

LABOR RELATIONS COUNSEL

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Unpaid leave provisions are extended for military families

Major changes to FMLA

On January 28th, President George W. Bush signed into law the first-ever expansion of the federal Family and Medical Leave Act. The recent amendment, passed as part of the National Defense Authorization Act of 2008, expands the FMLA in two significant ways:

■ First, the law now allows*the spouse, son, daughter, parent or next of kin (defined as the nearest blood relative) to take up to 26 workweeks of unpaid leave to care for a service member who is undergoing medical treatment, recuperation, therapy or is otherwise in outpatient status or is on the temporary disability retired list for a serious injury or illness. Such leave can be taken intermittently or on a reduced leave schedule if medically necessary.

■ Second, the law now permits an employee to take up to 12 workweeks of leave because of any qualifying exigency (to be defined by regulation) arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty in the armed forces in support of a contingency operation as defined by federal law (for example, military operations ordered by the Secretary of Defense, President or Congress). This leave also may be taken intermittently or on a reduced leave schedule so long as proper notice and certification has been provided to the employer.

However, 26 weeks of leave in any 12-month period will be the maximum amount of leave available under the amended law, regardless of the reason for the leave. In addition, a husband and wife who work for the same employer will be limited to a total of 26 weeks of leave. Since the FMLA requires that all employers post a summary of rights, current posters will have to be replaced with a new one as soon as it becomes available from the U.S. Department of Labor. New regulations and guidance also is expected in the near future.

Florida retaliation ruling

The Fourth District Court of Appeal recently held that Broward County's policy of suspending internal investigations once an employee files a charge with the U.S. Equal Employment Opportunity Commission or Florida Commission on Human Relations violates Florida law prohibiting retaliation against employees who oppose discriminatory practices or participate in the investigation of such practices. The case involved a white bus driver who filed an internal complaint with the county after he was passed over for promotion in favor of a black employee. However, once the white employee filed a charge with the EEOC and FCHR, the county closed its investigation. The stated rationale for the county's poli-

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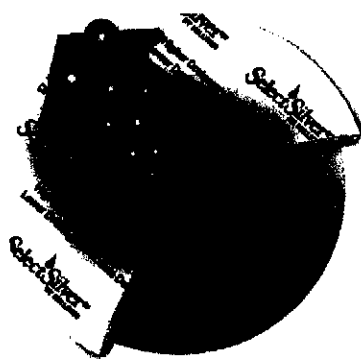
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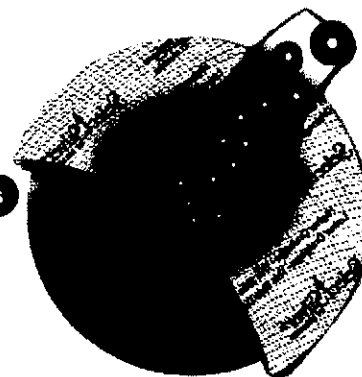
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Tuesday, March 18
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Wednesday, March 19
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FHCA-FCAL 2008 Annual Conference

Monday, August 4 - Thursday, August 7, 2008

Rosen Shingle Creek
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Trade Show is August 4 and 5

Labor Relations Counsel

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cy, which the court said appears to be reasonable, was that it furthered the goals of administrative efficiency and economy. Nonetheless, due to recent expansion of the federal anti-retaliation provision (upon which the state law counterpart was modeled), the court ultimately held that withdrawal of the internal investigation process could be viewed by a reasonable employee as materially adverse and, thus, retaliatory because it would force employees to forego the more expedient and less adversarial internal county process or hinder exercise of the employee's right to pursue a charge under the EEOC/FCHR administrative process if they opted for the internal process.

Reasonable accommodation

A recent decision from a U.S. Court of Appeals demonstrates the peril in ignoring an employee's request for reasonable accommodation. The case involved a deaf package handler who asked for assistance — specifi-

cally, either an American Sign Language interpreter or written notes summarizing regular employee meetings and training sessions (including such important matters as safety) — but who was denied any assistance. The evidence showed that co-workers tried to help the deaf employee because they felt sorry for him, but that management ignored his requests and failed for many months to do anything, despite internal company policy that promised assistance to disabled employees, the availability of an ASL interpreter and the reasonable alternative of providing written summaries of the meetings to the employee. The court affirmed a \$100,000 punitive damage verdict against the employer.

ADA violation

In another recent case involving the Americans with Disabilities Act, a federal court of appeals affirmed a verdict in favor of a supervisor with Parkinson's Disease. Immediately after the supervisor suffered a panic attack at work, senior management began treating him differently. They refused to join him informally for coffee or even to look at him. The company president sent an e-mail message stating that the supervisor was "qualified for ADA designation," even

though he had been cleared by his doctor to return to work with no restrictions. The company insisted that the supervisor be cleared by the company doctor before he returned to full duty, which did not happen for several weeks. After the company installed a new computer system, it failed to provide the supervisor with adequate training or assistance with writing, instead simply removing job duties from him because they feared he would make errors. Ultimately, the company terminated the supervisor in a reduction in force, retaining a newly-hired probationary employee and promoting a lower-level employee into a renamed "foreman" position that essentially performed all of the supervisor's job duties. The only other supervisor who was affected by the RIF was allowed to stay with the company in an hourly position, an opportunity that the plaintiff also had asked for but it was denied to him. The court examined the evidence and found that it supported a finding that the company regarded the supervisor as disabled due to his Parkinson's and terminated him unlawfully under the pretextual guise of an RIF. The court affirmed a \$177,000 award for back pay, plus compensatory and punitive damages of \$10,000 each and attorneys' fees.