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Changes are Challenging

Michele M. Goldsmith is a shareholder of Bergman & Dacey. She represents and advises employers and management in employment litigation and on compliance with employment and labor laws. She can be reached at mgoldsmith@bergmandacey.com

It is a fundamental necessity that employers change their policies to adapt to ever changing business needs. Personnel policies and procedures frequently shift as a company evolves. Modifying a company's personnel policy, however, may not be done without first seriously considering a variety of factors. For example, a new or modified policy cannot discriminate against a protected class of persons, breach a contract, cause an employee to lose a vested benefit, or otherwise violate the law. Once an employer determines that a new policy can be adopted, the next step is shaping how and when such policy should be adopted. Generally, the rule of thumb is that if the existing policy is of indefinite duration, and the employer effects the change after a reasonable time following reasonable notice (without interfering with employees' vested benefits), the modified policy may come into effect. *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1 (upholding the discontinuance of a management policy whose duration was indefinite and after a reasonable time had passed). Accordingly, absent an express provision spelling it out, the question of what constitutes "reasonableness," both in terms of the time the policy has been in effect and how much notice employees were given in advance of the policy change, is critical.

As was recently demonstrated when the California State Automobile Association (CSAA) changed its sales compensation plan, the failure to properly modify a company's personnel policy may prove costly. *McKaskey v. California State Automobile Association* (Oct. 29, 2010). Plaintiffs Charles Luke, Francis McCaskey, and John Mellen had worked for CSAA as sales agents. When hired, each sales agent signed an "Appointment Agreement" providing that CSAA would pay commissions on new and renewal business in accordance with various "Compensation Plans," which CSAA expressly reserved the right to modify. Each of these agreements provided that either party could terminate the agreement without prior notice. The compensation plans prescribed formulas for calculating the specific commissions sales agents would be paid for selling particular insurance products. These plans also included minimum production requirements (MPRs), which effectively outlined sales quotas for employees. Some of the plans in existence during plaintiffs' employment contained a provision clarifying that the failure to meet MPRs constituted grounds for termination. However, it was subsequent proposed changes in CSAA's MPR policy that threw this particular train off the tracks.

In 1973, CSAA had specified in its plans that sales quotas would be reduced for individual employees proportionately to their years of service (i.e., at age 55, an employee was entitled to a 15 percent reduction in MPR for five years; at age 60, an employee was entitled to an additional 25 percent reduction). In effect, such policy permitted senior agents the option of making fewer sales without consequently risking their termination for failing to satisfy an MPR. Based on their long years of service, each plaintiff was qualified under the 1973 policy to have their MPR reduced. However, in early 2001, and without notice, CSAA adopted a revised policy that scuttled any MPR reduction for senior sales agents. Somewhat unsurprisingly, the plaintiffs refused to sign the 2001 policy. While CSAA conveyed it would not fire these employees, it clarified to them that the 2001 compensation plan would nevertheless govern their compensation and that CSAA had discarded the seniority-based reduction in MPR policy. Later, in 2005, McCaskey was discharged for failing to meet his MPR for the preceding months. That same year, new compensation plans were distributed to CSAA employees, along with the express warning that any sales agent who did not sign off on the new plans (which, like the 2001 plans, did not allow for a seniority-based reduction in MPR) would be terminated. Mellen and Luke subsequently refused to sign their new plans and were terminated.

Each plaintiff sued CSAA separately for breach of contract, age discrimination, and wrongful termination. Their actions were consolidated, and CSAA filed a motion for summary judgment. CSAA claimed that the employees were "at will" and that it did not breach any contract as CSAA had satisfied the preconditions giving it the power to modify employee policies pursuant to the principals applied in *Asmus*. The trial court entered summary judgment in favor of CSAA primarily on the grounds that they were contractually entitled to rescind the policy of seniority-based MPR reductions.

The Court of Appeal reversed the trial court's determination as to the breach of contract claims, examining, in part, the reasonableness of CSAA's policy modification.

In *McKaskey*, plaintiffs contended that *Asmus* was inapplicable because the policy in their case (seniority-based MPR reductions) was not of indefinite duration but instead took effect at a prescribed, finite time. Alternatively, plaintiffs argued that their right to seniority-based MPR reduction was a vested right not vulnerable to interference by CSAA.

The Court of Appeal stated, however, that neither side's view of the case was sustainable. It reasoned that although CSAA failed to explicitly set an end date for its performance of the promise at issue, there was an "implied-in-fact" durational term by which CSAA's duty to honor the policy would end based on an employee's age. To take advantage of the "reasonable time" rule applied in *Asmus*, CSAA had to establish as a matter of law that no durational term could be derived from the terms and circumstances of the MPR reduction policy itself. The court reasoned that the plaintiffs had created a triable issue of fact that there were durational time limits in the compensation plans at issue.

The court clarified that a policy change is reasonable if a sufficient amount of time passes between a policy's implementation and repudiation. Most times, the implementation of a policy coincides immediately with the rights that are being effected. As framed by the court, the question of what constitutes a reasonable time from policy inception to repudiation is not how long ago the policy was implemented, but how long the promisor is required to perform under the policy. In *Asmus*, for example, the employer had performed under the policy for six years, and laid off an employee two years after that, so that court found that the employer had carried the burden of the promise long enough. In contrast, *McKaskey* reasoned that CSAA did not have the "burden" of the promise under the policy until employees reached a certain age and seniority. In the court's view, CSAA received the immediate benefit of a loyal workforce in exchange for the promise of a future reward. Thereafter, and only very shortly after plaintiffs had received the benefit of the reduced MPR - and before any of them actually sought to take advantage of it - CSAA renounced their duty to honor the policy. Accordingly, the court found that there were triable issues of fact as to whether a "reasonable time" had passed from the time that the policy was meaningfully implemented until the time it was repudiated. The court strongly inferred that it was troubled by the close temporal proximity between when plaintiffs were able to take advantage of the policy and when CSAA removed the seniority-based MPR reduction policy.

While not expressly discussed in the decision, employers should consider the additional factor of what constitutes "reasonable notice" of a policy change. Although no precedent clarifies precisely how much advanced notice is required, companies should consider the likely effects of a policy modification and provide employees a reasonable period of time to adjust to them. Employers should provide as much notice about policy revisions as they do when originally implementing such policies.

As a practical matter, and until *McKaskey* is resolved, if an employer is considering modifying its policies several steps can be taken to protect itself from potential exposure. First, the language of the policy itself should be considered to determine the effective duration of the policy at issue, from benefit inception to repudiation, to ensure employees are given a meaningful opportunity to enjoy the benefit of the policy. Additionally, employees should receive as much notice as possible of policy revisions. Second, an employer should notify its employees about the policy change and revise the employee handbook to reflect it. Ideally, employees should be required to sign off on the policy change, with such acknowledgement being retained in their personnel files. Taking these steps will not only assist your employees in transitioning to the new policy, but will also aide in preventing future litigation.

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