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Employment Law News

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Welcome to the second issue of **Murphy Austin's Employment Law News**. We've passed the first (and let's hope the last) COVID-19 anniversary. Employers continue to have a complicated array of COVID-19 laws and regulations to implement, including new or expanded COVID-19 leave laws discussed in this issue. But the continuing broadening of the COVID-19 vaccination program gives some hope that there is light at the end of the tunnel, so please also read our update on the latest guidance on vaccines and employees.

Although COVID-19 remains at the forefront of most employers' minds, it is still important for you to stay abreast of new wage and hour law developments. We review key points from new cases this past quarter in this issue.

Finally, we review the rules on an issue that frequently costs our clients' money – how do you handle the employee portion of group insurance premiums when your employee is on CFRA leave?

Sincerely,

Shawn M. Joost, Of Counsel
Murphy Austin Labor and Employment Law Team

NEW DEVELOPMENTS IN WAGE AND HOUR LAW

If Your Payroll Clerk Goes Rogue …You're in Trouble

By Shawn M. Joost, Of Counsel

The U.S. Supreme Court recently declined to review a Ninth Circuit decision in an important case on employer responsibility for the actions of low-level employees.

Employer Solutions Staffing Group (ESSG) contracted with Sync Staffing to recruit and place temporary employees at jobsites. ESSG handled the administrative duties associated with its employees, including processing their payroll. Sync prepared a spreadsheet each pay period of each employee's hours worked and sent it to ESSG. ESSG correctly trained its payroll clerk on how to calculate the number of regular and overtime hours and on how to

calculate the payroll accordingly to pay the required overtime. After the clerk prepared the first payroll report and sent it to Sync, a Sync employee called her and told her that she should process all hours as regular hours, but did not provide any explanation as to why. ESSG's payroll clerk then proceeded to prepare and process the payroll reports without any overtime hours, despite her training and despite having to override ESSG's payroll system's constant error messages, for an entire year.

ESSG was liable for unpaid overtime and penalties under the Fair Labor Standards Act (FLSA) for willful failure to pay overtime. ESSG's argument that it could not be liable for a low-level employee's actions was rejected by the court, which held that allowing an employer "to evade liability simply because none of its 'supervisors' or 'managers' processed the payroll would create a loophole in the FLSA" that would leave workers unprotected. Since the payroll clerk ignored her training, even though she received no explanation from the Sync employee that explained why the overtime rules did not apply and she overrode the error messages in the payroll system to produce the reports, she at least acted in "reckless disregard" of whether or not she was properly paying all wages due. Therefore, the violation was willful and ESSG was liable for penalties.

Finally, a willful failure to pay overtime means, by definition, that the employer did not act in good faith and is also liable for liquidated FLSA damages.

There are several lessons to be learned from this case:

- train all levels of employees on wage and hour law;
- conduct training at regular intervals;
- ensure your supervisors are reviewing their staff's work processes at appropriate intervals; and
- be sure your lower-level employees know who they should take instruction from, with clear lines of authority.

(*Scalia v. Employer Solutions Staffing Group, LLC* (9th Cir. 2020) 951 F.3d 1097 *cert. den.* 2021 WL 666405.)

Time Records Showing Noncompliant Meal Periods Create A Rebuttable Presumption of Meal Period Violations

By Shawn M. Joost, Of Counsel

All employers are required to keep accurate records of the start and end times of each non-exempt employee's work shifts, including the start and end of each meal period. All non-exempt employees who work more than five hours must be authorized and permitted to have an uninterrupted, thirty-minute meal period that begins before the end of the fifth hour of work.

If your time records do not show that your employees, i) took their meal periods; ii) took them on time; and, iii) took the full thirty minutes, the California Supreme Court recently held there is a rebuttable presumption that you violated the law.

While the court reaffirmed the existing law that employers are not required to "police" or "ensure" that employees take their meal periods, the court emphasized that employers are required "to give employees a mechanism for recording their meal periods and to ensure that employees use the mechanism properly." If time records are inaccurate or incomplete, it is the employer's burden to show that it authorized and permitted its employees to take compliant meal periods.

