Fenwick Employment Brief

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EMPLOYERS NEED NOT ACCOMMODATE EMPLOYEES WHO USE MEDICAL MARIJUANA

In a significant ruling for employers, the California Supreme Court recently held that an employer is not required to accommodate an employee who uses medical marijuana. In *Ross v. Ragingwire Telecommunications*, Ross used medical marijuana to treat his chronic pain at the suggestion of his physician. He applied to work for Ragingwire and received an offer as a systems administrator, subject to a drug test. Ross informed the clinic performing his drug test that he was using medical marijuana, and he gave the clinic a copy of his doctor's recommendation to that effect. After the results of his drug test came back positive, Ragingwire terminated Ross's employment. Ross sued, claiming that Ragingwire had violated the California Fair Employment and Housing Act ("FEHA") by failing to make a reasonable accommodation for his disability (and also thereby violating public policy).

The Supreme Court rejected Ross's claims, holding that the Compassionate Use Act of 1996 did not give medical marijuana users protection under FEHA. Emphasizing that marijuana is still illegal under federal law—even when used for medicinal purposes—the Court wrote, "FEHA does not require employers to accommodate the use of illegal drugs." The Court took particular note of the potential for abuse of marijuana and the employer's legitimate interest in whether an employee uses the drug. The Court also rejected Ross's argument that he was terminated in violation of public policy because there is no public policy in the employment context protecting his right to use medical marijuana.

The Court's opinion in *Ross* is significant because, until now, employers faced grave uncertainty with the question of how to treat disabled employees who use medical marijuana. While the legislature may change the Compassionate Use Act in the future to apply explicitly to the employment context, employers need not tolerate use of illegal substances by their employees and may continue the even-handed application of anti-drug policies.

NEWS BITES

Unnecessarily Broad Background Checks Halted As An Invasion Of Privacy

The federal Ninth Circuit Court of Appeals (San Francisco) has ruled that the government may not conduct broad background checks of low-level contract workers who do not work with classified material. In *Nelson v. Nat.'l Aeronautics & Space Admin*., NASA sought to conduct sweeping background checks on low-level contract employees of a private company working at its Jet Propulsion Laboratory. The background checks were part of the application process and governed by a Homeland Security Directive. The employees sued to stop the background checks from occurring, claiming, among other things, that the checks violated their right to privacy. The court agreed, noting that government intrusions into a person's private matters must be narrowly tailored to achieve a legitimate government interest. While the government's interest in national security was clearly legitimate, it could not show how the broad and highly private searches—which included inquiries into sensitive personal matters such as finances and mental health issues—were narrowly tailored to that interest when the employees were not working on matters directly connected to national security nor exposed to classified material. Although this ruling was limited to background searches conducted by a government agency, private sector employers should remain mindful of the privacy protections offered by state and federal law and carefully consider the appropriate breadth of proposed background checks.

FMLA Now Covers Leave To Care For Members Of The Armed Forces

The Department of Labor has announced that, effective immediately, the Family and Medical Leave Act (FMLA), as recently amended, will allow employees to take leave to care for a member of the armed forces. The new law provides that a "spouse, son, daughter, parent, or next of kin" may take up to 26 workweeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." The full text of the Department of Labor's announcement, including a link to the new law, is available at the Department of Labor's website at http://www.dol.gov/esa/whd/fmla/NDAA_fmla.htm.

Employee Terminated For Alcoholism-Related Absences Not Entitled To FMLA Leave

The federal Seventh Circuit Court of Appeals (Chicago) has ruled that an employee who missed work due to alcoholism was not entitled to FMLA leave for the time he missed before seeking treatment and in order to avoid being fired for excessive absenteeism. In *Darst v. Interstate Brands Corp*., the employer maintained an absenteeism policy that recorded "points" whenever an employee missed work. If an employee accumulated 32 points, he/she would be fired. The employee in question had accumulated 23 points prior to a subsequent series of alcohol-related absences during which time he entered into treatment for his alcoholism. When the employee sought FMLA leave for the time he received treatment, the employer called the employee's treatment center and verified the employee entered treatment after there were enough points to warrant termination. When the employer fired the employee, he sued under the FMLA, claiming the employer had improperly terminated while on leave and had improperly contacted his health care provider regarding his alleged FMLA leave.

The court found that employees are not entitled to FMLA leave for absences caused by substance abuse—as opposed to absences for substance abuse *treatment*—and upheld the employer's decision to terminate the employee. While the court also noted that the employer's effort to obtain information from the employee's health care provider was technically improper, it ruled that such conduct did not violate the FMLA because the employee was not entitled to FMLA leave, having already been terminated.

Eighth Circuit Requires Cooperation In Dealing With Conflicts Between Employer Needs And Employee Religious Obligations

In *Sturgill v. United Parcel Serv., Inc.*, the plaintiff's religious beliefs kept him from working between sundown on Fridays and sundown on Saturdays. UPS fired him because he refused to complete his route at these times. While other federal Courts of Appeals have required employers to accommodate the employee by eliminating the work conflict, the Eighth Circuit ruled that employers and employees should work together to accommodate both the employee's strongly held religious beliefs and work demands. The Eighth Circuit (St. Louis) upheld a jury award of $ 104,000 due to religious discrimination, but eliminated punitive damages because it found that UPS had not acted recklessly in refusing the religious accommodation.

Paying Employees With Out-Of-State Checks Can Create Problems And Liability

California requires employers to pay in-state employees with checks that may be drawn on an in-state bank instantly and without cost to the employee. In *Solis v. Regis Corp.*, the company paid its California employees with checks drawn on a bank in Chicago. The federal California court held that such payments were technically improper because the Labor Code's language requires strict compliance, even though many employees never experienced any difficulties or costs in cashing the checks. The court went on to impose penalties on

the employer for withholding wages when employees were not able to cash their checks instantly or without paying a fee. The court held that the employer was also liable for penalties under the California Private Attorney General Act for the instances where employees *were* able to cash their checks instantly and without a fee because the Act allowed the employees to recover damages for the technical breach of the law.

Forfeiture Of Stock Purchased Under ESPP Upheld

A California Court of Appeal recently upheld a policy providing that employees who resign or are terminated for cause during a two-year vesting period under an employer's stock purchase plan forfeit not only the purchased stock but also the money used to purchase the stock. In *Schachter v. Citigroup*, a class action had challenged such a policy, arguing that the employer's refusal to refund an amount equal to the value of the funds used to purchase the stock constituted an illegal failure to pay all wages due at termination of employment as required by California Labor Code Sections 201 and 202. The Court of Appeal disagreed, holding that the employees had voluntarily participated in the stock purchase program using the wages they had already earned. The court reasoned that the payment of wages occurs when the employer directs the funds allocated by the employee to the purchase of the shares pursuant to the terms of the plan. Thus, the employee received the wages and cannot complain of non-payment at termination.

California Supreme Court To Review Use Of "Sue-Your-Boss-Law" For Labor Code Violations

The California Supreme Court has granted review of an appellate court's decision in *Arias v. Super. Ct. San Joaquin County*, where the California Court of Appeal had ruled that suits to recover penalties for Labor Code violations may be brought as "representative actions" on behalf of current and former employees under the state's Private Attorney General Act—without the need for class certification. The Supreme Court's decision to review means that the appellate court opinion is not binding precedent. It keeps more stringent "class action" certification procedures in place rather than "easier-to-maintain" representative actions. You may find our summary of the earlier *Arias* decision in our September 10, 2007 FEB Publication [http://www.fenwick.com/publications/6.5.4.asp?mid=26].