

PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

140 Geary Street, Seventh Floor ■ San Francisco, CA 94108-4635
Phone: (415) 433-1099 ■ Fax: (415) 433-9434 ■ www.sfcounsel.com

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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.



New Associate Joins Scherer Smith & Kenny LLP

We are pleased to announce that Negin Nina Yazdani has joined our firm as a new associate. Negin is a graduate of UC Davis School of Law, where among other posts and honors, she served as Managing

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Editor of the UC Davis Law Review and finished in the upper quartile of her class.

Negin will be working closely with Denis Kenny on litigation and employment matters. We hope that you have an opportunity to meet Negin soon and we look forward to her becoming a valuable member of our team.



Unpaid Leave - New Guidance on an Often-Overlooked Reasonable Accommodation

On December 30, 2012, the California Department of Fair Employment and Housing (“DFEH”) issued new final regulations concerning several provisions of California’s Fair Employment and Housing Act (“FEHA”). FEHA serves as California’s most significant protection against discrimination, harassment, and retaliation in the workplace (and is applicable to companies that employ five or more employees, though some of its provisions apply to companies with just two employees). These new regulations constituted the first amendment to FEHA’s regulatory framework since 1995. While the new regulations are expansive and will be subject to future interpretation in California courts, of particular note within them are new provisions related to the accommodation of disabilities – specifically a new requirement setting forth an employer’s obligation to consider unpaid leave as a “reasonable accommodation” under certain circumstances.



Brandon Smith

It seems that each day I open the paper I see a new business idea that both excites and intrigues me. It may be a new business that allows people to find a ride fast, such as Uber, or it might be a new business model that lets small businesses get access to MBAs for consulting advice at a low cost. It doesn't really matter what they do as much as what

The new FEHA regulations place on an employer an “affirmative duty” to provide a “reasonable accommodation” to any employee with a disability. (FEHA defines “disability” in extremely broad terms, essentially excluding from it only conditions explicitly identified within FEHA itself and its accompanying regulations.) Under this framework, an employer may only avoid offering such accommodation after it has engaged in back-and-forth communications with the employee – known as the “interactive process” – and can thereafter demonstrate that the offering of certain accommodations would impose on it an “undue hardship” (consequently making such accommodations by definition unreasonable).

Notably, the new regulations now identify unpaid leave as a potential reasonable accommodation. This added regulation is in line with significant California case law that has for years found the offering of such leave to be a reasonable accommodation. While the offering of such leave may seem like a simple concept, the attendant case law supporting this regulatory amendment contains several pitfalls of which employers should be aware.

As in initial matter, unpaid leave may not be required if an employee can perform his/her job with reasonable modifications, such as reduced hours of work, lifting restrictions, “light duty,” etc. . . . However, if any employee is unable to perform the essential functions of his or her position with or without some type of job modifications, unpaid leave must be considered by employers in order to avoid a FEHA discrimination claim.

The next question which must be asked by the employer is: how long must unpaid leave be provided? In other words, how much, is too

they represent, and they all seem to have the same effect. I’m excited because we are all witnessing someone being creative and innovative – even transformational. I also find it intriguing – and perhaps even a bit alarming (and I’m sure I’m not the only one with this feeling) because I wonder if these ideas may ultimately affect the relevance of our business and the professional services we provide. It doesn’t seem to matter whether the business is even remotely connected to any of our clients or to the services that we offer. To say the least, staying relevant has been on my mind a lot

much? Unfortunately, there is no clear answer to that question. What we do know is that under the amended regulations unpaid leave as a reasonable accommodation may extend beyond the period(s) provided by other employee-protection laws (such as the California Family Rights Act (“CFRA”) and the Family Medical Leave Act (“FMLA”)). We also know (from decisions reached by California courts and federal courts interpreting a similar provision of the federal Americans with Disabilities Act (“ADA”)) that unpaid leave periods approaching one-and-a-half and even two years have been found to constitute reasonable accommodations (as opposed to an unreasonable/undue burden for the employer). Consequently, employers should not create policies that cap unpaid leave after certain amounts – such as six months, a year, etc.

The good news for employers is that there are limits to unpaid leave. For example, such leave will not be considered a reasonable accommodation if an employer can demonstrate the employee is not likely to return to work in any capacity, with or without time off. Further, the new regulations state that an employer is not required to consider “indefinite” leave as a reasonable accommodation. This means that the employee requesting or seeking to extend a period of unpaid leave must remain in communication with the employer and provide requisite medical documentation addressing the period of anticipated leave and return to work dates. Nevertheless, employers should not assume a potentially long period of unpaid leave is indefinite without thorough investigation of the attendant circumstances. And employers should be proactive in their dealings with employees on leave. The “interactive process” is ongoing. So the employer must make documented attempts to contact an employee on leave to ensure that

recently.

