

go wherever they want and not have to perform any duties.

2. For every four hours an employee works s/he is entitled to a 10 minute break. This is the most difficult obligation to prove because many employees are suing over this issue and they can go back and claim no breaks for three years. The penalties are: for each day a meal period or 10 minute rest break is not provided (going back 3 years) the employer must pay that employee 1 additional hour of work at that employee's regular rate of pay.
3. If you do not have a good "harassment" (not just "sexual" harassment) policy, you will not be entitled to the defense of limiting an employee's emotional distress claim. For those employers who have very good and detailed harassment policies, any employee claiming harassment because of sex, sexual orientation, race, religion, etc. has a duty to avoid the consequences of their harm to report it to management and if not management the owners. This allows them to investigate, potentially remediate if such occurred, and to end it so plaintiff no longer suffers emotional distress ***Dept. of Health Services v. Superior Court*** (2003) 31 Cal.4th 1026, 1044. If so, an employee is only entitled to emotional distress from when the harassment occurred to when the employee knew or should have known to report it.
4. Arbitration agreements are a great way to reduce litigation expenses for employee related disputes and they are enforceable with applicants, but must be optional with existing employees. However, there are several factors that are required to ensure they are enforceable. When was the last time you reviewed your arbitration policy and/or have you ever considered one?
5. In California an employee does not have to file with the labor commissioner anymore to file a wage and hour claim. They can file a civil suit in court. Now they can recover attorney's fees.
6. When an employee is injured on the job, you might have legal exposure to disability or perceived disability discrimination which worker's compensation does not cover as an employee may sue in civil court. If you have 50 or more employees you may also have to consider federal and state family leave act policies.
7. Did you know, that you must provide a reasonable accommodation for pregnant employees with the assistance of their health care provider.
8. Did you know that damages and fines have increased if you try an employment case before the Fair Employment and Housing Commission, instead of opting for civil court -the amount has increased from \$50,000 to \$150,000 per aggrieved person per respondent. Govt. Code Section 12970(a)(3).

WHAT IS A DISABILITY?

By Catherine M. Corfee, Esq.

So many times do you feel like you have to play doctor when an employee requests an accommodation? California and Federal law have dramatically different definitions of what constitutes a "disability" to trigger your obligations under anti-disability discrimination law.

- Federal vs. State Court Definition

The federal ADA's definition is one who has a physical or mental disability that "substantially" limits a major life activity. California does not require a "substantial" limitation - just a limitation regarding a major life activity. A physical disability can include chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorders, diabetes, multiple sclerosis, and a heart condition. It also includes mental disabilities that are long term such as depression, anxiety, post traumatic stress disorder, etc. However, the disability must be one that limits a person's major life activity. What is a major life activity? Case law provides some guidance, including but not limited to, walking, seeing, hearing, working, and caring for oneself in daily life activities.

For example, a woman who had to be constantly aware of her blood sugar levels with diabetes was held to be disabled. Her major life activity of eating was limited. The key distinction is that the limitation is not a disability in and of itself, rather a person claiming ADA protection must prove the disability limited a major daily life activity as compared to a normal person. In one case, the fact that a person could not fly because of his obesity was not held to be a major life activity because not everyone flies. In another case, a student who was held to not have a disability under the ADA with respect to learning. Despite the student's alleged learning disability, he achieved considerable academic success beyond the attainment of most people of the average age. Wong v. Regions of the University of California, (2005) 2005 DJDAR 6620.

The Supreme Court has defined "major life activities" as activities that are of central importance to daily life. If an employee cannot do certain manual tasks, like lifting and bending on a job, that will not qualify as a life activity in most people's daily lives. The focus is not whether a claimant is unable to perform tasks associated with a specific job. This is because manual tasks are unique to any particular job and are not necessarily important parts of most people's lives. The focus is whether there is a limitation in doing major life activities such as household chores, bathing, brushing teeth, etc.

