PERSPECTIVES

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THE STRENGTH OF PARTNERSHIP

January 2014

Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Employer Alert: New Legislation for 2014

It's that time of the year to be with family and friends, to give back – and, of course, to brush up on the new labor and employment laws for 2014. Below, we discuss a few of the most significant changes that will affect your workplace in the New Year. We advise that you consult an attorney for further information on the new laws and for recommendations for effective compliance. Scherer Smith & Kenny

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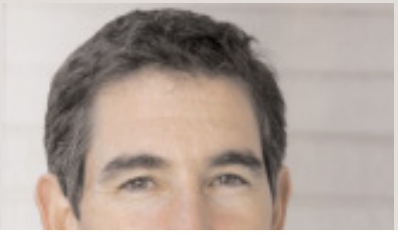

LLP remains available to assist you with questions and will continue to provide updates in our ongoing client communications.

Family Friendly Workplace Ordinance —Flexible Schedule for Caregivers in San Francisco

San Francisco employers should be aware that as of January 1, 2014, certain employees have the right to request a flexible work schedule without fear of discrimination or retaliation for their status or exercising their right to request an accommodation. An employer who denies the request must have a legitimate business reason for doing so.

In an effort to reduce "family flight" and make San Francisco a more family-friendly city, the San Francisco Board of Supervisors approved an ordinance allowing eligible employees (Employees who are employed in San Francisco, have been employed for six months or more by their current employer, and who regularly work at least eight hours per week for an employer with 20 or more employees.) to request a flexible or predictable working arrangement to assist with their caregiving responsibilities at home. This ordinance applies to a number of caregiving duties, whether it is for a child under the age of eighteen (18), a family member with a serious health condition, or a parent of the employee.

An employer must meet with an employee who requests such an accommodation within twenty-one (21) days of their request. Then, within twenty-one (21) days of the meeting, the employer must respond to the employee's request. An employer who denies such a request must do so with a written response that establishes a bona

Brandon Smith

Happy New Year! I trust that you and your families had a safe and enjoyable holiday. Hopefully this time allowed a chance to step back and give some thought to your goals and aspirations for this coming year. Whether you set specific goals or just thought about how you would like 2014 to be different than 2013, this is the perfect time to reflect on what did and did not work last year, and also how you picture this year unfolding.

fide business reason for the denial and provide the employee with notice that they may appeal the denial. Bona fide business reasons for denying such a request include (1) an identifiable cost of the accommodation, including the cost of productivity loss, retraining or hiring employees, or transferring employees to different facilities; (2) a detrimental effect on meeting customer or client demands; (3) the inability to organize work among other employees; and (4) an insufficiency of work that could be performed at the time the employee proposes to work.

Critics predict this ordinance could cause tension between employees and their employers and lead to unnecessary lawsuits. It will be important for employers to keep an eye on this law to see if it is challenged.

SB 292 – Definition of "Sexual Harassment" Modified Under Fair Employment and Housing Act, Amended Section 12940 of California Government Code

This bill, which clarifies that claims of sexual harassment need not be tied to conduct that is motivated by sexual desire, also went into effect on January 1, 2014.

This law was enacted in direct response to a Court of Appeal Decision, *Kelley v. Conco Companies* (2011) 196 Cal.App.4th191. *Kelley* involved allegations of sexual harassment by a male iron worker against his male co-workers who subjected him to crude, offensive, and demeaning comments which, in part, had sexual content, connotations and generally discussed sex. However, the Court found no sexual harassment because the plaintiff employee

From a business perspective, many business owners set goals or resolutions for their companies at the beginning of each year. Tailoring your business to help your customers and clients meet these goals is often a great way to grow your business and help your clients in the New Year. You can do this through offering goods or services that tailor to common goals, such as saving money, becoming more efficient or organized, or going green. For example, you might offer a new online tool to help your clients track all their orders or you might have a service that allows people to reduce their

was unable to show that the statements, comments, and actions were motivated by a sexual desire for him or otherwise resulted from his actual or perceived sexual orientation.

SB 292 overturns the *Kelley* decision and serves as an important reminder to employers to emphasize that sexual harassment can take many forms and to be diligent in prohibiting harassment in the workplace in any form. Well-written sexual harassment policies and employee hand books should prohibit sexual harassment regardless of form. It may be helpful to have trusted counsel review your policies and handbook to ensure they are updated.

AB 10 – Increase in Minimum Wage

Governor Jerry Brown has stated that California's minimum wage has not risen at the same pace as the state's rising costs and that an increase in minimum wage is overdue. In the next two years, California's minimum wage will increase dramatically. Effective July 1, 2014, California's minimum wage will increase to $9.00 per hour from its current rate of $8.00 per hour. Then, by January 1, 2016, California's minimum wage will again increase by $1.00 to $10.00 per hour. Prior to this wage increase, California's minimum wage had not been raised since 2008.

Note that some cities have higher rates, including San Francisco, which holds the nation's highest minimum wage at $10.74 per hour. If you are unsure about what the minimum wage in your city is, please contact your attorney. Failing to pay minimum wage may now require the employer to pay liquidated damages to the employee, in addition to existing penalties.

costs when hiring employees. If so, let them know.

You can also do it by changing how *you* interact with clients to help them achieve the same resolutions. An example of this might be something as simple as emailing invoices or as complex as setting up an electronic data room to coordinate multiple projects. The point is to think about what goals your clients might have for 2014 and then think about ways that you can help them achieve those goals.