I think that anyone who is serious about their business must set aside time from the day-to-day to consider how their business can stay relevant. This could be daily, monthly or annually, but everyone should consider it in today’s rapidly changing world. I am also sure nearly everyone out there would prefer to just put his or her head down and focus on what they provide rather than consider the prospect of whether a new web 2.0 business might provide it more conveniently, cheaper, or universally, and whether it might threaten their business.

the employee's apparent lack of communication or cooperation is not the result of a mistake or justifiable neglect which could have been discovered had the employer made reasonable efforts to contact the employee.

In our experience, unpaid leave is a reasonable accommodation that is often ignored by employers. However, as California case law has continued to demonstrate – and as the new FEHA regulations now make abundantly clear – this form of leave is a viable accommodation employers fail to consider only at their own peril. While it is tempting to presume the interactive process has adequately occurred on the employer's end when all vacation and sick leave combined with any CFRA/FMLA leave have been exhausted, the new regulations make clear employers must often go far beyond the leave allotted under these devices and provisions in order to avoid running afoul of FEHA's requirements. Consequently, unpaid leave should always be considered as a reasonable accommodation and, if offered, should be terminated only after careful consideration has been given to whether additional leave would (1) be futile; or (2) an undue burden for the employer (as narrowly interpreted under controlling law).

Needless to say, the decision to terminate an employee on unpaid leave should be made with the oversight and assistance of experienced legal counsel.

Please contact Denis S. Kenny at dsk@sfcounsel.com or Ryan W. Stahl at rws@sfcounsel.com for more information.

- Written by Ryan Stahl

Unfortunately, with the pace of change these days the time to just do the work seems to have been reduced from years to months.

When I started practicing law nearly 20 years ago, industries seemed to change every 5-7 years, if not longer (I'm sure others remember this being 10-20 years of continuity). We stayed current on the law, we provided high quality professional services to our clients and we met new clients, but we didn't often worry that what we provided or how it was provided would change anytime soon. The Internet changed this, of course.



A Positive Spin on a Negative Situation

In today's day and age, online review sites are both friend and foe of business owners. On the one hand, positive reviews are invaluable: smaller businesses with limited to no marketing budget get the benefit of free publicity and word of mouth advertising. On the other hand, negative reviews can have devastating consequences: one bad review, warranted or not, can ruin a business's reputation, resulting in less Internet hits and ultimately fewer customers. Adding insult to injury, customers nowadays largely defer to amateur online reviewers over a company's professional marketing efforts.

It is this latter trend that is the most troubling for many of our clients. Unfortunately, even the most inflammatory opinions are generally not legally actionable. What's more, many business owners do not have the time or budget to employ the dispute resolution procedures set out by the host sites, such as Yelp, Twitter or Facebook. Even if they had the time, Section 230 the Communication Decency Act gives internet content providers and their users a safe harbor from defamation suits for content posted by others ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.")

As a result, business owners feel frustrated and held hostage by cranky customers. Many clients have come to us asking: what can we do? Without legal recourse, are business owners left with no other choice than to sit idly by?

For example, and with regard to Scherer Smith & Kenny, in the minds of some prospective customers, the value and expertise of forming and organizing new companies and the relationships among the founders, which remains a staple of our firm that we continue to handle on a regular basis, has been eroded to some extent by various cheap, easily usable (but very generic) online services. We must adapt to compete.

This has led me to consider some factors that permit businesses to stay relevant.

The bright side is that your hands are not tied. The most effective means of battling the beast in this case, both financially and professionally, is to take a proactive approach towards your social media presence. By monitoring your online brand, staying ahead of consumer reviews, engaging the reviewers, and developing an effective response plan, you can take back control over public perception of your business.

Here are some helpful tips on developing an effective social media response plan, and how you can navigate social media in the most useful way:

1. Know Yourself

Be familiar with your social media presence (*i.e.*, know exactly where your business appears on the web), and then monitor it regularly. This not only prevents you from hearing about a negative review from someone else, but also helps you take your customers' temperature regarding their general experiences with your business as a whole. Think of it as free market research, a way to find out valuable information about your business from the customers' perspectives. If you pay heed, you can uncover valuable opportunities to make your business better, either by remedying previously unknown defects in your goods or services, or conversely by continuing in the more successful aspects of your business that you now know are working.

