Fenwick Employment Brief

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NINTH CIRCUIT CLARIFIES WHEN AN EMPLOYER IS A FMLA "SUCCESSOR IN INTEREST"

The Ninth Circuit Court of Appeals in San Francisco recently addressed the question of whether and under what circumstances a new employer qualifies as a "successor in interest" to an old employer under the Family Medical Leave Act ("FLMA"). The distinction matters because an employee is not eligible for the protections of the FMLA until he or she has worked for a specific employer (including the employer's "successor in interest") for at least 12 months. In *Sullivan v. Dollar Tree Stores*, the court applied a list of eight factors and ultimately concluded that defendant Dollar Tree was *not* a successor in interest to the former employer, Factory 2-U, because there were not enough similarities between the two entities. Based on that finding, the Court held that a former employee of Factory 2-U who had been working for Dollar Tree for less than 12 months was not entitled to FMLA benefits.

Plaintiff Christina Sullivan was the full-time manager of a Factory 2-U store for approximately four years until Factory 2-U filed for bankruptcy in 2004. Dollar Tree purchased Factory 2-U's leaseholds and opened for business in Factory 2-U's former location. Sullivan applied for and was hired as an assistant manager for Dollar Tree, and she was employed continuously throughout the ownership transition. After eight months of working as an assistant manager for Dollar Tree, Sullivan requested, but did not receive, unpaid leave to care for her sick mother. After she filed a complaint with the Department of Labor ("DOL"), the DOL concluded that Dollar Tree was a successor in interest to Factory 2-U, and Sullivan was eligible for leave under the FMLA even though she had been employed by Dollar Tree for less than twelve months. After Sullivan quit several months later, she commenced a lawsuit in federal court claiming interference with her FMLA rights and seeking lost wages.

The federal district court dismissed Sullivan's case on summary judgment, finding that Dollar Tree was not a successor in interest to Factory 2-U. The Ninth Circuit agreed, relying on the application of DOL regulations identifying a set of factors to determine whether a company is a successor-in-interest under the law. These factors are: (1) substantial continuity of the same business operation; (2) use of the same plant; (3) continuity of the work force; (4) similarity of jobs and working conditions; (5) similarity of supervisory personnel; (6) similarity in machinery, equipment, and production methods; (7) similarity of products or services; and (8) the ability of the predecessor to provide relief. Applying these factors to this case, the court concluded that successorship had not been established, emphasizing that Dollar Tree had not purchased any of Factory 2-U's assets beyond the leaseholds; Dollar Tree had not absorbed most of Factory 2-U's former employees (the plaintiff was one of only two persons hired from Factory 2-U); and Dollar Tree changed her job title and responsibilities and required her to undergo new training.

Whether a business qualifies as a successor in interest to an employee's former employer for purposes of the FMLA will ultimately be a case-by-case factual determination, but the Ninth Circuit's decision in *Dollar Tree* clarifies that such analysis should be guided by the eight DOL factors listed above.

NINTH CIRCUIT'S NARROW CONSTRUCTION OF THE "CREATIVE PROFESSIONAL" EXEMPTION EXPANDS THOSE ENTITLED TO OVERTIME PAY AND MEAL BREAKS

An opinion issued last month by the Ninth Circuit suggests that it will narrowly define the scope of the "creative professional" exemption to the Fair Labor Standards Act (FLSA). In *Wang v. Chinese Daily News*, the Court affirmed a ruling in favor of the reporters of a local Chinese language newspaper

who sued their employer for unpaid overtime and meal and rest break wages, concluding that the reporters did not satisfy the criteria for an overtime exemption under federal or California law.

In reaching its conclusion, the Ninth Circuit focused on the Department of Labor's regulation addressing the "creative professional" exemption. That regulation distinguishes between work requiring "invention, imagination, originality or talent" from work which depends primarily on "intelligence, diligence and accuracy." 29 C.F.R. § 541.302(d). With these distinctions in mind, the court explained that the primary duties of the plaintiff reporters in this case related to the recounting of public information as opposed to independent analysis. The court noted that the defendant's newspaper articles lacked the sophistication of the national papers, and that the intense pace at which the defendant's reporters worked precluded them from engaging in sophisticated analysis. It further noted that the managing editors maintained significant control over the paper's content. The Court concluded by emphasizing that the "creative professional" exemption was to be construed narrowly and that the majority of journalists are not likely to fall within its scope.

Employers should be cautious in deciding whether any of their employees are exempt from overtime pay under the "creative professional" exemption, which has been narrowly construed by the courts. The decision also emphasizes that it is the employer's burden to prove that any employees classified as creative professionals are engaged in work that primarily requires "invention, imagination, originality or talent" and not simply "intelligence, diligence and accuracy."

