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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

Wage Claim Settlements: A California employer may compromise a claim for unpaid wages where there exists a bona fide dispute over whether any wages were owed. *Chindarah v. Pick Up Sticks, Inc.* In this case, plaintiffs claimed overtime and other Labor Code entitlements resulting from their misclassification as exempt employees, which the employer denied. *Comment:* This case is welcome relief for employers. Prior law expressly prohibited waiver of Labor Code claim entitlements as a part of a settlement. As a result, it was difficult to settle wage loss claims. This case breathes some sanity into the process.

Alternative Work Week: Two recent developments have provided employers with greater flexibility in fashioning alternative work weeks. A DLSE Opinion Letter allowed an employer to adopt a schedule of four 9-hour days (Monday through Thursday) and one 4-hour day (Friday) from June through September while returning to a normal work schedule (Monday through Friday – 8 hours per day) during the balance of the year.

Further, buried in the text of the recent California budget was a provision that, with employer consent, employees may move from one schedule option to another on a weekly basis. This change did away with the prior law which required rigid consistency regarding the definition of a work week. It also changes the definition of an "affected work unit" to a "division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof." Thus, alternative work weeks may be implemented as to any such "work units."

Tip Pooling: A restaurant's mandatory "tip pool," in which servers share their tips with bussers, bartenders, kitchen staff, and dishwashers, did not violate Labor Code § 351. *Etheridge v. Reins International, California, Inc.* In this case, the court rejected the employees' argument that only servers or those involved in direct table service alone were entitled to share in tip pools. *Comment:* Restaurant and other hospitality employers can now extend tip pooling benefits to a broader range of employees.

Tip Pooling: Employees have a private right of action against employers for wrongfully taking employee gratuities. *Grodensky v. Artichoke Joe's Casino.* In this case, casino dealers were required to share a portion of their tip pools with shift managers, whom the court found to be agents of the employer. This violated C.L.C. § 351, which provides that tips are "the sole property of the employee or employees to whom it was paid." *Comment:* Service industry employers with tip pooling policies must use care to assure that tip pool sharing does not extend to management or supervisory employees.

RETALIATION

Internal Investigations: Protection against retaliation extends to employees who speak out about discrimination while

[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.

answering questions during the employer's internal investgation. *Crawford v. Metropolitan Government of Nashville and Davidson County.* In this case, the plaintiff-employee was fired for an alleged embezzlement shortly after being interviewed during an internal investigation into rumors of sexual harassment. *Comment:* Employers should treat employees making complaints or supporting them as protected for a reasonable period following the same.

Violence Complaints: An employee who complained to her employer about the increased risk of violence to which she was subjected was later terminated for alleged poor performance. Thereafter, she successfully sued for retaliation in violation of the public policy contained in Labor Code §§ 6310 and 6312 (prohibiting retaliation for refusal to work in violation of health and safety standards). *Boston v. Penny Lane Centers, Inc.* A jury awarded $700,000, finding that the employer had violated Health and Safety Code § 1596.882 (protecting from discrimination employees who make good faith complaints to a regulatory agency or the employer regarding violations of the Health and Safety Code). *Comment:* An employer is duty-bound to properly respond to employee concerns regarding threats of violence.

ARBITRATION

Discrimination Claims of Union Members: The U.S. Supreme Court has held that unionized workers may be required to arbitrate discrimination and other statutory employment claims. *14 Penn Plaza LLC v. Pyett.* However, the arbitration provision in the Collective Bargaining Agreement must contain a clear and unmistakable waiver of the right to a jury trial. *Comment:* This case provides an employer of unionized workers to litigate discrimination and other statutory employment claims through Collective Bargaining Agreement arbitration rather than the more costly civil courts.

Class Action Waivers: An arbitration agreement containing a waiver of the right to bring a class action or participate in a Private Attorney General Act (PAGA) was unenforceable. *Franco v. Athens Disposal Company, Inc.* In this case, plaintiff signed an arbitration agreement including a waiver of "any right to join or consolidate claims in arbitration with others or make claims in arbitration as a representative or as a member of the class or any Private Attorney General Act capacity." Subsequently, the plaintiff-employee filed a class action against the employer alleging denial of overtime pay and rest and meal breaks. *Comment:* There have been inconsistent holdings from various courts on this issue in recent times. The majority of those decisions invalidate attempts to preclude an employee from participating in class or other collective actions.

LEGISLATION

American Recovery and Reinvestment Act: The American Recovery and Reinvestment Act (ARRA), includes a number of provisions with which employers need to be familiar:

- ♦ COBRA premium subsidy and related employer tax credits – Employers are now required to cover a departing employee's group health coverage for up to 18 months, and is entitled to a tax credit to recoup that subsidy. (See discussion in our prior newsletter.)

- The ARRA also limits executive compensation for employers that receive TARP funds.
- Terminated employees on unemployment compensation will receive $25.00 more a week until December 31, 2009.
- *Respect Act* – The definition of "supervisors" has been expanded to those who perform at least 1 of 12 supervisory functions set forth in the statute. This change expands the scope of employees who can be excluded from a union's collective bargaining unit.
- *Lilly Ledbetter Fair Pay Act* – This federal legislation extends the time period during which an employee may file charges of pay discrimination under federal law.

MISCELLANEOUS

Disability Discrimination: An employer did not discriminate against an employee with a medical condition ("thick blood") in delaying to shield her from the most stressful aspects of her job. *Wilson v. County of Orange.* In this case, the employer accommodated the employee in precisely the manner requested but delayed in initiating the "interactive process" leading to the accommodation. *Comment:* An employee cannot take an employer to task for a good faith, but delayed, effort to accommodate a disability or protected medical condition.

Labor: An employer committed unfair labor practices by firing employees for taking steps toward a filing of a wage and hour lawsuit and videotaping the discharged attorneys as they picketed in front of the employer's restaurant. *Saigon Gourmet Restaurant, Inc.* Employees' discussions pertaining to the filing of a wage and hour lawsuit constituted protected concerted activity under the National Labor Relations Act. *Comment:* Additionally, this conduct may have constituted retaliation for activity protected under the Labor Code.

Privacy: Group health plans that were required to comply with privacy requirements of the Health Insurance Portability and Accountability Act (HIPAA) by April 14, 2003 (i.e., large health plans) now have an obligation to notify individuals who are covered by the plan that the privacy notice is available and to tell them how to obtain the notice. This reminder notice must be sent at least once every 3 years. *Comment:* For most large plans (defined as $5 million in claims for self-insured plans and $5 million in premiums for fully-insured plans), the reminder notice must be sent by April 14, 2009.

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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