Weekly Wright Report (10/30/17)

EMPLOYMENT LAW

Sadly, Sexual Harassment Continues to Permeate the News Outside of Hollywood

Continuing the trend sweeping the country, the EEOC filed a lawsuit against a restaurant in Virginia alleging that the restaurant violated federal law by subjecting an 18-year-old female hostess to a sexually hostile work environment and retaliating against her by reducing her hours when she complained about the harassment. Not only was the hostess' tenure at the restaurant plagued by unwelcome propositions for sex and physical touching by an older male manager, but the restaurant lacked a sexual harassment policy as well as employee complaint procedures. When the hostess did complain, they retaliated by reducing her work schedule. An additional wrinkle was that the wife of the alleged harasser handled the scheduling for all employees. While sexual harassment is a violation of both criminal and civil law, when a teenager new to the workforce is a victim, the abuse is all the more unconscionable. Ask Paul PEvelius@wcslaw.com.

The ADA is Not a Leave of Absence Statute

The Seventh Circuit Court of Appeals recently issued opinions on two factually similar cases, acknowledging that an employee's "brief" period of leave to deal with a medical condition could be an accommodation in some situations. In each of the cases, the plaintiffs exhausted their 12 weeks of leave under the Family Medical Leave Act (FMLA), yet still needed several months or weeks to recover from their ailments before they could return to work.

In each case, the court made clear that long-term leaves of absence fit securely within the "domain" of the FMLA, *not* the Americans with Disabilities Act (ADA). In doing so, it set out a fairly bright-line rule: "a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the inability to work for a multi-month period removes a person from the class protected by the ADA." *See Severson v. Heartland Woodcraft* (7th Cir., Sept. 2017) and *Golden v. Indianapolis Housing Agency* (7th Cir., Oct. 2017).

What does this mean for employers faced with requests for open ended time off?

1. Practically speaking, a few days or weeks of leave is likely required under the ADA, which applies to companies with 20 or more employees. But one that is open-ended and spans

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multiple months simply is not. Be careful about setting a generous precedent that may be hard to distinguish for future employees.

2. Always engage the employee in the ADA's interactive process.

3. Communicate before, during and after FMLA leave, as appropriate. The FMLA applies to companies with 50 or more employees.

4. Document all communications with the employee, such as: (a) the employee's ability to perform his/her job; (b) whether and when the employee likely will be able to return to work; (c) whether the requested leave will allow the employee to return to work immediately after the leave ends or very soon thereafter; (d) whether there are other accommodations to help the employee return to work in a timely manner; and (e) whether the employer has received any feedback from the employee's medical provider about the above issues.

The EEOC's decision to initiate litigation against an employer often hinges on whether the employer is to blame for the breakdown in the interactive process under the ADA. To minimize your exposure to liability, keep communicating with your employees and document each of those communications to create a clear record. Ask Laura LRubenstein@wcslaw.com

INSURANCE LAW

A Reminder to Read the "Fine Print" in Insurance Policies Before Filing Suit

A tough lesson was learned by a General Contractor who did not check the policy purchased by its subcontractor in *Walsh Construction Company v. Zurich American Insurance Co.*, 73 N.E. 3d 957 (Ind. App. 2017). Owners and contractors typically require firms they hire to have liability insurance and name them as additional insureds should they ever get sued for negligence of the subcontractor. When Walsh Construction was hit with a claim for negligence on a highway project, it made a claim as an additional insured against the policy the responsible subcontractor obtained. Although the subcontractor identified Walsh Construction as an additional insured, no one noted the Zurich policy had a $500,000 Self-Insured Retention. The court found that Walsh Construction had no greater rights against Zurich than its subcontractor and Zurich had no obligation to defend or pay any claims until that $500,000 was first satisfied. Check those policies carefully. Ask Don Dwalsh@wcslaw.com

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