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]

WAGE & HOUR

Meal/Rest Breaks: The Supreme Court has ruled that employees who "prevail" on their meal or rest break claims are *not* entitled to recover attorney's fees. *Kirby v. Immoos Fire Protect, Inc.* Further, an employer who "prevails" in a meal and rest break claim would not be entitled to recover attorney's fees either. *Comment*: This decision as much as the *Brinker* decision (previously reported) will discourage lawsuits against employers for meal and rest break violations.

Commission Charge-Backs: An employer may charge back against future commission advances to a salesman where all conditions were not met. *Deleon v. Verizon Wireless, LLC.* Here, the employer's compensation plan included advanced commission payments that the employer could recover or charge back if the customer discontinued the service plan. *Comment*: This is an affirmation of earlier rulings that employers can retrieve commissions based on sales that were not concluded.

Administrative Exemption: According to the California Supreme Court, a work qualifies for an "administrative" exemption when it is directly related to management policies or business operations. *Harris v. Superior Court*. Qualifying work must satisfy two components: (1) it must be quantitatively administrative (i.e., work done by white color employees engaged in servicing a business such as advising management, planning, negotiating, and representing the company); and (2) must be qualitatively administrative (i.e., of substantial importance to the management or operations of the business). Comment: In ruling on this matter, the California Supreme Court directed the lower courts to make deference to the federal regulations which were incorporated into California wage orders.

Executive Exemption: "Team" of workers qualify as a "subdivision or department" for purposes of the executive exemption. *Ramos v. Baldor Specialty Foods, Inc*. In this case, plaintiffs worked as nightshift "captains" in the company's warehouse department, qualifying them as exempt executives under the Fair Labor Standards Act. Comment: This is a fairly liberal interpretation of the executive exemption (which might not be followed by some courts).

ARBITRATION

Class Action Waivers: The trial court properly granted a motion to compel arbitration of a plaintiff-employee's wage and hour claim, and dismissed the plaintiff's class action claims where the arbitration agreement provided for a waiver of class action entitlement. *Iskanian v. CLS Transportation Los Angeles, LLC.* In so ruling, the appellate court effectively overruled three prior California Supreme Court decisions. *Comment*: It is doubtful that this conflict between California and Federal law regarding enforceability of arbitration waivers is over and it is likely that *Iskanian* will likewise be appealed to the California Supreme Court.

Arbitration Agreement: An arbitration agreement that is located at the end of a long handbook was "procedurally unconscionable." *Nelson v. Legacy Partners.* But the agreement

[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.

was not substantively unconscionable and was thus found to be enforceable. *Comment:* While arbitration agreements are not necessarily the great panacea (i.e., there are negative factors to be considered by an employer before adopting an arbitration policy), they are generally enforceable and can be used to nullify class action exposure.

OTHER DEVELOPMENTS

Religious/Ministerial Exemption: Former ministers of the Church of Scientology, who alleged that they were forced to labor for the church under threat of serious harm if they left the ministry, failed to establish that the church's alleged wrongful conduct violated the Trafficking Victims Protection Act. *Headley v. Church of Scientology International.* In this case, the plaintiffs alleged that the church caused them to believe that they could not leave the ministry or they would face serious harm in doing so in violation of federal law. *Comment*: Courts of late have generally upheld the employment decisions of religious organizations as to their employees and volunteers.

Social Media: As previously reported, the acting Attorney General Counsel of the National Labor Relations Board (NLRB) has issued a third memorandum on the lawfulness of social media policies. From those memoranda and recent court decisions, the following principles can be gleaned: (1) a disclaimer that "nothing contained in this policy shall be interpreted … to 'interfere' with the legal rights of employees to engage in Section 7 (organizing) activities" does not cure a social policy that is otherwise violative of the organizing rights of employees; (2) a social media policy should give clear guidance and specific examples of acceptable and prohibited conduct; (3) social media policy cannot prohibit the posting or publication of complaints or criticisms about the company; (4) prohibiting illegal conduct online is acceptable; and (5) prohibiting the disclosure of confidential information is generally permissible. *Comment*: Recently, rarely a week goes by without some change/clarification in this area of the law. Stay tuned.

Access to a Party's Facebook Account: Both employer and employee attempts in discovery to obtain user name and passwords to Facebook accounts was denied. *Trail v. Lesko*. In this case, the judge ruled a blanket request for log-in information was unreasonable and that a party does not get free rein to access non-public social networking posts of an opposing party. *Comment*: The breadth of the requests in this matter signaled their doom. Judges will generally be guarded about unnecessary privacy intrusions in ruling on these requests.

Witness Statements: Recorded witness statements and the identity of witnesses from whom statements were obtained are subject to a qualified attorney work product privilege, preventing their disclosure. *Coito v. Superior Court*. Those things could also be subject to an absolute privilege against disclosure if the disclosure would reveal the attorney's tactics, impressions or evaluation of the case. *Comment*: This California Supreme Court decision ends much of the debate which has raged on this issue.

Independent Contractors: A franchisor's exercise of extensive control over the operations of a franchisee may destroy the independent contract relationship between them. *Patterson v. Domino's Pizza, LLC*. In this case, a Domino's "area leader" had told a franchise owner to fire an employee and the franchisee felt that he had to comply with the area leader's directive because "if you didn't, you were out of business very quickly." *Comment*: A franchisor's unnecessary involvement in the day-to-day operations of the franchisee's business may destroy the

independent contract shield that otherwise protects a franchisor from vicarious liability for the actions of the franchisee.

Retaliation: A termination one year after a disability was too remote to show a connection between the two. *Rickards v. UPS*. Allegedly, defendant's manager had earlier reacted angrily upon learning of the plaintiff-employee's back injury. A year later, the plaintiff-employee had a confrontation in which he threatened his supervisor, leading to his termination. *Comment*: While one year has informally been a benchmark for cutting off retaliation exposure, that has not been the case where there has been intervening conduct which resets the clock.

Nationality/Religious Discrimination: An employee from Pakistan could proceed with religious and national origin claims by Indian engineers toward non-Indian colleagues. *Rehmani v. Superior Court*. In this case, the court specifically noted that tensions between Muslims and non-Muslims could be considered in determining whether there was discriminatory animus.

Anti-SLAPP Motions: A hospital successfully obtained the dismissal of a radiologist's claim that he had been discharged for discrimination based on a perceived mental disability or medical condition. *Nesson v. Northern Inyo County Hosp*. Here, the hospital successfully obtained dismissal of the radiologist's lawsuit using the anti-SLAPP (Strategic Lawsuits Against Public Policy) motion, claiming that the complaint targeted a protected activity by the medical review group. *Comment*: Anti-SLAPP motions can be used effectively to terminate lawsuits brought based on constitutionally-protected activities.

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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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