NEWS BITES

California Federal Court Rejects Request to Enforce Binding Arbitration Agreement

A recent ruling by a federal district court in California underscores the importance of a well-drafted and well-communicated arbitration agreement. In *Doubt v. NCR Corp.*, the court rejected NCR Corporation's motion to compel arbitration in an age discrimination and retaliation suit brought by a former NCR employee. Although NCR's Internal Dispute Resolution (IDR) policy provided that all disputes were to be resolved in binding arbitration before a neutral arbitrator, the court refused to enforce the arbitration clause on the grounds that NCR's IDR was procedurally and substantively unconscionable. With respect to procedural unconscionability, the court emphasized the fact that NCR notified employees of the IDR in an email and then posted it on the intranet, without ever asking them to sign it (rather, employees were informed that their continued employment and receipt of benefits would be deemed as a consent to the IDR's terms). The court found the "take it or leave it" manner in which NCR's employees were presented with the IDR as indicative of oppressiveness. In finding the IDR to be substantively unconscionable, the court pointed to the "non-mutuality" of the IDR's arbitration terms, including: 1) the IDR compelled arbitration for claims more likely to be brought by the employee, such as wrongful termination and employment discrimination, but exempted from arbitration claims more likely to be brought by the employer, such as trade secret misappropriation; and 2) the discovery provision in the policy was insufficient because it did not provide the plaintiff, the weaker party, with sufficient discovery to vindicate her claims.

This ruling is an important reminder that in order to ensure the enforceability of a binding arbitration agreement, employers should be careful to consider the *method* in which the agreement is delivered to employees in addition to its substance.

ADEA Defendant Compelled to Produce Broad Range of Emails and Documents as Potential "Background Evidence" of Discriminatory Purposes

A federal judge in Virginia held last month that a plaintiff in an age discrimination case was entitled to discovery of her former employer's personal and business emails, personnel files, performance reviews, and RIF-related documents. The 60-year-old plaintiff in *Marlow v. Chesterfield Cnty. Sch. Bd.*, a former employee of a Virginia county school board, brought a suit under the Age Discrimination in Employment Act (ADEA) alleging that the board had demoted and terminated her, reduced her pay,

altered the terms of her employment, and caused her to retire early on account of her age. When the school board refused to produce all of the documents and information sought by plaintiff's broad discovery requests, she brought a motion to compel. The judge granted the motion in part, reasoning that many of the requested documents—including personal emails to or from friends and family—could lead to evidence regarding the employer's disparate treatment of plaintiff or other employees on the basis of age, or alternatively could constitute "background evidence of the employer's attitudes, biases, or prejudices," which would be relevant to proving discriminatory impact.

This ruling suggests that in cases alleging disparate impact discrimination, plaintiffs may be entitled to examine a broad range of information to establish "background evidence" of an employer's discriminatory purposes.

Employee Sues for Harassment and Retaliation Arising from His Refusal to Attend All-Male Retreat

A case filed last month in Orange County, *Eggleston v. Bisnar/Chase LLP*, addresses the question of whether workers can sue their employers for harassment arising from offsite retreats. The plaintiff alleges that his former law firm stopped paying his monthly wages and became extremely hostile to him after he refused to attend an offsite "New Warrior Training" seminar organized by the Mankind Project. Eggleston alleges he expressed to his employer his concerns about the potential activities, including one which involved participants sitting naked in a circle and passing around a wooden phallic symbol. Eggleston alleges several causes of action in his lawsuit, including sexual harassment, retaliation, failure to pay wages and intentional infliction of emotional distress.

As demonstrated by this case, the issue of employers' liability for activities occurring at offsite retreats continues to be a litigious one. Employers should keep their potential liability in mind and implement careful, business-related activities in planning for an offsite retreat.

Notice to California Employers: New Workers' Compensation Posting Requirements Go Into Effect October 8, 2010

Effective October 8, 2010, California employers must comply with the following workers' compensation posting requirements resulting from recently passed regulations:

1) By October 8, all California employers must post a new "Notice to Employees--Injuries Caused by Work" poster, available at http://www.dir.ca.gov/dwc/forms/DWCForm7_2010.pdf, in a conspicuous location frequented by employees;

2) All California employers must distribute a new "Know Your Rights to Workers' Compensation Benefits" pamphlet, available for purchase through the California Chamber of Commerce, to all new employees who start work on or after October 8;

3) All employers must begin using a revised DWC-1 Claim Form/Notice of Potential Eligibility, available online at http://www.dir.ca.gov/dwc/forms/ClaimForm2010.pdf, that will need to be provided within 24 hours of receiving knowledge of an injury; and

4) Employers who utilize or who are implementing, changing or terminating a medical provider network (MPN) must create a MPN Notice to post in a conspicuous location and distribute copies to any employees injured on the job on or after October 8.

Failure to comply with the new posting requirements can lead to fines of up to $7,000 for each violation.