Pay attention to both of your responsibilities:

1. **Have a mechanism for employees to record their meal periods.**
   We regularly defend clients against meal break claims that arise because of faulty time-keeping systems. Time-keeping systems that create problems for employers include, i) automatically deducting a half-hour from each day's time with no clock-out or clock-in for meals; ii) supervisors recording clock-out and clock-in for meals for all staff with no method for employees to affirm or disaffirm the accuracy of the times; and, iii) systems that cannot be accessed by employees in the field or on the road.

   Be sure that you have a mechanism in place that allows employees to accurately record their meal periods, and you are halfway there.

2. **Ensure the employees use the mechanism properly.**
   This is frequently the more challenging issue. We often see time-keeping systems that are properly designed but improperly implemented. For example:

   - the employee time card shows the exact same meal period time every day, to the minute (usually, evidence that the time card was not filled in accurately); or
   - the employee time card shows regular late or short meals, but there is no evidence of the reason for the noncompliant meals.

Supervisors and payroll staff should be trained i) to review time cards for evidence of inaccurate use or of failure to comply with company meal period policies and ii) to take action to train and/or discipline employees who fail to use the time-keeping system properly.

With time records showing noncompliant meal periods constituting evidence that you failed to follow the law, it is critical to bring these systems and practices up to the necessary standards.

(*Dononhue v. AMN Services, LLC* (2021) 11 Cal.5th 58.)

Are You Rounding Times for Meal Periods? Stop!

By Shawn M. Joost, Of Counsel

The California Supreme Court overturned an appellate court decision approving the use of "rounding policies" for meal periods, finding that the thirty-minute meal period was too severely impacted by losing even a few minutes.

Employers can still use a "rounding policy" for the beginning and end times of work periods, as long as the policy is fair and neutral on its face and in practice.

(*Dononhue v. AMN Services, LLC* (2021) 11 Cal.5th 58.)

Are Your *Per Diem* Payments Really Wages in Disguise?

By Shawn M. Joost, Of Counsel

Employees who travel regularly for work are often paid a *per diem* amount to compensate them for travel expenses incurred. Those payments are not characterized as taxable wages and are not included in calculating the employees' regular rate of pay for overtime purposes.

That is okay if the *per diem* is really an expense reimbursement mechanism and not compensation for work in disguise. A recent case analyzing such payments found that the *per diem* payments at issue were really wages because:

- the payments were made at a default basis for seven days each week, even though employees generally traveled on three days each week;
- employees' *per diem* pay was docked if they had to leave their work site early due to personal reasons or illness, even though they still incurred the same travel expenses;
- employees could "bank" hours from a week they traveled more than three days and apply them to a week in which they traveled less than three days so that their *per diem* pay was not reduced in the shorter week.

If you are using a *per diem* payment as reimbursement for travel expenses, review your policy to make sure the payments are based on factors that are relevant to the estimation of travel expenses.

(*Clarke v. AMN Services LLC* (9th Cir. 2021) 978 F.3d 848.)

California COVID-19 Sick Leave – Retroactive to January 1, 2021

By Shawn M. Joost, Of Counsel

With the expiration of the required federal COVID-19 paid sick leave at the end of 2020, California enacted a new **COVID-19 paid sick leave law** that requires employers of 25 or more employees to provide eighty (80) hours of paid sick leave to full-time employees, with a *pro rata* amount for part-time employees. The paid sick leave law expires on September 30, 2021.

The sick leave is available for the following reasons:

- The employee is subject to a quarantine or isolation period as defined by the California Department of Public Health, the Centers for Disease Control, or applicable local health authority;
- The employee has been advised by a health care provider to self-quarantine;
- The employee is attending an appointment to get a COVID-19 vaccine;
- The employee is experiencing symptoms related to getting the COVID-19 vaccine;
- The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- The employee is caring for a family member who is subject to a public health quarantine or isolation period or who has been advised to self-quarantine by a health care provider; or
- The employee is caring for a child whose school or child-care provider is closed or unavailable for COVID-19 related reasons.

