NASHRM

A Practical Guide to High Risk Issues in the Workforce

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Gregory S. Fisher, Esq. | Partner | Anchorage

Davis Wright Tremaine LLP

Schedule

- Handling Disability Accommodations—Common Problems and Fixes
- News from the Wage and Hour front
- Break
- “Me Three?”—Breaking Trends in Sexual Harassment
- Protecting Business Interests—non-competes and related subjects
- Concluding Risk Management tips from “the desk of doom”
- Questions and concluding comments

Focus

- Brief review and summary
- Given time constraints, emphasis will be
  on practical considerations
- Risk management focus
- Please hold questions until end

Handling Disability Leave Accommodations: Common Problems and Fixes

Gregory S. Fisher | Partner | Anchorage

gregoryfisher@dwt.com

P: 907.257.5335

Scope

- Because of time constraints, we are assuming employee is disabled and/or is eligible for FMLA and there is a qualifying substantial serious health condition

- A comprehensive seminar would require 1.5 to 2 hours just to address all aspects of the ADAAA of 2008 and FMLA

Biggest problems with disability leave?

- Dialogue (no actual conversation occurs)
- Document (no documentation)
- Haste (people rush to a decision)

Biggest actual problems?

- Migraines, back aches, mental or emotional illnesses that cannot be objectively perceived

- Any leave-related issue that frequently occurs at intervals with no advance notice

Solutions

- All of these problems can be solved—or at least managed for risk—by staying true to three benchmarks:

  (1) Dialogue (true dialogue)

  (2) Document

  (3) Patience (be patient)

Remember

- ADA and FMLA do not grant an employee any **greater** rights
- However, no adverse action should be taken **because** of a disability or FMLA leave
- Reasonable accommodation is required

“Interactive Dialogue”

- Technically, Employee should broach subject, but practically Employer should take the lead if Employer has notice or reason to believe there is a problem

- May request a fitness for duty examination to see if employee can perform essential functions of the job 29 CFR 825.312

Reasonable Accommodation

- Tip: If your supervisors are supervising, you should know or have reason to know of circumstances suggesting Employee may need or want reasonable accommodation

- Should evaluate **reasonable** accommodations with emphasis being on **reasonable**

Reasonable Accommodation

- Do not have to restructure workforce
- Do not have to create positions
- May transfer to a lower-paying position in certain circumstances
- Unpaid leave may constitute a reasonable accommodation
- BOTTOM LINE—discuss options with counsel first

Note

- May still discipline employee for violation of workplace rules
- Build “attendance” into job descriptions and have an attendance policy

Key Steps

- Identify the problem in advance. Be proactive.
- Supervisors supervise. Managers manage. Make sure they keep an eye out for obvious clues –attendance issues, tardiness, performance issues—that may signal some type of problem
- Dialogue with employee (ask questions)
- Document

Fitness for Duty Examination

- Job-related and consistent with business necessity

- Reasonable belief, based on objective evidence, that employee's ability to perform essential functions is impaired by medical condition or direct threat is posed

Fitness for Duty--limitations

- If the condition already known, ability to request may be limited (and don't overuse)

- However, may request FFD to better evaluate scope of situation (for example, may ask Employee to provide documentation from his or her health care provider explaining the effects of medication on the Employee's ability to perform the job).

Fitness for Duty Examination

- Send Employee to his or her doctor with HIPAA release, WH 380 (FMLA request for information), and a copy of the job duties/description.

- Ask Employee's doctor to advise regarding Employee's ability to perform essential functions, prognosis, and whether reasonable accommodation needed

Good Source with Examples

- EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations, No. 915.002 (July 27, 2000)

- Available on-line

Disability Leave and Accommodations

- Dialogue—true dialogue
- Document
- Explore options
- Document
- Be Patient
- Document
- Confer with counsel

Accommodation Issues

- Can you force employee to take prescription medicine (combative employee with mental illness)?
- Can you force employee to make life-changing or behavioral-changing decisions (morbid obesity and surgery or gym)?
- Is unpaid leave an accommodation and, if so, for how long?
- When is patience exhausted?

