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News & Types: Employment, Labor & Benefits Update

# Employment, Labor & Benefits Update - May 2016

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By: Frank J. Del Barto, Nancy E. Sasamoto

Practices: Employment, Labor & Benefits

**NEW ACT, NEW REMEDIES: DTSA TO PROVIDE ADDITIONAL PROTECTION FOR TRADE SECRET OWNERS AND WHISTLEBLOWERS**

By Nancy Sasamoto

With President Barack Obama expected to sign the Defend Trade Secrets Act ("DTSA") in the near future, the DTSA is about to become law. Under the DTSA, trade secrets owners will, for the first time, have the right to file suit in federal court for misappropriation of trade secrets, as well as pursue other new remedies. Currently, trade secrets protection is a matter of state law with all states, except New York and Massachusetts, having adopted some version of the Uniform Trade Secrets Act ("UTSA"). The DTSA will not preempt state law, but is intended to provide a unified legal framework to protect trade secrets from misappropriation by employees, as well as foreign actors.

While many of the provisions of the DTSA are identical to those under the UTSA, the Act includes several unique aspects. First, once the DTSA is enacted, an owner of a misappropriated trade secret will have the right to bring a civil action in federal court if the trade secret "is related to a product or service used in, or intended for use in, interstate or foreign commerce." Additionally, the trade secret owner will be able to apply for an *ex parte* seizure order that would allow the government to seize misappropriated trade secrets without giving any notice of the lawsuit to the defendant. Because seizure is an extraordinary remedy, certain stringent requirements are imposed on the party seeking the ex parte seizure order, including showing that immediate and irreparable injury will occur if the seizure is not ordered and that the harm to the applicant outweighs the legitimate interests of any party from whom the material is to be seized. The application for seizure must describe with reasonable particularity the matter to be seized and its location. Because of the drastic nature of this remedy, the applicant must post security and can be held liable for damages caused by a wrongful seizure.

In addition to the *ex parte* seizure order, the trade secret owner may be entitled to an injunction to prevent a person from entering into an employment relationship or to have conditions placed on such employment based on evidence of threatened misappropriation. Under the DTSA, damages for actual loss caused by the misappropriation or for any unjust enrichment may be recovered. In addition, a court can award exemplary damages in an amount not more than two times the amount of the damages if the trade secret is willfully and maliciously misappropriated.

One of the more overlooked provisions of the DTSA relates to potential whistleblowers. Any individual who discloses a trade secret to a government official or attorney solely for the purpose of reporting or investigating a suspected violation of law is granted immunity from being held civilly or criminally liable under any federal or state trade secret law. In addition, the DTSA provides that an individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to his or her attorney and use the trade secret information in the court proceeding, provided that certain steps are taken to protect the confidentiality of the trade secret.

Employers should be aware that the DTSA directs employers to provide notice of the immunity protections of the DTSA to employees "in any contract or agreement with an employee that governs the use of trade secret or other confidential information." For purposes of the DTSA, "employee" includes any individual performing work as a contractor or consultant for an employer. An employer will be considered in compliance with this notice provision if the employer includes such notice in a policy document and provides a cross-reference to such policy document. The consequence of not providing the required notice is that the employer will not be able to recover exemplary damages or attorneys' fees under the DTSA in any action against an employee to whom notice was not provided. Companies should be prepared to update their confidentiality and non-disclosure policies and agreements to include the required notice regarding immunity under the DTSA.