2. Evaluate Feedback

Take all reviews with a grain of salt and determine which are credible

Keep Providing High Quality Services

With all of the competition out there – and more importantly the ability for customers to easily locate a competitor – providing high quality services or products is more important than ever. Gone are the days of being able to survive, even while providing mediocre product, because competition was limited to the city in which you lived and by the lack of a cheap and easy way to inform the public about your services. Competition is now a “click” away, and given the current and growing popularity of

and which are not. All consumer review sites have anonymous reviewers who will vent about things that you can do nothing about. However, most reviews are truthful (though based in opinion), and should be seen as opportunities, a chance to get ahead of issues and resolve them before they become unmanageable. Try to see negative reviews as a blessing in disguise. Consistent complaints about one particular area of your business can help you identify those areas and improve them.

3. Respond Publicly

Take a personal approach to reviews, both negative and positive. By responding publicly online, you create a permanent e-record that others will see and consider when choosing your business. For positive reviews, try picking a random reviewer and giving them a free good or service on their next visit as a way of thanking them personally. For not so good reviews, no matter how negative they may be, always be polite and professional. Let the reviewer know you appreciate the feedback, are sorry for their experience, and would be happy to resolve the situation by inviting them back. You should also take the opportunity to provide brief but supportive facts about your business through your response, like mentioning the high quality of your goods and services, to make their experience appear one-off and unusual. Never argue, get defensive, or insult the reviewer. You want your responses to remain positive, sincere and constructive. Even if reviewers never respond, your responses show future customers, browsers and the local community that you value feedback of any kind, and will take all appropriate steps to ensure high customer satisfaction.

growing popularity of rating services, such as Yelp, high quality services is more important than ever.

Watch the Trends

Watch the trends and new ways of doing business. See whether the trends change the way your customers will get their services, and whether your business is keeping up. Conversely, see if the trends create new classes of potential customers. If your business lags the best practices of your competitors, or if your customer base is not expanding with the market, you may need to rebrand what you do or modify how you provide your services to stay with the times.

By proactively responding to issues afflicting your business, you show consumers that you are engaged and attentive to their experiences and feedback, which helps strengthen customer relationships.

One point of note, you should never make a direct request that a reviewer change their review, lest your motives appear insincere. Most often, if their concerns have been satisfied a pleased reviewer will amend their review. And, even if the review is ultimately never amended or retracted, at the very least you are on record as making sincere efforts to remedy their complaint.

4. Private Messaging

In addition to your public message, you can also private message the reviewer (where possible) in an attempt to settle or research the issue further. This can be helpful where there are specific facts that the reviewer included in their review that you can address, such as a particularly rude waiter or bad service provided on a specific date.

Be sure to let them know you are making this personal gesture because you value their feedback and business. If possible, try to offer a specific way to make it up to them. In a private message setting, and depending on the nature of the complaint, you might also provide a direct contact number and tell them to contact you personally so that you can assist them now and in the future.

These small gestures increase your accountability in the mind of the consumer and demonstrate your commitment to excellence with respect to your product or service.

to stay with the times.

Think of Something New

Rather than just ignoring the new businesses and new ways of doing things, try to be creative and think of something new that you can contribute, whether it is new products or new services, that are not being done right now.

At Scherer Smith & Kenny we work hard at staying relevant. To name a few, we started this publication, *Perspectives*, we actively look at alternative fee arrangements with clients, and we work hard at staying current

5. ENCOURAGE MORE REVIEWS!

Perhaps the most effective means of diluting a negative review is to obtain more positive reviews. Brand your in-store marketing materials and website with a statement that feedback is encouraged. Simple statements like “Like us? Let us know on Yelp!” can work wonders.

Notably, you should not only encourage your best and most loyal customers to write reviews, but solicit reviews from all customers. Let all your patrons know that you encourage and welcome feedback, and that customer service is your number one priority. By encouraging more than just positive reviews, you send the message that you are committed to good customer service, not just service for good customers.

You can also add your own positive content to the host site, such as the addition of a new employee, news about the industry, pictures of your business, etc., so that those posts appear more recently than negative reviews. By doing this, you give your Internet presence a fresh face, and potential customers may ultimately favor the more recent positive content over outdated negative commentary.

Please contact Brandon D. Smith at bds@sfcounsel.com or Heather G. Sapp at hgs@sfcounsel.com for more information.

- Written by Heather Sapp



with growing areas of the law so that we can advise our clients appropriately as they encounter those new areas.

- Written by Brandon Smith

Areas of Practice

[Business; Real Estate; Intellectual Property and Employment Law;](#)
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