150 employees arguing that the Investment Securities Firm had misclassified its brokers as exempt from overtime pay.

All employees are entitled to overtime pay unless he/she falls within a specific exemption to the established rules such as the Management or Administrative Exemption. As you have probably gathered from the recent news reports, wage & hour class actions are all the rage these days as employers have been called to the mat for not paying overtime or not mandating meal & rest periods.

Given the penalties, interest and attorneys fees that go into calculating the amount due to the potentially aggrieved employee, these cases can turn expensive in a hurry. This case was no different as the opening settlement demand exceeded $13 million. Through creative lawyering, extensive research on the legal issue of exempt status and a good mediation strategy, Jim and Sarah were able to resolve the case for less than $1 million.

This is no doubt a good time for you to make sure that your own employees are properly classified, that your job definitions reflect duties that would create exempt status (if applicable), that proper wages are being timely paid and that meal & rest periods are carefully defined and enforced. This is also a good time to make sure that your Employee Handbook is up to date and has been received (and acknowledged) by all of your employees. Jim Ballard, Dick Semerdjian and Ross Schwartz can assist you in reviewing your exempt employees to be sure he/she falls within an applicable exemption. We can also help you to update your Employee Handbook to reflect the current wage & hour standards. This time up front can save numerous headaches down the road.

2. Race Discrimination Lawsuit - Heading Off These Cases Early

Jim Ballard also recently defended a race discrimination case in Oakland that reinforces the notion that employers and, especially corporations, need to avoid jury trials at all

costs. In that matter, a long-time African-American employee sued his employer alleging that both his demotion and subsequent termination was based upon his race. Although the evidence strongly suggested that the employer had legitimate reasons for both the demotion and termination, the jury hung as to whether the actions were based upon race. Fortunately, the Court granted the majority of our motions for nonsuit following the jury's failure to reach a decision and the case has been gutted.

Some lawsuits will occur even if you do everything the "right" way and have good, legitimate reasons for the actions taken. But this case may have been avoided altogether had the employer retained an attorney to handle the investigation of the race discrimination allegations and/or negotiated a severance package complete with a release of all claims. Although this requires attorney fees up front, it would have been less than the cost of a jury trial and the risk that goes with that. The moral is that you never want to create a claim ripe for a jury and early resolution certainly beats the risks of allowing 12 typically employee-friendly peers to review the final employment actions taken. Jim Ballard, Dick Semerdjian and Ross Schwartz can assist you handling troublesome employees and navigating the treacherous waters of investigations, demotions and terminations.

3. Employees on Medical Leave - The Road Gets Tougher

California law makes it unlawful for an employer to discriminate against an employee because of his/her physical disability or to terminate an employee because of a physical disability. California law also requires an employer to provide reasonable accommodations to a disabled employee and to engage in a good faith interactive process with the employee to determine what reasonable accommodations can be made. While this may seem like simple mandates, in our experience, no area causes more confusion for the employer than handling employees out on medical leave and ready to return to the work force.

A recent Appellate Court decision only adds to the confusion involved with handling disabled employees. In Nadaf-Rahrov v. Neiman Marcus Group, Inc., the employee went out on a disability claim and many months later asked for her job back. In the interim, the plaintiff's doctor had opined that she was not physically fit for her old job and did not release her back to work. Despite the doctor's opinion, the plaintiff sought a list from the employer of all job openings within the company. Because the plaintiff's physical limitations would not qualify her for any job within the company and because she had not been released to resume work, the employer refused to provide a list of job openings and refused to engage in a good faith interactive process to determine what job, if any, she could fill. The employer did state that it would be willing to so engage once the plaintiff had been released to resume working. The employee sued the employer for disability discrimination and for its refusal to engage in the mandatory good faith interactive process to determine if any job would suit her unique physical requirements.

The trial court sided with the employer finding that the plaintiff was unable to perform the "essential duties" of her job and was not qualified for other jobs within the company. The Appellate Court, however, reversed the trial court's decision finding that the employer had not done enough to investigate the plaintiff's actual physical condition or to explore potential alternate positions. In making such finding, the Court illustrated how exhaustive the employer's efforts must be if it expects to avoid legal liability in dealing with employees out on disability claims. To wit:

1. The employer cannot avoid reviewing alternate positions merely because a doctor's note states that the employee is "unable to work." The Court interpreted this language to mean that the employee was only unable to perform her original job, and may not apply to all potential substitute jobs.

2. The employer must consider all vacant positions within the company that the worker could perform. For example, clerical jobs must be considered for employees who formerly performed only physical duties. This does not require creating a job or promoting the employee but there must be careful consideration of all vacant positions.

3. The employer must consider positions that are not yet vacant. Thus, a "reasonable accommodation" might include extending the employee's medical leave until a new position opens up.

4. The employer must consider vacant positions at other locations within the company if there are multiple locations. If the employee is willing to relocate, this may require a nationwide search for vacant positions that the employee could perform.

From an employer's perspective, there were two potential positives that came out of this case. First, the Court determined that the employee bears the burden of proving his/her ability to perform the essential functions of a job. Second, an employer may be liable for failing to engage in the good faith interactive process only if a reasonable accommodation is available. In other words, if there are absolutely no other jobs within the company, absolutely no accommodations that can be made for an employee and no way to continue to employ the disabled employee, an employer may be able to skip entirely the good faith interactive process by which such determinations are made. However, please note that the California Courts of Appeal are in conflict on this question with another appellate district holding that the good faith interactive process must occur even if no reasonable accommodation is possible. In fact, that Appellate Court would impose liability for such failure regardless of whether the employee can work with an accommodation and regardless of whether the employer has a job opening.

Confused yet? The Appellate Courts certainly are and we expect the Supreme Court to provide a definitive answer in 2009. For now, you should simply be aware that handling

a disabled employee and especially handling a disabled employee seeking reinstatement requires kid gloves and current knowledge of the applicable statutes and cases. You should err on the side of caution and always engage in a good faith interactive process to determine if reasonable accommodations can be made for the disabled employee. You should also consider the risks of terminating such an employee or refusing to provide reasonable accommodations.

You cannot be expected to follow the daily workings of the Courts of Appeal but we do. Let us help you with the good faith interactive process; let us help you determine what accommodations are reasonable; and, let us help you decide if that employee can perform the essential functions of the job. Our assistance in this regard may prove invaluable and we are ready to provide guidance on the myriad of laws affecting the way you employ and re-employ disabled employees. Please feel free to contact Dick Semerdjian or Ross Schwartz to discuss further.