**CALIFORNIA EMPLOYERS MUST ACCOMMODATE EMPLOYEES ASSOCIATED WITH DISABLED INDIVIDUALS, CALIFORNIA COURT RULES**

By Asa Markel

This past month, a California Court of Appeal held that California's Fair Employment and Housing Act (FEHA) of 1980 requires employers to provide reasonable accommodations to employees who are associated with a person with a disability. In *Castro-Ramirez v. Dependable Highway Express, Inc*., Nos. B261165 & B262524 (Cal. App. Apr. 4, 2016), the plaintiff, a truck driver who began working for the defendant company in 2010, had requested accommodations to his schedule so that he could operate a dialysis machine for his disabled son. The plaintiff was the only member of his family who was qualified to operate the machine. The plaintiff's manager and supervisor at the time accommodated the plaintiff's scheduling concerns. However, in 2013, the plaintiff was placed under different managers who did not provide accommodations and terminated him for refusing to work a shift that would have made it impossible for the plaintiff to get home in time to his son. The defendant employer tried to argue that an employer has no duty to provide reasonable accommodations to an employee simply because the employee is associated with a person with a disability. While the trial court agreed with the employer, the Court of Appeal held that FEHA did require reasonable accommodations in cases of associative disabilities.

The Court in *Castro-Ramirez* began its analysis by noting that the FEHA protects employees from discrimination based upon their association with disabled persons since the Court of Appeals decision in *Rope v. Auto-Chlor System of Washington, Inc*., 220 Cal. App.4th 635 (2013). The holding of Rope states that an employer cannot discriminate against an employee simply because the employee has to take care of a disabled family member. The federal courts have enforced a similar rule under the federal Americans with

Disabilities Act (ADA) of 1990 since the seminal decision in *Larimer v. International Business Machines Corp*., 370 F.3d 698 (7th Cir. 2004).

However, federal courts have stopped short of requiring employers to actually provide reasonable accommodations for employees based upon those employees associations with disabled persons. The *Castro-Ramirez* Court, in contrast, has gone that extra step in holding that employers must provide such accommodations under the FEHA. As the *Castro-Ramirez* court pointed out, this is due to the difference in the wording between FEHA and the ADA. FEHA defines "disability" to include associative disabilities while the ADA does not. Instead, the ADA expressly and specifically proscribes associative discrimination, but contains no provision on providing reasonable accommodations based upon employees' associations with disabled persons.

The message for California employers is clear: the fact that an employee's requests for accommodations do not stem from the employee's own disabilities is not a basis for denying accommodations outright. An employer will need to investigate whether the disabled person is sufficiently "associated" with the employee to trigger FEHA accommodation rights. If so, the employer will be required to engage in the mandatory interactive process with the employee to determine whether a reasonable accommodation is possible, as if the employee himself were the disabled individual.

**FMLA: EXCELLENT RESOURCE AVAILABLE FOR DOWNLOAD**
By Frank Del Barto

On April 26, 2016, the U.S. Department of Labor ("DOL") issued "The Employer's Guide to The Family and Medical Leave Act." According to the Guide, it is being provided as "a public service" by the DOL in order to assist employers in meeting their compliance responsibilities and increase their knowledge of the FMLA law. Although the Guide is intended to provide general information only and does not "carry the force of legal opinion," its organization, pinpoint references to the applicable sections of the FMLA regulations, examples of common challenges, and its "Did You Know" sections make this Guide an invaluable resource.

The topical index / table of contents includes:

- Chapter 1 – Covered Employees Under The FMLA And Their General Notice Requirements
- Chapter 2 – When An Employee Needs FMLA
- Chapter 3 – Qualifying Reasons For Leave
- Chapter 4 – The Certification Process
- Chapter 5 – Military Family Leave
- Chapter 6 – During An Employee's FMLA Leave
- Chapter 7 – FMLA Prohibitions

Recently, we have assisted several employers with their obligation to provide employees with an eligibility notice and a rights and responsibilities notice. Here, a quick review of the Guide indicates that it provides a summary of the notice requirements, identifies the leave forms that are available for employer use, identifies the applicable regulations, and briefly indicates the liability that an employer is exposing itself to for failing to

make a timely eligibility determination. As a result of the comprehensive approach, we recommend that all FMLA eligible employers and human resource representatives download this Guide for future reference.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.