LYNCH, GILARDI & GRUMMER
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CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

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The following is a brief summary of the significant employment law developments since our last newsletter.[1]

LEGISLATION

HIPAA Deadline: The grace period for compliance with the employer-sponsored health benefit plans ends on September 23, 2013 at which point group health plans and other "covered entities" and "business associates" are required to be in compliance with the applicable provisions of the final rules. Those rules (1) significantly expand the scope of the impact of HIPAA privacy as security rules on vendors—business associates—who work with group plans; (2) revise rules covering individual rights regarding PHI as well as other rules to take into account changes made by the HITECH Act and (3) make additional changes required by the Genetic Information Nondiscrimination Act (GINA). In light of the new rules, employers should:

- Update existing business associate agreements with providers such as claims administrators, pharmacy medical managers, insurance brokers, and benefit consultants;
- Update Notice of Privacy Practices distributed by participants to explain participant rights;
- Review and revise internal policies and procedures that govern plans' handling use and disclosure of PHI; and,
- Train the benefit staff that actually administers the plan on these new legal developments.

Minimum Wage Increase: California's current minimum wage of $8 an hour will increase to $9 an hour on January 1, 2014. It will increase to $10 an hour on January 1, 2016.

Paid Family Leave Change: Effective July 1, 2014, this law will change to expand benefits for when the employee takes leave to care for grandchildren, grandparents, siblings or in-laws. *SB 770.*

Domestic Service Employees' Overtime: A new wage hour law provides for overtime for certain employees who qualify as domestic service employees. *AB 240*. Fundamentally, those employees who qualify under this law as a "domestic worker who is a personal attendant" will earn time-and-one-half pay for all hours worked over 9 hours/day or 45 hours/week. *Comment*: The exceptions applicable to this law may render it functionally unenforceable.

PRIVACY

Facebook v. First Amendment: A sheriff facing a challenge at re-election learned that some of his employees supported his opponent and demonstrated that by "liking" the opponent's Facebook page. The sheriff was unhappy with that show of support and when he was re-elected, terminated his employees who had supported the opponent. *Bland, et al. v. B.J. Roberts, et al.* The Court of Appeals found that the expression by his dissident employees was a protected First Amendment right. *Comment:* Although this case is from another jurisdiction, I think it is fairly predictive of California law on this issue. Employers should tread lightly when penalizing employees for expressions of First Amendment rights.

Fair Credit Reporting Act Amendment: The Fair and Accurate Credit Transaction Act of 2003 (FACTA) provides that certain reports on employees related to employer "investigations" are exempt from most of the usual requirements that the FCRA imposes on employers that obtain these reports from third-party consumer reporting agencies (CRAs). This exception provides employers with complete defenses to

[1] This summary is intended to be a brief overview of significant legal developments and is not an in-depth analysis of the cases or statutes discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein. *NOTE*: These cases have not been updated/cite-checked since they were first reported.

lawsuits alleging FCRA violations (or related class actions). *Comment*: A fuller discussion of the obligations under the FCRA and FACTA are contained in the chapter which I authored for the California *Continuing Education of the Bar* treatise on: *California Privacy Law Compliance and Litigation.*

OTHER DEVELOPMENTS

Arbitration Rules: An employer's arbitration agreement was not "unconscionable" because the employer did not attach the AAA Dispute Resolution Rules that govern the arbitration proceedings. *Peng v. First Republic Bank, et al.* The court distinguished contrary prior authority holding such agreements invalid in the absence of attached Rules. *Comment:* This development is good news for employers as having to attach the applicable arbitration rules is sometimes onerous and greatly expands the girth of the arbitration agreement.

Wage and Hour: A federal appellate court decided that an employers' "on-duty" meal period program for security guards was susceptible to class action treatment. *Abdullah v. U.S. Security Associates Inc.* The important element of this case is its discussion of when an on-duty meal period is authorized under California law. Generally, that (1) the employee must be relieved of all duties and (2) when the nature of the work prevents an employee from being relieved of all duty and, when by written agreement between the parties, an on-the-job paid meal period is agreed to. *Comment*: The contest in these cases is generally whether the "nature of the work" prevents an employee from being relieved of all duties.

Discrimination: An employee claiming that she was wrongfully terminated due to her pregnancy had to prove that her pregnancy was not merely a *motivating reason* for her discharge but was a "substantial" motivating reason. *Alamo v. Practice Management Information Corporation.* The case was returned to the trial court for further litigation of that issue. *Comment*: While the distinction might seem trivial, jurors who follow the law will frequently reach one conclusion under one standard and a different conclusion under the other standard.

Retaliation: Employees claiming that they were subject to retaliation for complaints regarding workplace safety must first bring a complaint before the Labor Commissioner (i.e., exhaust administrative remedies). *McDonald v. California*. The appellate court agreed and dismissed plaintiff's complaint for not having exhausted administrative remedies. *Comment*: Exhaustion is not a difficult task but doing so, especially within applicable time limits (e.g. within six months of the date of the violation) is critical. Failure to do so provides a complete defense.

Vicarious Liability: An employee who is required to drive her vehicle to work in order to visit employer clients during the course of the day was acting in the course and scope of her employment when involved in an accident on her way home. *Moradi v. Marsh USA.* The fact that the employee stopped for a frozen yogurt and a yoga class on the way home did not take her outside that course and scope. *Comment*: This decision expands the scope of the workday for which an employer is vicariously liable.

Vicarious Liability: An off-duty bartender took a flask of whiskey to his employer's holiday party and re-filled the flask from the bar. The employee made it home, but then went out again to drive an intoxicated co-worker home. The employee recklessly killed plaintiff. The trial court granted summary judgment on the ground that the employee was not acting within the scope of his employment at the time of the accident. But the Court of Appeal reversed, holding that "a trier of fact could conclude the party and drinking of alcoholic beverages benefitted (the employer) by improving employee morale and furthering employer-employee relations… [and] that (the employee) was acting within the scope of his employment while ingesting alcoholic beverages at the party." *Purton v. Marriott Int'l,*

Inc. The fact that the employee had arrived home safely before venturing out again did not cut off the employer's liability as a matter of law. *Comment*: An employer can be held liable for its employee's off-duty accident as long as the proximate cause of the injury (alcohol consumption) occurred within the scope of employment.

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If you have questions regarding any of the aforementioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.

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