



LYNCH, GILARDI
& GRUMMER
A Professional Corporation

CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

October 2012

Ronald J. Souza
LYNCH, GILARDI & GRUMMER
A Professional Corporation
170 Columbus Avenue, 5th Floor
San Francisco, CA 94133
(415) 397-2800

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

LEGISLATION²

Wage Statements: An employee is deemed to have suffered an “injury” subjecting an employer to penalties if an employer fails to provide a wage statement or means by which the employee can determine (1) amount of gross or net wages paid during a pay period, (2) deductions the employer made from gross wages to determine net wages, (3) the name and address of the employer or legal entity which secured the services of the employer, and (4) the name of the employee and only the last four digits of the employee’s SSN. *California Labor Code §§ 226(e) & (f).*

Commission-Based Compensation: An employment agreement providing for commission compensation must be in writing and set forth the method by which the commissions are required to be computed and paid. *AB 1396.* This Bill is applicable to all employers and eliminates a prior provision providing for treble damages for out-of-state employers.

Written Commission Agreements: The California Labor Code requirement that employers provide commission statements and the method of calculating the same does not

include “short term productivity bonuses.” *California Labor Code § 2751.*

Salary Payment to Non-exempt Employees: Payment of a fixed salary to non-exempt employee provides compensation only for the employee’s regular, non-overtime hours, notwithstanding any “explicit mutual wage agreement” or other private agreement to the contrary. *California Labor Code § 515.*

Fair Employment and Housing Commission: This governmental entity has been eliminated and its duties transferred to the new Fair Employment and Housing Council within the Department of Fair Employment and Housing (DFEH). *California Govt. Code § 12907.*

Wireless Communications While Driving: A driver can lawfully use electronic wireless communication devices that are specifically designed and configured to allow voice-operated and hands free operation to dictate, send or listen to a text-based communication and is used in that manner while driving. *California Vehicle Code § 23123.5.*

False Claims Act: State and federal False Claims Acts make it unlawful for a person and entity to present false claims to governmental agencies to improperly obtain money for goods and services that are substandard. An employee who himself/herself has violated this Act may file suit against the employer based on the employee’s prohibited conduct and be awarded a share of the proceeds of the action. *AB 2492.*

Social Media Privacy: In September 2012, Governor Brown signed into law a Bill which prohibits employers from requiring that employees or job applicants disclose information related to their personal social media accounts, such as Facebook. There are exceptions if an employer recently believes the request to be relevant to an investigation

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.

² Most of these enactments will become effective January 1, 2013.

into workplace misconduct or requests for passwords or other information used to access employer-issued electronic devices, like laptops or cell phones. There is nothing in the new law that would prevent an employer from looking at an employee's web page viewable by the general public.

Personnel Files: A new law changes the rights of current and former employees and of employers concerning employees' personnel files. *AB 2674*. Former employees have the same rights to inspect and have a copy made of the contents of their personnel file as do current employees; employees have the right not only to view but also to receive a copy of the contents of their personnel file (provided they pay the actual copying expenses); an employee can designate a representative to conduct the inspection of the personnel file; employers must develop and provide a written form used to request access to personnel files; employers must provide access within 30 calendar days. The Labor Commissioner may recover a \$750 penalty and employees may obtain injunctive relief and attorneys' fees necessary to assert their rights under the new law. Employers are required to retain personnel file records for a period of three years following the termination of employment. There are certain exceptions and restrictions on employees' rights and employers' duties.

Updated FCRA Notices: Currently, the Fair Credit Reporting Act (FCRA) governs third-party credit reporting agencies that perform background checks on job applicants and employees on behalf of employers. Under the Act, employers must clearly disclose to applicants or employees the intent to obtain such a report and utilize it in making employment decisions. The FCRA provides for additional notice and provision of

information to the applicant or employee if an adverse employment action is taken on the basis of the report. To be in compliance with the FCRA, the employer must certify that it (1) notified the applicant or employee and got that individual's permission to get a consumer report; (2) complied with all of the FCRA requirements; and (3) will not discriminate or misuse the information obtained.

ARBITRATION

Choice of Law: The Federal Arbitration Act (FAA) does not preempt the application of the California Arbitration Act (CAA) to an arbitration agreement in which the parties have agreed to be governed by California law. *Mastick v. TD Ameritrade Inc.* The FAA does preempt, however, when they have not so agreed. *Comment:* Arbitration agreements should be carefully structured to retain for employers the benefits of both the (1) FAA and (2) California law.

Misclassification: An arbitration provision applying to disputes arising out of work agreements did not apply to workers' claims that they were being misclassified as independent contractors instead of employees. *Elijahjuan v. Superior Court.* The court found that the workers' claim fell outside the purview of the arbitration provision because the misclassification claim did not concern the application or interpretation of the agreements but sought to enforce their rights under the California Labor Code.

OTHER DEVELOPMENTS

Wage & Hour: A salesperson employed in the mercantile industry (e.g. retailers) who earn more than 1-1/2 times the minimum wage and whose income is more than 50% derived from commissions qualifies for an inside

salesperson exemption from overtime. Headhunters who spent most of their time trying to match potential job applicants with clients qualified for this exemption. *Muldrow v. Surrex Solutions*. Headhunters offered a candidate to a client in exchange for money and their duties were related to that task so they were “selling.” *Comment*: This case eliminated the confusion about whether this exemption might extend to sale of non-tangible products.

FEHA Violations: The Fair Employment and Housing Act (FEHA) is violated if the “motivating reason” or “a motivating factor” of an employment decision was discriminatory. *Alamo v. Practice Management Information Corp.* Here, a former employee was allowed to proceed with her lawsuit alleging that her pregnancy-related leave was a “motivating reason” for her termination. *Comment*: In this case, which has more importance for lawyers, the court clarified that an employer’s act could violate FEHA even though only partially related to a protected classification.

Trade Secrets: A former employee was awarded \$480,000 in fees and costs against an employer who prosecuted a trade secrets claim in bad faith. *SASCO v. Rosendin Electric, Inc.* In this case, the former employer abandoned his case once the former employee filed a motion seeking dismissal of employer’s claims on the grounds that it lacked merit. *Comment*: Former employers must use care in deciding whether to prosecute former employees for alleged trade secret violations.

Anti-Strategic Lawsuits Against Public Policy (Anti-SLAPP): A bank’s defamation action against a former employee was properly dismissed for violation of the Anti-SLAPP statute. *Summit Bank v. Rogers*. In this case, the former employee had posted

allegedly defamatory statements about the bank in the “rants and raves” section of Craigslist. *Comment*: All lawsuits founded on allegedly unlawful speech should be carefully reviewed for violations with the Anti-SLAPP statute.

Class Certification: Plaintiffs were denied class certification in a lawsuit alleging statutory violations related to meal breaks, rest breaks and pay stubs. *Tien v. Tenet Healthcare Corp.* In this case, plaintiffs were hourly employees who claimed that they were denied meal breaks and their time-keeping records were inaccurate. But the company introduced individualized questions regarding whether particular employees actually took their meal breaks and produced signed waivers by some employees regarding the meal breaks which they had missed. *Comment*: An employer’s avoidance of class certification usually signals the demise of the lawsuit as there remains little incentive for plaintiffs’ lawyers to pursue litigation on an individual basis.

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

© 2012 Lynch, Gilardi & Grummer, APC.
This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please contact your employment attorney in connection with any fact-specific situation in which you intend to take significant employment action. State or federal law may impose additional obligations upon you or your company, apart from the aforementioned legal authorities.

RJS Client Newsletter-10-12.doc