LYNCH, GILARDI & GRUMMER
A Professional Corporation

ATTORNEYS AT LAW

SINCE 1978

California Employment Law Newsletter

What's New for California Employers?

Ronald J. Souza
Lynch, Gilardi & Grummer
475 Sansome Street, Suite 1800
San Francisco, CA 94111
(415) 397-2800

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

DISCRIMINATION

Sexual Orientation: The big news of the day is, of course, the State Supreme Court decision granting same-sex couples the right to marry. *In re Marriage Cases*. Employers can expect newly-married same-sex couples to seek treatment equal to that afforded their heterosexual co-workers, including spousal benefits, when the decision takes effect on 6/14/08. *Comment:* Inquiries regarding the following topics should be anticipated:

- Benefits provided under state law; e.g., the California Family Rights Act (Labor Code § 233);
- Benefits provided through employer policies (e.g., health/dental insurance for "spouses");
- Benefits provided under federal law, which defines "marriage" as a union between one man and one woman (e.g., retirement plans governed by ERISA);
- Federal income tax treatment of "spouses" under the I.R.C.;
- Spousal rights under the Consolidated Omnibus Budget Reconciliation Act (COBRA);

Same-Supervisor Action: A plaintiff's supervisor was capable of discriminating against her even though the supervisor had previously hired plaintiff and then promoted her multiple times. *Harvey v. Sybase*. In this case, the supervisor commented that plaintiff's hiring decisions made the HR Department "look like an airport" (i.e., more white males were needed); that more men were needed in HR because there was there was "too much gossip," and women going on pregnancy leaves. Plaintiff sued after receiving negative performance evaluations leading to her termination based on the elimination of her job position, which was later filled by two white males. A jury found that the supervisor had discriminated against plaintiff based on her race and gender, leading to an award of over $1.3 million in compensatory damages, $500,000 in punitive damages, and attorneys' fees (OUCH!). *Comment:* While this case presented an extreme situation, there is competing authority which holds that where the same manager hires a plaintiff and fires him/her, there is a presumption that the termination was not discriminatory.

Disability/Retaliation: An employee who was terminated after complaining of pain and numbness in his arms, fingers, shoulders and feet for a year or two, and then filed a workers compensation claim, was not able to proceed with the claim for disability discrimination or retaliation under state law (FEHA). *Arteaga v. Brinks, Inc.* The Court found that the pain and numbness did not make it difficult for him to achieve the life activity of work, and the employer had a legitimate non-discriminatory reason for the termination – loss of confidence in the plaintiff. *Comment:* There is a saying among lawyers that "bad facts make bad law." In this case, there was rather strong evidence that plaintiff was guilty of theft, which provided the employer with a solid basis for a "loss of confidence" in him. Generally, employers should use caution in terminating employees who have recently complained about a medical condition which impedes their ability to work and then files a workers compensation claim based thereon.

WAGE AND HOUR

Computer Network Operator: A computer network operator qualified for an administrative exemption (disallowing

[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.

overtime). *Combs v. Sky River Communications, Inc.* The position satisfied both the salary base (more than $28,080) and duties test (i.e., primarily non-manual work related to management policies and general business operations where the employee customarily exercised discretion and judgment over significant matters. *Comment:* Computer professionals are increasingly found to be exempt. But employers should check with employment counsel before classifying them.

Meal Breaks: A District Court declined to certify a meal period class action, finding the employer is not obligated to ensure employees take meal breaks. *Brown v. Federal Express Corp.* In this case, the subclass of ramp transport drivers and a class of courier drivers were allegedly denied meal and rest breaks. The Court found that the relevant Labor Code sections and Wage Orders did not support plaintiff's contention that the employer was required to ensure that an employee take a meal break, but instead that an employer not "fail to provide" a meal period. *Comment:* Although this is a federal court interpreting federal law, this is an important development for employers who do not know or cannot police an employee's break habits.

