



LYNCH, GILARDI
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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

WAGE AND HOUR

Meal and Assigned Rest Breaks: A federal court has held that interstate motor carriers are not subject to California's meal and rest break rules. *Dilts v. Penske Logistics, LLC*. The reason is that California meal and rest break laws are preempted by federal legislation (Motor Carrier Act) governing interstate transport. *Comment:* This case has only limited application to California employers who are involved in interstate transport.

Computer Exemption: New wage rates have been announced for some computer software employees. *California Labor Code § 515.5*. The old-new rates are as follows:

Hourly: \$37.94-\$38.89;

Monthly salary: \$6,587.50-\$6,752.19;

Annual salary: \$79,050-\$81,026.25

Comment: Employers should consult the California Labor Code or their employment lawyer before implementing these changes as the new rates apply only to *some* computer professionals.

DISCRIMINATION

EEOC Claims: The Equal Employment Opportunity Commission (EEOC) received a record number of charges of discrimination and secured the highest amount of damages in 2011. *EEOC Performance and Accountability Report*. The EEOC received 99,947 charges of employment discrimination in 2011 (10/1/10-

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.

9/30/11) which is the largest number ever filed in a fiscal year with the EEOC. Further, the EEOC revealed that it secured a record 10% reduction in its backlog of pending cases and \$364.6 million in back pay and penalties paid to alleged victims. *Comment:* The EEOC continues its emphasis on systemic discrimination as well as its approach to investigating charges of discrimination including demands for timely (and disruptive) responses.

California Family Rights Act (CFRA): An employer did not violate CFRA by transferring employee upon her return from a 19-week stress leave. *Rogers v. County of Los Angeles*. Rogers was not entitled to reinstatement because she had failed to return to work at the end of the 12-week CFRA-protected leave and there was insufficient evidence of retaliation against Rogers for having exercised her CFRA rights. *Comment:* Employers should continue to use care in dealing with employees returning from pregnancy (or other) disability leaves.

LEGISLATION

Trade Secrets: As currently written, federal legislation may prohibit as unlawful lying about one's age as well as the unauthorized downloading trade secrets from an employer's computer. *Consumer Fraud and Abuse Act, 18 USC § 1030*. Provided certain conditions are met, the civil provisions of the Consumer Fraud and Abuse Act (CFAA) create a private right of action against those who wrongfully access, or exceed their authorized access, to a protected computer. *Comment:* Because of the unintended breadth of this legislation, many have argued that it be amended.

Commissioned Employees: Governor Brown signed a law mandating that all commissioned employees in California be provided with a written contract. *California Labor Code § 2751*. The legislation will go into effect on January 1, 2013. *Comment:* The "commissions" do not include short-term productivity bonuses such as

those paid to retail clerks or bonuses and profit-sharing plans.

MISCELLANEOUS

Unlawful Competition: An injunction prohibiting an employee from competing with a former employer was upheld. *New Life Sciences, Inc. v. Weinstock*. In this case, the employee had signed a non-compete agreement in connection with the sale of the employee's invention. *Comment:* Courts will uphold non-compete agreements that are a part of the sale of a business or invention. This is contrary to the court's normal reluctance to enforce non-compete agreements in favor of employers against former employees.

Individual Liability: There is no individual liability under the Military Service Anti-Discrimination Law for supervisors who allegedly discriminate against returning veterans. *Pantuso v. U.S.* In this case, a veteran returning from six months of duty in Iraq was denied reinstatement to his old position. *Comment:* This case means only the individual supervisors cannot be liable; not that the employers cannot be liable for unfairly treating returning servicemen as to employment opportunities.

Labor: The National Labor Relations Board (NLRB) recently dismissed a charge brought by an employee who was fired for a post on LinkedIn. In this case, a supervisor from the employee's department invited the employee to join LinkedIn. Thinking only his supervisor would see his response, the employee jokingly wrote that his position was "F__ktard." The company informed the employee that he had violated the company's electronic communication policy which "forbids material that is 'obscene, defamatory, harassing or abusive.'" *Comment:* Generally the NLRB is taking a surprisingly conservative approach to terminations based on social media actions.

Privacy: HIPAA privacy and security audits begin in November 2011. *HIPAA, 1996.*

Beginning in November of 2011, the HHS Office of Civil Rights will begin a pilot audit program which will include auditing up to 150 covered entities. *Comment:* Remember, most employers are not covered by these rules which apply generally to healthcare providers.

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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