- Tips

One helpful tip for employers is to verify the alleged disability by sending a form to the employee's healthcare giver. It is critical that the employer require that this form be returned to them within 15 days and if not, such could be insubordination. A good form to use is the Department of Labor form regarding Federal Medical Leave Act, which indicates serious health conditions. It is not necessarily a

disability. Alternatively you could draft your own form which says please identify whether this individual has a disability that limits a major life activity such as walking, seeing, breathing, caring for one self as compared to a normal person.

Our firm has developed these forms as well, so call us. Ask the doctor to identify what accommodations would be possible to help the individual perform the essential functions of his/her job. You should attach or describe the major functions of the job. For example, why does the job exist- list those critical job duties. Ask if less hours, etc. are necessary. Having to modify schedule is an accommodation.

Lastly, you do not have to play doctor, a doctor's certificate is very helpful and you can even get a second opinion by your company doctor if you have a reasonable suspicion and you must pay for it and the employee does not lose wages.

**U.S. GOVERNMENT NOT LIABLE WHEN SERVICEMAN
ACTED OUTSIDE SCOPE OF EMPLOYMENT.**

By: Conor McElroy

Employers are strictly liable for a supervisors actions. In a recent Ninth Circuit decision, the Court seemed to create some breathing room for employers in defending against lawsuits by third parties resulting from their employees acts to non employees. In Nationwide Mutual Ins. Co. v. Liberatore (2005) 2005 DJDAR 5458, the Court found that an active duty member of the armed services of the United States was not acting within the scope of his employment when he negligently caused a vehicle accident, despite being on an authorized travel order. Of course the employer was sued for this employee's actions.

The employee, a Command Master Chief in the U.S. Navy, was in Los Angeles on military travel orders authorizing him to make several employment related trips. The travel orders implicitly contemplated that there would be free time. Using a prepaid rental car, the employee picked up a friend and decided to travel with her to State Line, Nevada to gamble and spend the night prior to making his scheduled trips. An accident followed shortly thereafter, in which the passenger was seriously injured and the employee was arrested for driving under the influence. The passenger brought tort claims against the employer for her injuries.

Employers are not responsible when an employee substantially deviates from the employment duties for personal purposes. The employee may have been authorized to enjoy some liberty while fulfilling his duties contemplated by his travel orders, but at the time of the accident he was on a frolic of his own in which he substantially deviated from the employer's purposes. Just because the Navy had no objection to the employee's use of his free time and the prepaid rental car for personal purposes did not render his conduct in this case within the scope of his government employment. Hopefully employers who previously worried about what their employees were really doing when not under the employer's watch can now

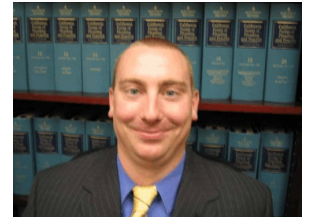
breath a sigh of relief when sending an employee on a task involving travel.



CORFEE STONE WELCOMES

CONOR MCELROY

Conor McElroy joined Corfee Stone & Associates as a Law Clerk in the summer of 2005. He is currently entering his final year as a student at the University of Pacific - McGeorge School of Law. Conor previously interned at the Juvenile Division of the Sacramento County Public Defender's Office where he represented Sacramento County juveniles accused of misdemeanors and felonies. Conor also has prior experience in the concrete and residential construction industry.



Conor earned a Bachelor of Science Degree from the University of Wisconsin - La Crosse in 2003 making the Dean's list as an out standing student. He did this prior to making the trip to Sacramento to attend Law School. Conor also has an extensive construction back ground making him very helpful to our ADA access cases. He was raised in Princeton, WI, a small town in central Wisconsin with a population of roughly 1,500.



ASHLEY PATTERSON

Ashley Patterson joins Corfee Stone as our new clerk. She does very many operational tasks here. Her previous law firm experience is well noted. Please welcome her. She may answer your call!

Catherine M. Corfee is a principal owner of Corfee Stone & Associates, a firm which exclusively represents employers in all facets of employment matters, businesses regarding ADA access and housing discrimination defense.

For more information about any of the articles contained in this issue, you may contact Catherine M. Corfee at (916) 487-5441