Options

- Be flexible
- Solicit Employee's input and try to get the Employee to "buy-in" to an option that is reasonable and acceptable to all

Bottom Line on ADA and FMLA

- You should have your HR managers and assistants attend training
- Never make snap decisions
- Dialogue
- Document

News from the Wage and Hour Front

Gregory S. Fisher | Partner | Anchorage

gregoryfisher@dwt.com

P: 907.257.5335

Long-standing issues

- Two major wage and hour issues have plagued Alaska employers:

(1) Burden of proof for exemptions (beyond a reasonable doubt)

(2) Interpretative presumptions underlying exemptions (narrow construction)

- Both are now moving to the Alaska Supreme Court

- We'll review these issues, then discuss what is now happening

The “narrow construction” dilemma

- For decades, courts have instructed that exemptions under the FLSA should be “narrowly construed” or subject to a “narrow construction” meaning that exemptions should be limited or restricted

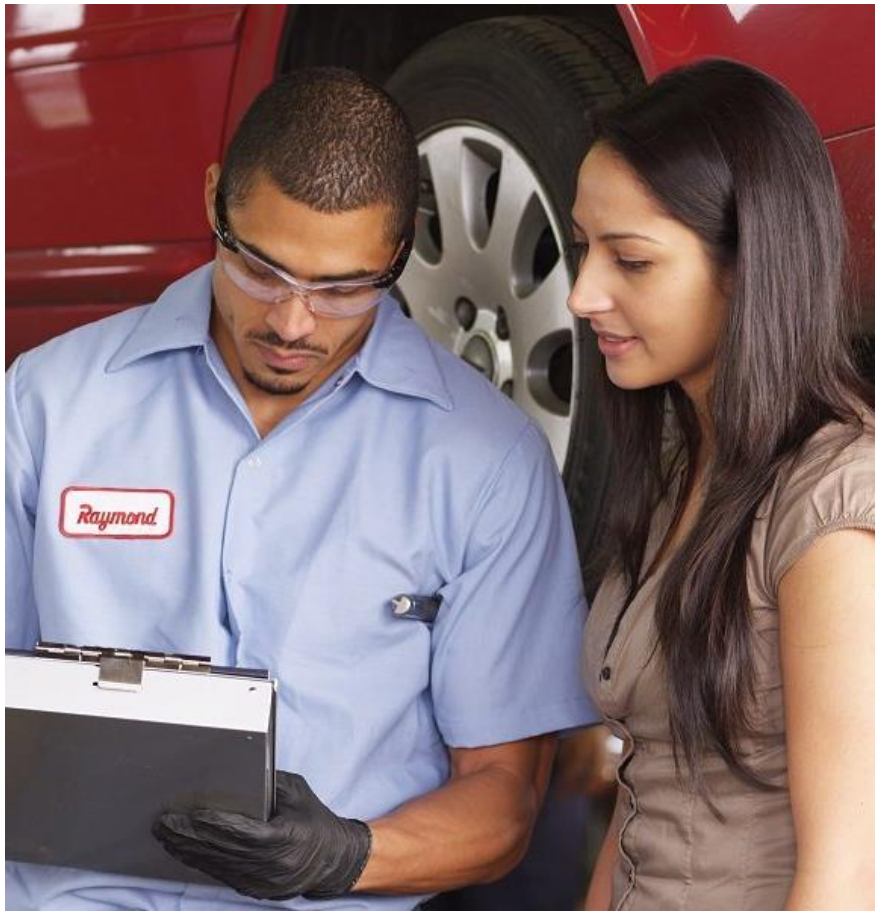
- Alaska has long-applied the same interpretative canon

- Criticism: there is actually no such requirement under the law

Encino Motorcars v. Navarro

- April 2018, U.S. Supreme Court holds that under FLSA auto service advisors are exempt salespersons engaged in servicing automobiles

- Court also instructs exemptions should be given a “fair reading” and do not have to be “construed narrowly”



The Upshot?

- The “fair reading” standard is widely viewed as a more even-handed, fairer standard than the old “narrowly construed” standard

- Under Alaska law, most white collar exemptions have the meaning of and are interpreted in accordance with the FLSA and its regulations. AS 23.10.055(c)(1)(2)

- Question: should the “fair reading” standard now govern the Alaska Wage and Hour Act, too?

Fred Meyer v. Bailey

- In November 2004, the Alaska Supreme Court reaffirms that the burden to prove wage and hour exemptions is by the “beyond a reasonable doubt” standard

Complications?

