



BVHRMA Newsletter

May 2010

Chapter #0330



Articles

Monthly Program & Luncheon

➔ Monthly Program and Luncheon

TOPIC: Conduct and Performance Issues under the ADA

➔ Calendar of Events and Diversity Dates

WHEN: Thursday, May 6, 2010

TIME: Lunch served from 11:30AM to noon;
Program from noon to 1:00PM

➔ Legal Briefs

WHERE: College Station Conference Center

COST: \$10/member & first time guest
\$15/non-RSVP guest

PROGRAM: Attorney Jacquie Brennan will discuss how to address conduct and performance issues, including use of alcohol and illegal drugs, for employees who have disabilities.

SPEAKER: Jacquie Brennan is an attorney with the Southwest ADA Center. A graduate of the University of Houston Law Center, Jacquie's interest in disability law started with her nine children, the youngest five of whom are adopted and have different kinds of disabilities. In addition to her work at the Southwest ADA Center, Jacquie is the Director of the Paralegal Certificate Program at the University of Houston. She is the President of the Board of Directors of two non-profit organizations -- Project DOCC of Houston and A Simple Thread. She serves on the Bioethics Committee at Texas Children's Hospital and the Ethics Committee of TIRR Memorial Hermann.

If Attending: RSVP to Katherine at rsvpprograms@gmail.com by noon on Tuesday, May 4, 2010

What's coming up?

October 10-13, HR Southwest Conference
www.hrsouthwest.com

Diversity Calendar: MAY 2010



Asian Pacific American Heritage Month

Jewish American Heritage Month

Mental Health Awareness Month

Women's Health Care Month

1 - National Day of Prayer (United States)

5 - Cinco de Mayo (Mexico)

9 - Mother's Day (United States)

9 - Victory Day (Russia)

17 - Armed Forces Day

18 - Shavuot* (Jewish)

19 - Malcolm X's birthday (African-American, United States)

31 - Memorial Day (observed)

HR CORNER....It's Legal Briefs Time!!!

Welcome to Legal Briefs for HR, an update on employment issues sent to over 4500 HR professionals, in-house counsel and business owners all over the U.S. to help them stay in the know about employment issues.

Here's what's up springing up:

1. **Ax the Tax - Hiring Incentives to Restore Employment (HIRE)** became law on March 18, with the purpose of offering tax breaks to lure employers into hiring the unemployed. As explained last month, employers are exempt from 6.2% of payroll tax (equivalent to employer's portion of Social Security taxes) on persons hired after Feb. 3, 2010 and before Jan. 1, 2011, if the person swears, in writing, to have been unemployed for at least 60 days, or worked no more than 40 hours for a different employer during the past 60 days. The payroll tax reduction can be taken by employers, starting in the second quarter of 2010. The IRS signaled it will provide a model affidavit for new hires to sign, swearing that they meet the unemployment requirement. This is a record, not a report, so employers should keep the affidavit on file rather than submitting it to an agency. You will not be required to use the IRS' affidavit, so long as your form contains the same info as the model affidavit. Thinking of cleaning house and hiring a bunch of new faces to get the exemption from taxes? Not so fast. The exemption is not available unless the incumbent being replaced by the new hire either quit or was let go "for cause." The new law also provides employers a general business tax credit of \$1000@ for each new employee hired during this timeframe who remains employed for at least one year (available on their 2011 income tax returns). Keep an eye on the IRS website (www.irs.gov), to get a copy of the model affidavit when it is released (and I will give it a mention via Twitter . . . see #11, below).
2. **Trafficking Becomes More Lucrative in CA - Sitting down?** The 9th Cir. recently reversed itself and found that an employee required to use a company car (while servicing customer sites from his home-based office) may proceed with his claim that he is entitled to pay for time spent commuting between home and the first job each day and again between the last job and return home, due to the degree of control exerted by the employer over use of the vehicle. With heavy traffic resulting in very long commutes, overtime would become the rule (not the exception) even though no additional work is being performed. What to do? You could say "give me the keys" but a less draconian approach is to examine your vehicle use restrictions. The ones that brought about this startling reversal were [1] no passengers; [2] no personal business; [3] no use of phone unless calling the office; and [4] employee must travel directly to/from home/work with no side trips or personal business along the way. *Rutti v. Lojack* (9th Cir. 3-10).
3. **Heads' Up, Pennsylvania Employers** - You are already subject to a state law that prohibits consideration of an applicant's arrest record during hiring and limits your use

of felony and misdemeanor convictions to deny employment, unless there is a direct correlation between the offense and the job sought. Now, the PA Human Relations Commission (PHRC) is mulling over a "guidance" which will presume a prima facie case of disparate impact discrimination, where a Black or Hispanic applicant claims employment was denied due to his/her criminal conviction. Before you pull all operations out of PA, consider that [1] the "guidance" will not have force of law (but the PHRC will use it in their decisions); [2] the guidance will not trump state and federal laws which require certain employers to run background checks and deny employment to convicted criminals in certain settings (e.g., child care facilities, nursing homes); and [3] the guidance explains how employers can rebut the presumption. The comment period was to run through March 2, but the link on the PHRC homepage for comments on the guidance (and a detailed description) is still up at www.phrc.state.pa.us/. Read up and fire away!

