

Paul Plevin & Sullivan LLP

Serving California Employers

Recent
Developments

This is the first edition of Paul Plevin & Sullivan's Electronic Employment Law Update. (May 27, 1999)

There have been two significant developments in the last week, and one development that is still in progress.

Summary

1. The U.S. Supreme Court held that an employer cannot presume that an individual who has filed for disability insurance benefits is necessarily unable to perform the essential functions of his/her job for ADA purposes.
2. The Federal Trade Commission issued an opinion that any investigation into employment issues done by someone outside the company must comply with the requirements of the Fair Credit Reporting Act.
3. AB60, the California bill to reinstate daily overtime pay requirements for California employers, is currently being debated in the Assembly.

U.S. Supreme Court Issues ADA Decision

On May 24, 1999, the United States Supreme Court ruled on the first of five ADA cases it has pending before it. In [Cleveland v. Policy Management Systems Corp.](#), the Court held that a plaintiff who pursued and received Social Security Disability Insurance (SSDI) benefits was not necessarily precluded from bringing a claim against her employer under the ADA for disability discrimination. The employer had argued that the employee's claim should be dismissed because she stated on her petition for SSDI benefits that she was unable to work due to her disability and was totally disabled. The employer reasoned that if the employee was totally disabled, she could obviously not perform the essential functions of her job and, thus, was not a qualified individual with a disability.

The Supreme Court held that there are many situations in which an individual might qualify for disability benefits under SSDI and still be able to perform the essential functions of the job with reasonable accommodation. Alternatively, an individual might be disabled at the time of her application for SSDI benefits, but her condition might have changed by the time of the relevant employment decision. The Court even noted that an individual might claim to be disabled while trying to obtain SSDI benefits, while alternately claim that she was not totally disabled in the ADA context.

Significantly, the Court noted that the plaintiff's sworn assertion in the SSDI forum that she was "unable to work" did "appear to negate an essential element of her ADA case [i.e. that she could perform the essential functions of the job] - at least if she [did] not offer a sufficient explanation." However, the Court held that plaintiff should be given the opportunity to explain her seemingly contradictory statements rather than having her ADA claim summarily dismissed based solely on her sworn statement in her SSDI application.

What this means: An employer cannot ignore its potential obligation to reasonably accommodate merely because an employee has stated that s/he is "disabled" in a disability insurance or workers' compensation context. Rather, an employer needs to make sure that any alternate explanations for how an employee is both "disabled" and "able to perform the essential functions of the job" have been investigated. When in doubt, an employer should undergo the required reasonable accommodation analysis for an employee with a disability, taking into consideration the employee's sworn statement as one piece of evidence regarding his/her ability to perform the essential functions of the job.

FTC Hampers Employers' Ability to Use Outside Investigators

On May 17, 1999, the Federal Trade Commission (FTC) issued an [opinion letter](#) that could substantially affect the ability of employers to use outside investigators (i.e. attorneys and/or consultants) for conducting workplace investigations. The FTC opined that the Fair Credit Reporting Act (FCRA) applies to any investigation into workplace issues (e.g. sexual harassment or workplace violence).

The FCRA was designed to protect consumer's privacy and to ensure accuracy, relevancy, and proper utilization of consumer reports. However, in order to avoid circumvention of the FCRA's goals, the terms "consumer" and "consumer reports" were defined very broadly - so broadly that the FTC concluded that "consumers" includes employees, and "consumer reports" includes reports concerning workplace investigations. As a result, the FTC has stated that the FCRA's restrictions apply to such investigations conducted by outside investigators. Significantly, the FCRA does not apply to an employer's own investigation.

The FCRA's restrictions include the requirement that the employer have the consumer (i.e. the accused employee) sign an authorization permitting the employer to obtain the report. If the report results in the employer taking any "adverse action," the FCRA imposes additional requirements, including providing the consumer with a copy of the report before taking the action.

What this means: The FTC's opinion is not law. Whether the courts adopt the FTC's reasoning is an open issue, particularly in situations where an operative investigation is mandated by other laws (e.g., sexual harassment). However, if the courts follow this opinion, it would discourage the use of any outside consultant for investigations, even though they are often used to ensure impartiality. Difficulties would exist if the accused refused to consent to an investigation. Moreover, the ability to have the investigative report covered by the attorney-client privilege would be eliminated if the report must be provided to the accused. This makes it more perilous for an employer to have an investigative report written because it could be used to skewer the employer if any misconduct is found to have occurred. Thus, employers must be extra cautious before having investigations conducted by any outside investigator and should weigh the costs and benefits of complying with the FCRA's requirements where an outside investigator is utilized.

Assembly Considers Bill to Reinstate Daily Overtime

California's Assembly is currently considering a bill ([AB60](#)) which would reinstate daily overtime for hours worked in excess of 8 in a workday. This occurs just about one year after California finally joined 47 other states in only requiring that overtime be paid after 40 hours in a workweek. This was a welcome change that allowed greater flexibility in scheduling for both employers and employees.

Significantly, the bill not only rolls back the law to its prior state, but it adds new requirements. For example, it only allows alternative workweek schedules of up to 10 hours in a workday and puts in place

a more restrictive scheme to obtain such an arrangement. It also increases the minimum salary necessary for an employee to qualify as an exempt employee. The new salary requirement would be 3 times the minimum wage, and the minimum wage may well be increased to \$6.75 per hour. This would mean that employees earning less than \$20.25 per hour (approximately \$41,000 per year) would not be eligible to be classified as exempt from overtime laws. Notably, the limitations on alternative workweek schedules do not apply if a union represents the employees. Moreover, most unionized employers would not be subject to the increased salary requirement for classifying employees as exempt. This law would take effect January 1, 2000.

What this means: According to the Assemblypersons, this bill has one purpose - to encourage employees and employers to embrace a union. The net effect of the bill would be to eliminate 12 hour shifts without overtime, to make all other alternative workweek arrangements difficult, and to significantly reduce the number of employees who are eligible to be classified as exempt. If this does not seem desirable, let your Assemblyperson know your viewpoint as soon as possible.

The Assemblypersons for San Diego are:

1. Howard Kaloogian, District 74 (North County, Carlsbad, Del Mar, Vista, Escondido, San Marcos) (916) 319-2174; howard.kaloogian@assembly.ca.gov
2. Susan Davis, District 76 (City of San Diego - Oak Park to Rancho Penasquitos) 916 319-2176; assemblymember.davis@assembly.ca.gov
3. Howard Wayne, District 78 (Coastal area from La Jolla to Imperial Beach) (916) 319-2178; howard.wayne@assembly.ca.gov
4. Denise Moreno Duchney, District 79 (National City, South San Diego, portions of Chula Vista) (916) 319-2079; denise.ducheny@assembly.ca.gov
5. Charlene Zettel, District 75 (Northern City of San Diego, East San Diego County, Poway, Ramona, Borrego Springs) (916) 319-2075; no e-mail given
6. Steve Baldwin, District 77 (El Cajon, La Mesa, Bonita, Santee, National City and Chula Vista) (916) 319-2077; steve.baldwin@asm.ca.gov

If you want further information on any of these developments, please feel free to call or e-mail Mike Sullivan ((619) 744-3655, msullivan@paulplevin.com), Fred Plevin ((619) 744-3650, fplevin@paulplevin.com) or any of our other attorneys ((619) 237-5200).

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