Employers may still obtain a credit against payroll taxes for the compensation paid to employees because the federal COVID-19 relief law extended the availability of that tax credit.

The law is retroactive to January 1, 2021; meaning that if your employee took leave for a covered reason before the law was enacted and makes an oral or written request for benefits under the new law, you must provide payment, if the prior leave was unpaid, and you may need to replace hours in the employee's regular sick leave or vacation bank and instead deduct them from the COVID-19 sick leave bank.

You must include the amount of COVID-19 sick leave available to the employee on your pay stubs or separate writing (just like you have to do for your regular California Paid Sick Leave.) Be sure you provide your employees with the required notice of the availability of these new leave benefits. **You can obtain the Labor Commissioner's poster for this purpose.**

You should review the **guidance issued by the Labor Commissioner's** office for details on when and how you can ask for documentation of the need for the leave, calculating the number of hours employees are entitled to, and the applicable rates of pay.

Federal COVID-19 Paid Sick Leave and FMLA are Expanded and Extended–But Voluntary

By Shawn M. Joost, Of Counsel

The March 2021 American Rescue Plan Act (ARPA) permits employers of 500 or fewer employees to provide paid sick leave and Family and Medical Leave Act (FMLA) COVID-19 leave on a voluntary basis. Employers who provide these benefits may obtain a credit against payroll taxes for the benefits paid through September 30, 2021. To claim the tax credit, employers offering the benefits must offer them to all employees.

The paid sick leave is expanded to provide leave time for purposes of obtaining a vaccination, recovering from illness after a vaccine, or waiting for the results of a COVID-19 test.

Under 2020's FFRCA, COVID-related FMLA leave was paid only for employees taking leave to care for their child whose school or child care provider was not available due to COVID-19. Under ARPA, FMLA leave is paid for all COVID-19 related purposes.

Review the **pertinent portions** of the ARPA for details.

What to do if my employees are vaccinated?

By Shawn M. Joost, Of Counsel

Some good news for employers – really! The Centers for Disease Control has issued **guidance** for fully-vaccinated people, removing the quarantine requirements for those who are exposed to COVID-19 under certain conditions. So, your exposed employee need not quarantine if he or she:

1. Was fully vaccinated at least two weeks prior to the new exposure; and
2. Has no COVID-19 symptoms.

Vaccinated employees must continue to follow all other health and safety guidance, such as distancing and mask-wearing, because there is not yet enough evidence to determine the risk of vaccinated employees transmitting the virus to others.

Employers Must Act Now on April 1 COBRA Subsidy Period

By Scott E. Galbreath, J.D., LL.M (Tax)

Under the federal health coverage continuation law, known as COBRA, a private employer with 20 or more employees that sponsors a group health plan must let individuals elect to continue their health coverage when it would otherwise end for certain reasons (such as job loss, divorce or the employee's death). Qualified beneficiaries with COBRA continuation rights include employees, spouses and dependents who would lose coverage because of

the event. Employers can charge individuals electing COBRA the full cost of coverage, plus an additional 2% to cover administrative costs. Individuals who lose employer coverage because of job loss (voluntary or involuntary) or a reduced work schedule can elect to continue COBRA coverage for up to 18 months (COBRA Continuation Period).

The American Rescue Plan Act signed by President Biden on March 12, 2021 contains relief from paying COBRA continuation coverage premiums, known as the COBRA subsidy (Subsidy), for former employees who lost healthcare coverage due to an involuntary termination of employment (except for gross misconduct) or a reduction in hours. Qualifying individuals can elect COBRA coverage and receive coverage without paying any premium. The coverage is subsidized by the federal government by allowing the employer refundable credits against its Medicare taxes. While the Subsidy is aimed at former employees who have lost health coverage due to the COVID-19 Pandemic, there is no requirement that the termination or reduction in hours be the result of the Pandemic. Identifying and communicating with former employees eligible for the Subsidy and administering it presents challenges for employers who should be taking action now to comply.

