Employment Law Updates for Cities

By Kirk Mylander

City officials should be aware of several recent court decisions and rulemaking activities that affect employment.

Wages and Hours

A revised employee meal and break rule (OAR 839-020-0050) promulgated by the Oregon Bureau of Labor and Industries (BOLI) went into effect on January 12, 2009. Employers must still provide a 30-minute, unpaid break for employees working longer than six hours. But now there are exceptions to the 30-minute rule, when employers can demonstrate the following:

1. Failure to provide a meal period was caused by unforeseeable equipment failures, acts of nature, or other exceptional and unanticipated circumstances that only rarely and temporarily preclude the provision of a meal period;
2. Industry practice or custom has established a paid meal period of less than 30 minutes (but no less than 20 minutes) during which the employee is relieved of all duties; or
3. Providing a 30-minute, unpaid meal period where the employee is relieved of all duties would impose an undue hardship on the operation of the employer's business.

"Undue hardship" is determined based on the size and financial resources of the employer, who is available to relieve the employee during a meal break, and what the consequences of the break would be on production, an unusual workflow, or the health and safety of employees, patients, clients or the public.

The rule further stipulates that employers not providing the full 30-minute meal period must give employees adequate time to consume a meal, rest, and use the restroom and must pay for this time. This is in addition to all rest periods required for the number of hours worked on any given shift. In addition, the employer must give notice to each employee affected by the undue hardship provision on a form prescribed by the Bureau of Labor and Industries (BOLI) and maintain a record of that notice.

The rule was developed following the work of a labor-management Meal and Rest Period Advisory Group.

Whisteblowing

The Oregon Court of Appeals' March 4 decision in the case of *Hall v. Douglas County* serves to better define what constitutes "mismanagement" in ORS 659A.203, which prohibits public employers from retaliating against employees who report certain acts of wrongdoing.

The court found that the legislative intent was that the complaints under ORS 659A.203, "must involve more than mere routine complaints regarding a public employer's policies." However, in the court's view, the complaints of plaintiff Hall potentially rose to a level that would undermine the county's "ability to fulfill its public mission."

According to the court's decision, the plaintiff alleged that he was physically assaulted by a coworker on numerous

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occasions over an extended period of time, that he reported the assaults to his supervisor, that the supervisor failed to take action to correct the situation, and that he eventually reported the supervisor's response to the county's human resources department. He also alleged that another supervisor created a sexually hostile work environment through his conduct at employee meetings and that plaintiff had reported that conduct.

"Those allegations do not merely concern workplace policies or practices with which plaintiff disagreed. Rather, they involve the kind of conduct that a jury could reasonably find would be of public concern and would have the potential to undermine defendant's ability to fulfill its public mission," the court said.

On the Web: *www.publications.ojd.state.or.us/A131405.htm*

At-Will Employment

On June 9, the U.S. Supreme Court found that public employees have protections from illegal and unjust personnel actions, but the Equal Protection Clause isn't necessarily one of them. The ruling came in the case of *Engquist v. Oregon Department of Agriculture*.

The plaintiff, a state employee, argued in court that she was laid off from her job due to discrimination on the basis of her race, sex, and national origin. She also argued for protection as a "class-of-one," claiming that she was let go for "arbitrary, vindictive, and malicious reasons."

At trial, a jury rejected claims of class discrimination based on her race, sex, and national origin. It found in favor of her class-of-one claim, however. The Ninth Circuit court of appeals disagreed, and the U.S. Supreme Court concurred with the appeals court.

The Supreme Court came to the "common-sense realization that government offices could not function if every employment decision became a constitutional matter," and that upholding the class-of-one premise in this case could ultimately invalidate the concept of at-will employment in the public sector.

On the Web:

www.supremecourtus.gov/opinions/07pdf/07-474.pdf

www.boli.state.or.us/BOLI/Meal_and_Rest_Period_Rule_Overview_011209.pdf

Editor's Note: Kirk Mylander has been a pre-loss attorney with City County Insurance Services since 2005.