

TAKE REINSTATEMENT OBLIGATIONS SERIOUSLY WHEN EMPLOYEES CONCLUDE LEAVES OF ABSENCE

July 21, 2010

Many laws obligate employers to provide leaves of absence to eligible employees under certain circumstances, and to reinstate employees to work at the conclusion of their leave of absence. All too often, companies fail to reinstate employees at the conclusion of their leave, or discharge them soon after reinstatement, prompting claims that the company has either denied leave rights or retaliated against the employee for exercising such rights.

Businesses often seek to justify a decision to deny reinstatement by explaining that they learned during the course of an employee's leave that he or she had been performing poorly, or that the employee is not really needed. In the first scenario, companies may hire a temporary replacement to fill in for an employee on leave, or shift work from an employee on leave to another existing employee, only to find that the temporary replacement performs better than the employee on leave, or that the employee on leave had concealed mistakes or other performance shortcomings while at work. In other situations, companies discover that the work of an employee on leave is readily absorbed by remaining personnel, demonstrating that the employee on leave is not truly needed. In both of these common scenarios, the company seeks to justify a decision to deny reinstatement by citing its recent discovery that the employee on leave is either a poor performer or not needed at all.

Although an employer may truly discover performance deficiencies or overstaffing in the wake of an employee's leave of absence, it exposes itself to great risk of a claim by denying reinstatement on either of these bases. Leave laws which provide for reinstatement at the conclusion of a leave of absence (such as the family and medical leave laws, pregnancy disability leave laws, and workers' compensation laws, among others) are generally intended to assure that employees are reinstated to their regular jobs, or to substantially similar jobs, at the conclusion of their leave. Companies may lawfully deny reinstatement in some situations, such as those in which an employee would have lost his or her job even if leave had not been taken (as in the case of a plant closing or bona fide reduction in force), but employers leave themselves vulnerable to a variety of claims if they deny reinstatement in most circumstances. Indeed, aggrieved employees may argue that the reinstatement rules are intended to prevent scenarios such as those described above from occurring, since in each instance the decision to discharge the employee would not occur if the employee had not taken a leave of absence.

Although declining to reinstate an employee to work following a leave of absence is a risky proposition in most instances, employers may be able to reduce their risk of liability substantially if they permit the employee to return to work and base a subsequent discharge decision upon events occurring after reinstatement. Leaves of absence pose some of the more complex challenges faced by employers in the ordinary course of business, however, and employers are wise to confer with counsel before making any final decisions to terminate the

Palo Alto

San Jose

Burbank

employment of employees who have recently taken leaves of absence. If you have any questions about leaves of absence, or any other issue relating to employment law, please contact one of our attorneys:

| | |
|---------------------|--|
| Daniel F. Pyne, III | DPyne@hopkinscarley.com |
| Richard M. Noack | RNoack@hopkinscarley.com |
| Ernest M. Malaspina | EMalaspina@hopkinscarley.com |
| Karen Reinhold | KReinhold@hopkinscarley.com |
| Erik P. Khoobyarian | EKhoobyarian@hopkinscarley.com |
| Shirley E. Jackson | SJackson@hopkinscarley.com |

This Employment Law Advisory is published for informational purposes only and should not be construed as legal advice. This advisory is considered advertising under applicable state law.

IRS Circular 230 requires us to inform you that the statements contained herein are not intended or written to be used, and cannot be used or relied upon, for the purpose of avoiding federal tax penalties, or for the purpose of promoting, marketing or recommending to another party any tax-related matters.