Action Needed. Any individual whether an employee or family member that has lost health coverage or will lose coverage during the period beginning April 1, 2021 and ending September 30, 2021 (Subsidy Period) are eligible for the Subsidy. The Subsidy should automatically apply to individuals receiving COBRA continuation coverage on April 1. Additionally, individuals who lost coverage prior to April 1 but did not elect COBRA coverage or elected such coverage but subsequently terminated it, who still have time on their COBRA Continuation Period within the Subsidy Period, may elect COBRA coverage with the Subsidy.

An otherwise eligible individual is not eligible for the Subsidy if he or she becomes eligible for Medicare or other group health coverage under another plan such as through a spouse or new employer's plan. However, individual market coverage such as through Covered California does not disqualify an otherwise eligible individual.

Additionally, employers can choose to have their group health plan permit individuals eligible for the Subsidy that are enrolled in COBRA coverage to switch to a different coverage option offered under the plan. The COBRA premium for the new coverage option must be equal to or lower than the coverage the individual was enrolled in. The plan must give individuals notice of their opportunity to switch coverage options and the individual has 90 days to make such election. While the intent of this provision is to allow those already on COBRA coverage to elect a less expensive option, providing this election complicates compliance even more. Additionally, because eligible individuals do not pay premiums during the Subsidy Period, there is no premium savings for switching to lower-cost coverage, unless their COBRA Continuation Period continues after the Subsidy Period ends on September 30.

Employers must give notice of the availability of the Subsidy to all eligible individuals by May 31, 2021. However, this means employers must identify all eligible individuals, provide them notice of the availability of the Subsidy, and provide them 60 days to elect coverage. Additionally, employers must provide such individuals with a notice when the Subsidy will end due to the end of the COBRA Continuation Period or due to the end of the Subsidy Period. Such notice must be provided no sooner than 45 days before the end of the applicable period but at least 15 days before the end of such period. The Department of Labor has issued model notices that employers can use to be considered in good faith compliance.

Steps employers must take include the following:

1. If the group health plan provides more than one option of coverage, decide whether to permit individuals on COBRA continuation to switch options.

2. Review the employment records of all COBRA eligible employees that lost health coverage due to involuntary termination (other than for gross misconduct) whose COBRA continuation coverage would reach April 1, 2021. This generally goes as far back as October 1, 2019. Likewise, the same review must be done for those eligible for COBRA coverage for an involuntary reduction of hours.

3. Provide the notice of the availability of the Subsidy and opportunity to elect such coverage to all such former employees and their family members who lost coverage as a result of the employee's loss of coverage.

4. Receive the elections to provide the coverage.

5. Provide the notice of the termination of the Subsidy or COBRA continuation coverage period.

Employers need to develop their compliance strategy now.

A recurring problem … Handling employee portions of insurance premiums for employees on leave.

By Shawn M. Joost, Of Counsel

Clients frequently call with problems arising because they have paid the whole portion of an employee's health insurance premiums while the employee was on leave. While the requirements for different types of leaves of absence vary, in general, employees on leave are required to continue to pay any portion of their insurance premiums that they paid prior to the leave.

Frequently, however, employers fail to give proper notice of the requirements or just continue to pay the premium to the insurer even though the employee is not paying his or her share. Employers are reluctant to have employee benefits cut off for fear of a retaliation claim. This is understandable, and employers should always exercise caution in all actions regarding employees on a protected leave.

However, that does not mean employers have no remedies. For example, if an employee is on a California Family Rights Act (CFRA) leave, the regulations provide that, "Unless an employer policy provides a longer grace period, an employer's obligation to maintain health benefits coverage ceases under CFRA if an employee's premium payment is more than 30 days late. In order to drop coverage, an employer must provide written notice at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the written notice unless payment has been received by that date." (2 CCR section 11092(d)(3).)

It is imperative to follow the requirements for providing the employee instructions on paying his or her premiums at the beginning of the CFRA leave before taking these steps and ensure that you have managed the leave properly. If done correctly, there is no need for employers to be left "holding the bag" for the employee's share of premiums.

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