4. **Do You Know the Code?** - A credit union in WI is on the losing end of a case involving an employee they fired just before she filed for bankruptcy. The Bankruptcy Code (11 U.S.C. sec. 525) prohibits employers from terminating the employment of or otherwise discriminating against an individual who "is or has been a debtor under this title." The prohibition clearly applies to a person who has already filed, but what about just prior to filing? Here, the employee's financial woes were mentioned in the local newspaper. When her employer inquired, the employee replied that she and her hubby were going to file a joint bankruptcy petition. She was fired the next day, allegedly because her filing wouldn't look good for her credit union employer. After parsing the statute and looking at other cases, the Court compared the Bankruptcy Code with Title VII and other remedial employment discrimination statutes, finding that a broad interpretation was consistent with the purpose of the law (i.e., helping bankrupts get back on their financial feet) and her firing violated the statute. *Robinette v. WESTconsin Credit Union* (W.D. Wis. 2-10).
5. **Help for Heroes** - H.R. 1879, if passed, will add full-time National Guard duty to the types of military service which do not count toward the five-year limit on the amount of U.S. military service for which a servicemember retains reemployment rights under USERRA. The types of service which currently do not count against the five-year limit can be found at 20 CFR sec. 1002.103. And you can always track movement of pending federal bills at <http://thomas.loc.gov>.
6. **Jump in the Pool?** - Restaurants and hoteliers in the 9th Circuit (AK, AZ, CA, HI, ID, MT, NV, OR and WA), take note of a recent decision which found that tip-pooling of waitstaff with back-of-the-house employees (e.g., cooks, dishwashers) does not violate the FLSA, so long as a tip credit against the minimum wage is not claimed for any employee in the pool. Do, however, check applicable state law before making changes since some states regulate tip-pooling. *Cumbie v. Woody Woo, Inc.* (9th Cir. 2-10).
7. **Smoked Out** - Add MI to the list of states that have enacted state-wide bans on smoking in workplaces, effective May 1. Employers will need to eliminate designated

indoor smoking areas, add "no smoking" signage to entrances, removes ashtrays, educate employees on the ban and enforce the ban. For a copy of the law, go to www.legislature.mi.gov/documents/2009-2010/billenrolled/House/pdf/2009-HNB-4377.pdf. Also, check for local ordinances regulating workplace smoking, which may be more restrictive than the state law. A great website to research laws affecting workplace smoking is at www.no-smoke.org/pdf/100ordlist.pdf. The list of laws claims to be current as of April 1.

8. **This Recess is Not Fun** - Against the advice of 41 Republican Senators, Pres. Obama announced recess appointments for Craig Becker and Mark Pearce to the NLRB. The Senators' letter urged the President not to appoint Craig Becker, an Associate GC of the SEIU, union-side labor attorney, vocal supporter of the Employee Free Choice Act (EFCA) and a person who has opined that employers should be forced to remain mum during union organizing drives at their companies. With the appointments, the Board now has a quorum and will be steaming ahead on issues such as unions' access to employee via employers' email systems, the definition of a supervisor and, most likely, a push to create rules that look a lot like the EFCA (which did not get through Congress).
9. **Another "Bring Your Gun to Work" Law** - Add IN to the list of states that now prohibit employers from banning guns in their employees' vehicles while parked on the employers' premises. The IN version takes effect July 1 and allows guns and ammo in the vehicle so long as they are [1] locked in the trunk; [2] kept in the glove compartment; or [3] stored out of sight in the employee's locked vehicle. Other states with similar laws include AK, AZ, FL, GA, KS, KY, LA, MN, MS, OK and UT.
10. **Childcare Savvy?** - Did you know that the Texas Department of Family and Protective Services provides a list of licensed childcare providers and posts results of recent inspections at www.txchildcaresearch.org? You might pass that site along to your employees, as a resource to help them identify an appropriate provider for their young 'uns.

Until next time,
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If attending luncheon on May 6th:

Please RSVP to Katherine at
rsvpprograms@gmail.com by noon on
Tuesday, May 4, 2010