THARPE & HOWELL, LLP

EMPLOYMENT AND LABOR LAW NEWSLETTER

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This Newsletter is brought to you by Tharpe & Howell's Employment and Labor Law Practice Group, in conjunction with the *California Business Law Report* – a newly launched online forum which addresses the rapidly increasing convergence of business and law. Should you have any questions or comments about the articles presented, please contact Firm Partner Christopher Maile at cmaile@tharpe-howell.com; telephone number (818) 205-9955. To remain apprised of significant developments in the business community, please visit our business law forum at www.commercialcounselor.com.

MANDATORY ARBITRATION CLAUSE AS A CONDITION OF EMPLOYMENT

As a condition of employment, 24 Hour Fitness, a California corporation operating fitness centers nationwide, requires that each employee sign a written agreement stating that any employment claim against the company will be arbitrated and that class-action or collective lawsuits and arbitrations are prohibited. On April 30, 2012, the National Labor Relations Board issued a complaint against 24 Hour Fitness, challenging this practice on the grounds that it allegedly violates federal labor law and specifically the protections guaranteed by the National Labor Relations Act. In its suit, the NLRB states that "[s]ince at least the summer of 2010, the company has enforced its no-class-action policy by asserting it in litigation brought by employees in numerous cases . . ."

According to one report, the 24 Hour Fitness policy allows employees to opt-out of mandatory arbitration within 30 days of receipt of their employee handbook. But the NLRB argues that the practice is still coercive because opting-out could brand an employee as a potential troublemaker thereby making retaliation possible. In addition, it notes that an opt-out provision may not be equivalent to "preserving an employee's right to join a class action — a right . . . required under the National Labor Relations Act."

In a noteworthy decision made in the earlier *D.R. Horton* case (January, 2012), the NLRB held that a home builder who required that employee claims be handled through individual arbitrations violated the rights of such employees under the National Labor Relations Act since they were prohibited from filing joint, collective or class employment claims. The decision in *D. R. Horton* is currently on appeal.

The NLRB continues to scrutinize employment contracts at considerable employer expense. If you are considering the use of an arbitration clause as a condition of employment in your organization, our Employment and Labor Law Practice Group is ready to help. Our attorneys have a long history of partnering with employers on contract and enforceability issues to help increase protection and insure compliance standards are being met. For more information on how we can assist, please contact Firm Partner Christopher Maile via email at cmaile@tharpe-howell.com; or by telephone at (818) 205-9955.

SAFETY PROGRAMS: IMPACT ON WORKERS' COMPENSATION PREMIUMS

According to the Workers' Compensation Insurance Rating Bureau (WCIRB), premiums for workers' compensation insurance are on the rise in the State of California. A recent WCIRB Report notes that, in 2011, total premiums in California rose by $1 billion (the second consecutive year to see a $1 billion increase), with the industry average charged rate, per $100 of payroll, rising 3% from 2010 and 11% above 2008. Also, no end to this increase appears to be in sight as we continue to see an uptick in workers' compensation and related claims. With these increasing costs in mind, California legislative committees met in late March to discuss issues related to the system. Of course, employers resist raising their costs in the midst of the economic downturn.

At Tharpe & Howell, we work with employers to effectively reduce their workers' compensation costs. One way we assist is by helping our business clients develop safety and return-to-work programs which oftentimes allow an injured employee to return to work on a modified basis subject to restrictions assigned by the treating physician. We believe these programs help reduce injury related costs while building employee morale. Some items we consider when analyzing our clients' standing include:

1. Whether an effective safety program has been instituted which includes rules and standards applicable to the client's workers and the tasks they each perform;

2. Whether a return-to-work program has been established which allows injured employees to perform modified tasks when they are unable to perform their regularly assigned duties;

3. If our client's premium, which is based on current payroll and proper job classification of each employee (among other factors), has been properly calculated or should be reduced;

4. If our clients actively monitor their experience modification ratings which compare their workers' compensation claims to that of other companies within their industry of the same approximate size;

5. How accurate our clients are when describing their employees, job classifications, and work performed to their workers' compensation insurance carrier. [Misrepresentations can result in policy cancellation after an inspection or audit!]

6. Whether appropriate file handling strategies intended to reduce overall exposure are in place and have been fine-tuned.