The beginning of the year is also a great time to reset expectations among employees and to

SB 462 – Attorney's Fees for Prevailing Party in Wage Claims

This new law makes it much more difficult for employers who successfully defend cases against their employees for wage and hour claims to recover their attorney's fees and costs from the employee. Previously, pursuant to California Labor Code section 218.5, if an employer successfully defended a lawsuit brought by an employee seeking unpaid wages or benefits, the employer, as the prevailing party, could seek to recover its attorney's fees and costs against the employee. However, under this new law that amends section 218.5, an employer can only seek recovery of its attorney's fees and costs if the court finds the employee brought their claim in bad faith.

"Bad faith" is a fairly difficult standard to prove. Generally, employers must establish that the employee brought the lawsuit for an improper purpose, such as to harass the employer. However, even when an employee brings a case that lacks merit, so long as a court finds the employee had a sincere belief of a basis for recovery, it will likely not find bad faith.

Please contact Denis Kenny at dsk@sfcounsel.com for more information about these laws or any other employment-related questions you may have.

- *Written by Negin Yazdani*

revisit your company's mission statement to remind everyone of why they are here and what they hope to achieve together as a team. If you don't have a company mission statement, now might be the perfect time to figure out what values and goals you have for your company and to convey those to your team so that everyone is operating on the same page and working toward a common goal. Employees always work harder, more efficiently and are generally happier if they feel they are part of a larger team and know why they are doing what they are doing. I've found over the years that

Employer Penalties Under the Affordable Care Act

With the new year upon us, additional regulations related to the Patient Protection and Affordable Care Act ("ACA") continue to be delayed, explained, and implemented. As the biggest federal regulatory rollout in a generation, both government officials tasked with implementing, and employers subject to, the ACA's requirements are working to grasp its effect and understand its applicability. One provision of particular interest to business owners is the ACA's "employer shared responsibility provision" which assesses penalties of between $2,000 and $3,000 per employee for employers with fifty (50) or more employees and, perhaps more importantly, how this provision is applied to groups of businesses with common control of ownership.

While nearly all of the ACA's regulations are seemingly riddled with numerous exceptions, the employer shared responsibility provision generally imposes penalties on larger employers that fail to offer sufficient coverage to their employees. In beginning this analysis, the ACA's requirements look to see if the covered employer (*i.e.*, those with fifty or more employees) offers health coverage to its employees. If such an employer does not offer such coverage and at least one employee receives a tax credit or subsidy for health insurance in an exchange, that employer is assessed a penalty of $2,000 per employee for each employee in excess of thirty (30).

However, even should an employer offer health coverage to its

business owners often assume that everyone knows what the goals are and are working towards that goal. But that is usually not the case until it is specifically communicated by the business owner.

I hope that you take this opportunity to give some thought to 2014 and wish you the best in 2014. We look forward to continuing to provide outstanding service to our clients and to seeing you in this upcoming year.

- Written by Brandon Smith

employees, the ACA may apply a penalty if such coverage is not "affordable" (*i.e.*, costs no more than 9.5% of that employee's W2 wages) or does not provide "minimum value" (*i.e.*, constitutes a health plan that covers, on average, at least sixty percent of its total cost of incurred benefits). In instances where coverage is not affordable or does not provide minimum value, and if an employee subject to that plan goes into the marketplace to seek coverage outside of that offered by the employer and receives a tax credit for that coverage, the employer will be assessed a penalty of $3,000 for failing to offer sufficient coverage to that employee. (This penalty may not, however, exceed the aforementioned total of the $2,000 penalty times the employer's total number of employees in excess of thirty (30).)

Regarding both penalties, these amounts will increase yearly consistent with the growth in insurance premiums. Further, these penalty amounts are not tax deductible.

Finally, please note that the above fifty (50) employer threshold under the ACA does not nullify San Francisco's Health Care Security Ordinance, which applies to employers with twenty (20) or more employees doing business in San Francisco.

Of particular importance regarding the aforementioned penalties is how the fifty-employee threshold is applied to certain corporations with common owners or shareholders. The ACA's provisions utilize preexisting provisions within the tax code to determine whether the ownership of certain separate entities should be aggregated into a single "control group" under the ACA. Notably, the application of these provisions looks solely to ownership and not operational

control of these entities. Consequently, separate entities that have been owned for years by, for example, certain family members might now be treated as a single entity under the ACA via the applicability of these aggregation rules. The result of such aggregation may be a very rude awakening to business owners who find themselves surprised to be subject to the ACA's employer shared responsibility provisions and attendant penalties.

Thankfully, while the employer shared responsibility provision was set to go into effect as of January 1, 2014, the Internal Revenue Service (which has been charged with the enforcement of this particular facet of the ACA) has provided transition relief delaying employer shared responsibility provision payments until January 1, 2015. Nevertheless, employers should not delay familiarizing themselves with the ACA's reporting requirements, including whether they may be subject to the above penalties beginning in 2015.

We at Scherer Smith & Kenny LLP remain available to offer counseling and guidance with respect to the above requirements as well as other facets of the ACA and employment law.

To discuss these requirements further, please contact Denis Kenny at dsk@sfcounsel.com or Ryan Stahl at rws@sfcounsel.com.

- *Written by Ryan Stahl*

Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts

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