- This is the criminal burden of proof that is never used in civil cases. Extremely difficult for private employers to meet this burden.
- In all other contexts, the burden of proof for employers is by a preponderance of the evidence (employment discrimination, OSHA, and other claims)
- The federal standard under the FLSA is by a preponderance of the evidence. The same law and principles should be governed by the same standards.
- The BRD standard encourages employers to outsource skilled workers, who the lose jobs and benefits.
- It also makes it more difficult for smaller employers where managers often wear two hats

Complications (continued)

- The BRD standard makes it difficult to provide training opportunities for employees to climb the ladder to management
- The BRD standard is hard to apply in Alaska because we have so many remote workplaces and a large number of smaller businesses
- Under the best of circumstances, wage and hour exemptions are governed by dense regulations that rival the I.R.S. code in complex ambiguities. Conflicting and contrary interpretations are often encountered.

A fix? AWHA Amended in 2005

- One year after *Fred Meyer*, almost to the day, the Alaska Legislature amended the Alaska Wage and Hour Act
- Alaska adopted federal exemptions to govern most state exemptions to bring state law into line with federal law
- Alaska also emphasized that Alaska white collar exemptions have the meaning of and are interpreted in accordance with the FLSA and its regulations
- Legislature's goal was to make life easier for employers so that they would not have to struggle with two sets of legal requirements

But—*Fred Meyer* not overruled

- However, notwithstanding the 2005 amendment to the Alaska Wage and Hour Act, courts have continued to apply the *Fred Meyer* "beyond a reasonable doubt" standard
- End result is that employers facing wage claims are subject to different burdens of proof for the same claims. Can be liable under state law, but not liable under federal law.
- Question: does this make sense? Should Alaska overrule Fred Meyer and adopt the federal "preponderance of the evidence" standard?

To the Present: Buntin v. Schlumberger

- Federal court case, Travis Buntin v. Schlumberger, presents both issues
- Judge Burgess certified two questions to the Alaska Supreme Court:
- (1) Does *Encino*'s "fair reading" standard govern Alaska exemptions?
- (2) Should the burden of proof to analyze exemptions be by a preponderance of the evidence instead of beyond a reasonable doubt?

Status of Buntin?

- Alaska Supreme Court accepted certification
- Briefing will close soon (October 2019)
- Argument has been requested
- Alaska State Council for SHRM filed amicus brief

Break!

“Me Three”?—Breaking Trends in Sexual Harassment (compliance tips and practical notes)

Gregory S. Fisher | Partner | Anchorage

gregoryfisher@dwt.com

P: 907.257.5335

Types of Sexual Harassment claims

- Quid pro quo (rare): sexual favors demanded as term or condition of employment (e.g., “sleep with me to get the promotion you want”)

- Hostile work environment (more common): words or conduct make workplace offensive

Hostile Work Environment

- Offensive words or conduct sufficiently pervasive and severe to make the workplace unreasonably abusive

- All concepts are terms of art

Harassment: “severe or pervasive”

- One incident may be enough, especially if it involves physical contact or threats

- Typically, however, more than one incident is required

Harassment: "unreasonably abusive"

- Must be both subjectively and objectively unreasonable
- Subjective—employee found the words or conduct objectionable
- Objective—reasonable person with similar characteristics would find it offensive (reasonable victim standard)

Common causes and sources of claims

- Off color jokes (especially sent via e-mail)
- Pornography (in eye of beholder)
- Flirting that carries on too long or too far
- Comments or remarks
- Ogling

[these are merely some of the more common sparks giving rise to sexual harassment claims]

Other sources?

- “Pre-emptive strikes” from employee facing discipline or separation
- Good faith, if untimely, complaints following news articles or other publicity
- Training

Who can sexually harass your employees?

- Co-employees
- Supervisors
- Customers or vendors may also create actionable claims for which you will be liable

Affirmative Defense

- *Faragher/Ellerth* affirmative defense

- If employer has sexual harassment policy, and if no tangible adverse employment action was taken (no termination or no demotion, e.g.) employer may defeat claim by showing employee unreasonably failed to take advantage of policy to report and cure

- Make sure you have a policy

Same-sex sexual harassment?

- *Oncale v. Sundowner*: Yes, in theory

- This upcoming Term (October 2019-June 2020) the U.S. Supreme Court will also hear argument in two cases regarding whether Title VII protects gay rights (prohibits employment discrimination based on sexual orientation)

Sexual Harassment: Prevention Tips

- Policy
- Notice and acknowledgment of policies
- Training (periodic)
- Communication (open doors)
- Supervision (monitor)

Preventative Tips

- Check your computer use and e-mail policies to be sure sexual harassment issues are addressed
- But carefully analyze use of filters that may deny access for legitimate purposes
- Check with your IT people on your server tape and hardware—how long are emails preserved and what measures do you have in place to store or retrieve data?

