WORKPLACE TRENDS

Survey finds effects of bad hires. Sixty-seven percent of companies in a survey from online job site careerbuilder.com reported a bad hire adversely affecting their business in the last year. Twenty-four percent said one bad hire cost their business more than $50,000 in the last year, and four in 10 said that one bad hire cost more than $25,000. The nationwide survey was conducted among more than 2,400 employers between August 17 and September 2, 2010. When asked how a poor hire affected their business in the last year, employers reported problems such as lost time to recruit and train another worker, lost money to recruit and train another worker, less productivity, fewer sales, and legal issues. Of employers that made a bad hire, 36 percent said they think they made a mistake hiring someone because they needed to fill the job quickly, followed by lack of understanding of where their target talent is (20%), and unsuccessful sourcing techniques (9%).

Report shows slight job tenure increase. The median length of time full-time workers stay in their jobs rose to just over five years during 2010, according to a report from the Employee Benefit Research Institute. But the analysis shows there are significantly different long-term trends by type of worker. For example, job tenure for men has been falling since 1983, while women's tenure has been rising over that period to the point at which the once-big gender gap in job tenure has almost closed. Because women's tenure has been increasing while men's tenure has been falling, the overall job tenure rate has been relatively stable. The report also noted that older workers appear to be staying in their jobs longer, but overall the results show that the American workforce over the past three decades has always had a high level of turnover.

Study identifies snooping as growing threat. A study on visual data breaches has found that two-thirds of employees expose sensitive data outside the workplace — some even exposing highly regulated and confidential information such as customer credit card and social security numbers. The Visual Data Breach Risk Assessment Study also found the majority of companies don't have policies or measures in place to protect sensitive information from computer screen snooping when employees are working in public places. The study was commissioned by 3M, a maker of privacy filters for computers and mobile devices. The study also examined how privacy concerns affect employee productivity while working outside the office. Fifty-seven percent of working professionals surveyed said they have stopped working on their laptops because of privacy concerns in a public place. ✤

PUBLIC EMPLOYERS

UC immune from attorneys' fees provisions

by Jonathan Holtzman

State and local governments are subject to federal overtime laws. However, questions persist about whether various provisions of the California Labor Code apply to state and local public agencies. This debate is significant because, among other things, some provisions of state wage and hour laws and the regulations issued under the laws are broader than federal law.

The following case is another in a series of cases in which employees have asserted that public agencies in California are subject to state wage and hour laws. As a general matter, it's established that they are not, but cases continue to arise because the California Labor Code itself isn't clear on the subject. In this case, the regents of the University of California successfully asserted that they are constitutionally immune to state wage and hour legislation.

Background

Michael Goldbaum is a professor of ophthalmology at the University of California San Diego (UCSD). He began working for UCSD in 1977, and in 1979, he received tenure.

In 2008, Goldbaum sued the school for breach of contract. He alleged that he should have been allowed to participate in the University of California Retirement Plan (UCRP) and that UCSD failed to report him as a participating employee from 1979 to 1992. He sought a judicial determination that he was eligible for pension benefits covering that period. The parties eventually settled the matter out of court, with the regents agreeing to consider him eligible during that period of time. Goldbaum then asked for attorneys' fees and costs under California Labor Code Section 218.5.

It's time for the legislature to amend the California Labor Code to put a stop to wasteful litigation.

UC regents constitutionally immune

The court analyzed whether Labor Code Section 218.5 applied to the regents. The California Constitution grants the regents broad powers with virtual autonomy in self-governance. Moreover, they have "general immunity from legislative regulation." The California Legislature may regulate the regents' conduct in three areas:

(1) It may prevent them from compelling appropriations for salaries.

(2) General police power regulations applying to private persons and corporations may be applied to the university.

(3) Regulations applying to public agencies may be applied to the university when the legislation regulates a matter of

statewide concern and doesn't involve internal university affairs.

Matters related to wages and benefits are internal affairs of the university and aren't subject to any of the exceptions to the regents' constitutional immunity from state regulation. The court found that the determination of employee compensation and benefits is particularly a matter within the regents' broad constitutional grant of authority to manage internal affairs. The court found that nothing in the wording of Section 218.5 suggests that it should trump the regents' immunity.

The court concluded that "because the underlying action giving rise to attorney fees under California Labor Code Section 218.5 concerns wages and benefits, matters of the University's internal affairs arising from the employer-employee relationship, whether to pay an opposing party's fees in such action is also within the Regents' broad constitutional grant of authority to manage its own internal affairs." *Goldbaum v. Regents of the University of California* (California Court of Appeal, Fourth Appellate District, 1/6/11).

More confusion in wage and hour laws wastes public money

It's a sad truth that public agencies have spent literally billions of taxpayer dollars litigating and settling wage and hour suits because both state and federal wage and hour laws are antiquated and weren't updated when they were first applied to public agencies. Many of the rules and definitions in federal law and related U.S. Department of Labor (DOL) regulations simply don't take into account the differences between practices that are necessary to ensure public accountability in public employment and longstanding private-sector practices that wouldn't withstand public scrutiny.

Realistically, no one argues that public employers should be immune from all overtime regulation, but it's time that both the DOL and the state legislature clarify the rules. In the case of state law, as this court recognized, state wage and hour laws generally don't apply to public agencies. It's time for the legislature to amend the California Labor Code to put a stop to wasteful litigation exploiting alleged ambiguities.

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EVIDENCE

Gay man may proceed on retaliation, hostile environment claims

The term "summary judgment" refers to a trial court's determination that an individual doesn't have enough evidence to present his case to a jury. But how much evidence is enough? In a recent case filed by a gay man against his former employer, the Ninth U.S. Circuit Court of Appeal (which includes California) reversed a summary judgment against him. The court concluded there were factual disputes on his retaliation and hostile environment claims that must be decided at trial.

Antigay slurs lead to complaint

Shane Dawson was hired in April 2007 as a temporary production-line worker for Entek International, an Oregon-based company that makes polyethylene battery separators. He worked the line on the graveyard shift with 24 other employees, all male. A couple of coworkers were already acquainted with Dawson outside of work and were aware that he is homosexual.

Troy Guzon worked side by side with Dawson to train him on line duties. He wasn't officially Dawson's direct supervisor, but he was the only supervisor Dawson saw on a day-to-day basis and the person to whom he was to direct any problems or questions.

According to Dawson, coworkers soon began making derogatory comments about his sexual orientation. One said he was a "worthless queer" who liked to "suck dick" and "take it up the ass." Another called him "Tinker Bell" and labeled him "a homo, a fag, and a queer." Guzon was in a position to hear all the comments, and Dawson asked him to do something about the situation. He said Guzon spoke with the coworkers but then used the term "homo" several times himself.

Because of the stress of the situation, Dawson took a day off work approximately one month into his employment with Entek. He called the company's general number and asked the person who answered to advise his supervisor that he wouldn't be in. Under Entek's policy, the day off was recorded as a "no-show/no-call" day because Dawson hadn't followed the required procedure of directly phoning his supervisor one hour before the scheduled shift to advise of the absence.