Prorating Salaries for Exempt Employees: An employer jeopardizes the exempt classification of an employee where the employer prorates the salary of that employee. *U.S. Department of Labor Wage/Hour Opinion Letter,* F.L.S.A. 2008-1NA. Here, the employee in question was earning $30,000 a year for full-time work and his hours were cut by one-half and his salary reduced to a commensurate $15,000 a year. Although the employee met the duties test for an exempt salaried employee, the DOL stated that the employee must receive a salary of at least $455 per week for every week in which he/she performs work, regardless of the number of hours/days worked. *Comment:* Prorating any exempt employee's salary, risks that employee's exempt status (and the employer's immunity from paying overtime and providing rest breaks).

Premium Pay: An employee who received premium pay for holiday work was entitled to overtime pay based on regular rate of pay only. *Advanced Text Security Services, Inc. v. Superior Court.* Here, the Court rejected the employee's argument that she should have been paid for eight hours of work on a holiday (Labor Day) at the premium rate of 1½ times the regular rate of pay and 4 hours at a rate of 1½ times the premium rate. *Comment:* This refreshing decision holds that there are limits on the rate at which employers must compensate holiday time.

ARBITRATION

Splitting Arbitration Costs: An employer cannot require an employee to split the costs of an arbitration hearing. *California Teachers Assn. v. State of California*. Here, the employer sought to require a disciplined employee to split the costs of an administrative appeal hearing if the employee pursued the appeal through a privately-retained attorney rather than through the union. *Comment:* In this curious situation, the employee's interests were actually pitted against his own union's interests (i.e., the union wanted to retain the business of representing the employee rather than losing it to outside counsel). In general, employers should avoid attempting to shift the costs of arbitration to employees, as this jeopardizes the validity of the arbitration agreement, thereby subjecting the employer to the risks/costs of civil action.

One-Way Provision: A court refused to enforce an arbitration agreement because the agreement required the employee to arbitrate claims against the employer, but not the other way around. *Tourangeau v. LBL Insurance*

Services, Inc. The agreement also contained hidden terms that were not disclosed to the employee and required the arbitration be governed by: (1) rules of the Employee Handbook, (2) rules of the American Arbitration Association, or (3) other unspecified rules so that it was unclear what rules would actually apply. *Comment:* This is yet another case where an employer tried to structure the arbitration agreement to obtain an undue procedural advantage over the employee. Employers should generally accept the benefit of arbitration (over civil action) as its only reward in obtaining an arbitration agreement.

OTHER DEVELOPMENTS

Retaliation – Potential DFEH Witness: An employee successfully pursued a claim for retaliation, claiming that she was forced to quit after verifying that the company's chairman inappropriately kissed an employee. *Steele v. Youthful Offender Parole Board*. Here, rather than conduct a prompt and thorough investigation of the report, the employer threatened to fire the employee if she did not keep her mouth shut and pressured her into writing a false statement that the incident never occurred. *Comment:* Rather than protecting the potential witness from retaliation, the employer created an intolerable working condition that forced her to quit.

Legislation: Employers may not discriminate against employees based on genetic information obtained during employment or through placement of health insurance. *Genetic Information Non-Discrimination Act of 2008* (GINA). This act amends Title VII of the Civil Rights Act. *Comment:* This legislation enables individuals to more freely take advantage of genetic testing, technologies, research and new therapies without fear of reprisal based on information revealed thereby.

Independent Contractor Classification: Newspaper carriers were properly classified as employees, not independent contractors. *Antelope Valley Press v. Poizner*. Here, door-to-door newspaper carriers were properly classified as employees and not independent contractors based on the level of control the publisher maintained over the way in which they performed their duties. *Comment:* Misclassification of employees as independent contractors is a costly mistake. The consequences include back workers' compensation premiums, potential overtime claims, potential meal/ rest break claims, loss of "employee benefits," etc.

Labor: Location of parking for university employees is a "term or condition of employment" within the scope of a collective bargaining agreement. *California Faculty Association v. Public Employment Relations Board.* In this case, the employer (University) prohibited employees from parking in new parking structures on two of its campuses. *Comment:* In general, any change of working conditions that could cause an employee employed under a collective bargaining agreement to complain should be reviewed with the union representative before undertaking the same.

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