Fraternization policies

- Some employers are adopting fraternization policies to avoid sexual harassment claims
- There can be practical problems and privacy concerns with such policies
- OTOH, appropriately drafted and implemented, such policies may help reduce claims

Investigations

- Never credit or discredit any complaint—accept the complaint, thank the person, and investigate
- Consider interim non-adverse measures (administrative leave or separate employees involved)
- Collect evidence/interview witnesses
- Analyze evidence and witness statements
- Confer with counsel

Credibility

- Is the complaint detailed or vague?
- Consistency
- Any obvious implausible dates or facts?
- Corroboration (other witnesses)
- Did the person have time and opportunity to witness?
- Any known bias or “back-story”?
- Time between event and complaint

Determination

- Confidentiality (don’t promise)
- Preserve evidence
- Reporting to complainant (explain what you can and cannot disclose, don’t leave complainant wondering)

Settlements and Severances

- Recent state and federal legislative developments are essentially preventing confidentiality or non-disclosure provisions in sexual harassment cases and providing for other tax treatment
- Alaska has not yet adopted similar provisions
- Always have counsel review

“Me Too” era--bottom Line

- Basic tests and standards have never changed
- Public more aware by impact of social media, news, and overall publicity
- Awareness is a good thing

Protecting Business Interests--non-competes and related subjects (practical safeguards)

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gregoryfisher@dwt.com

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Two Primary Types

- Employment Agreement (subject to certain tests, and increasingly struck down in other jurisdictions)

- Sale of Practice (courts will more readily enforce)

Scope defined by two elements

- Geographic restriction
- Time or temporal restriction (duration)

Basic Test

- Must be reasonable in scope, and
  reasonably related to a legitimate business expectation or interest

- Cannot operate as a restraint on trade

Justifications and factors

- Need time to train a replacement, and get replacement acquainted with patients, customers, or clients
- Are patients, customers, or clients exclusive?
- Is restraint necessary to protect business?
- Does restraint impose greater burden than is necessary to protect business?
- Public interest

Avoid cut and paste solutions

- Do you need a statewide restriction for a local medical clinic?
- Do you need a five year duration for an associate dentist?
- Times change and circumstances change—what may have been “reasonable” in context 5 or 10 years ago may no longer be reasonable

Evolving issues

- In some jurisdictions, medical care is carved out from non-competes under public policy rationale (Arizona is an example)
- Shortage of healthcare practitioners can make it difficult to enforce non-competes
- Cannot prohibit general advertising under FTC and First Amendment (commercial free speech)

Court modification of Non-Competes

- In Alaska, courts can essentially rewrite your non-compete to make it reasonable if they find the agreement was made in good faith

- There are no “black and white” or “failsafe” standards governing time or geographic scope.

- Evolving composition of judiciary

Other related concepts

- Anti-piracy (prevent patient, staff, or employee poaching)
- Works for Hire (copyright for software code for example)
- Trade Secrets (financial, business, or marketing plans)

Some common “fail-points”

- You cannot prohibit general advertising (commercial speech is protected speech)
- Patients or clients or customers are seldom “exclusive”
- Be careful of reverse claims for trade libel or defamation

Other Claims may provide relief

- Unfair Competition
- Misappropriation of Trade Secrets
- Computer Fraud and Abuse Act (for departing employee who pilfers information)

Non-competes—bottom line

- Never draft without counsel
- Periodically update or review
- Be reasonable

Concluding risk management tips from the “desk of doom”

Gregory S. Fisher | Partner | Anchorage

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Experience is a hard school …

- Off the cliff

The “Six Cs [and a Big D]”©

- Be in Compliance
- Be Clear
- Be Consistent
- Be Current (stay updated on developments)
- Be Careful (confer, consult, and collaborate)
- Be Cautious (avoid rash or snap judgments)
- DOCUMENT, DOCUMENT, DOCUMENT

Tips for all employers (especially smaller businesses)

- Embezzlement. Have your books audited and always be sure to check references for your bookkeepers.
- Office or equipment leases. Calendar all due dates.
- Insurance. Check with your broker about Commercial General Liability, Business Insurance, Malpractice, Workers' Comp, and other Insurance. Calendar all due dates.

Tips (continued)

- Schedule a HR audit or check-up every 12-18 months
- Schedule an in-house wage and hour audit every 12-18 months
- Compensable time and lunch hours (staff working at their desks during lunch)
- HR seminars by State (Fairbanks Second Wednesday seminars)

Questions?