In addition to strategizing with our clients on ways to reduce their Workers' Compensation costs, our litigators also represent insurance carriers, self-insured employers, and third party administrators before the Workers' Compensation Appeals Board to help obtain the best possible result. We understand the day-to-date pressures that employers, adjusters and risk managers face in resolving these time-sensitive issues while keeping in mind a cost-sensitive approach. To obtain more information about our workers' compensation defense services, please contact Firm Partner David Binder via email to dbinder@tharpe-howell.com; or at telephone number (818) 205-9955.

New Penalties For Mis-Classifying An Employee As An Independent Contractor

On January 1, 2012, Senate Bill 459 went into effect, increasing penalties against any California employer who willfully misclassifies an employee as an "independent contractor." Under this new law, willful misclassification is defined as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." Any company or other person who the Labor and Workforce Development Agency or a court determines has violated the law is subject to a civil penalty of not less than $5,000 and not more than $15,000 **for each violation** (in addition to any other penalties or fines permitted by law). If engaging in a pattern or practice of violations, the person or employer is subject to a civil penalty of not less than $10,000 and not more than $25,000 for each violation (in addition to any other penalties or fines permitted by law). [Cal.Labor Code, Section 226.8 (b) and (c).]

This new law also requires any employer who has violated the law, as determined by the Labor and Workforce Development Agency or a court, to display a notice prominently on its website which states it has engaged in willful misclassification. The notice must also include other information required by the statute and remain posted for one year from the date of the final decision or order!

Obviously, even an innocent violation can earn your business an embarrassing scarlet letter, as well some very stiff fines. If you want to be sure you are properly classifying your workers to avoid costly mistakes, please give us a call. We can help remedy potential problems, with limited legal expense.

Can Employer Terminate Employee Who Is Out On FMLA Leave?

The Family Medical and Leave Act ("Act") grants many employees the right to take up to 12 weeks of unpaid leave from work in the event of (a) a serious health condition, (b) the need to care for an immediate family member with a serious health condition, or (c) giving birth, adopting, or caring for a newborn or newly adopted child. However, the Act's provisions only apply to businesses with more than 50 employees, and covered employees are only those who have worked a minimum of 12 months for the employer, and 1250 hours during the past 12 months. These eligible employees are job-protected, meaning they have a right to return to work after their leave ends.

But is job protection under the Act without exception? As the decision in *Roll v. Bowling Green Metalforming* pointed out earlier this year, "it is not unlawful for an employer to terminate an employee who took leave under the Act if the termination would have occurred regardless of the employee's exercise of his rights under the Act." Still, employers should proceed with extreme caution before any such termination.

If an employee is able to make a prima facie case that he (1) was engaged in an activity protected by the Act (e.g. taking leave for a permitted purpose); (2) suffered an adverse employment action (e.g. termination); and (3) a causal connection existed between his protected activity and the adverse employment action (courts may assume a causal connection if termination occurs during or soon after the employee's leave), the burden shifts to the employer to prove that the termination would have occurred regardless of the employee's exercise of his rights under the Act. In *Roll*, the employer was able to meet this burden, having laid off 60% of the employee's department as part of a significant reduction in force due to the financial crisis and its impact on the automotive industry. Further, Roll was selected for layoff "based on objective criteria such as skills, performance, work history and overall ability." So, while circumstances do exist under which an employer can terminate an employee who is out on FMLA leave, any such decision must be carefully considered and documented in order to survive employee reproach.

IN THE NEWS

Christopher Maile, Chair of Tharpe & Howell's Employment and Labor Law Practice Group, has been invited to join the prestigious Claims and Litigation Management Alliance ("CLM"), a nonpartisan alliance comprised of insurance companies, corporations, attorneys, and risk management professionals who promote and further the highest standards of litigation management in pursuit of client defense. Mr. Maile is AV Preeminent Rated, having achieved the highest rating available to attorneys nationwide, and has represented management in all aspects of employment law since 1985.

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Tharpe & Howell recently launched the ***California Business Law Report*** – an online forum which continuously provides significant legal developments and practical advice for the business community. Please be sure to check it out at www.commercialcounselor.com!

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This informative Newsletter has been brought to you by Christopher Maile, a Partner of Tharpe & Howell and Chair of its Employment and Labor Law Practice Group. Tharpe & Howell has been part of the California, Arizona and Nevada business communities for more than 35 years, providing clients with experience, judgment, and technical skills. We are committed to delivering and maintaining excellent client service and case personalized attention, and to be an integral member of each client's team.

For further inquiry about any of the articles discussed, please contact Mr. Maile direct at (818) 205-9955; Email: cmaile@tharpe-howell.com