LYNCH, GILARDI & GRUMMER
A Professional Corporation

CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

August 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]

WAGE & HOUR

Overtime Exemption: An employee who is paid on commission for the candidates that he recruited, who are hired by clients of his employer, was statutorily exempt from pay for overtime wages. *Muldrow v. Surrex Solutions Corp.* The Court of Appeals found that the commissioned employee exemption applied. *Comment*: The Court did not reach the issue of whether the "administrative exemption" also applied.

Administrative Exemption: Insurance claims adjusters are exempt from overtime pay entitlement. *Harris v. Superior Court*. The California Supreme Court found that the "administrative exemption" applies to this class of workers. *Comment*: The Court invoked the California wage orders and certain federal regulations in reaching this decision.

OTHER DEVELOPMENTS

Arbitration: An employee who sued his former employer for wrongful termination was not bound by an arbitration clause, in a lengthy employee handbook, that was not called to his attention and to which he did not specifically agree. *Sparks v. Vista Del Mar Child and Family Services*. The Court found that plaintiff's mere acknowledgment of receipt of the handbook was insufficient to create an enforceable arbitration agreement. *Comment*: Generally, it is necessary for an employee to sign a separate arbitration agreement if he is to be bound thereby.

Americans with Disability Act (ADA): An employer's directive to an employee to see a mental health counselor as a condition of keeping her employment constituted a "medical examination" under the ADA. *Kroll v. White Lake Ambulance Authority*. The ADA prohibits employers from requiring a "medical examination" or for making inquiries about the nature or severity of an employee's possible disability, unless such an exam or inquiry is shown to be "job related and consistent with business necessity." *Comment*: The fact that an employer's intentions were "disability neutral," does not save the test from the ADA prohibition. Further, an employee may bring a claim under the ADA whether or not he/she is "disabled."

Wrongful "Termination": An employer's refusal to exercise its option to renew a contract of an actress did not constitute a "termination" for purposes of a wrongful termination suit. *Touchstone Television Productions v. Superior Court (Sheridan)*. In this case, Touchstone had the exclusive option to renew plaintiff's services on an annual basis for additional sessions. *Comment*: While ending plaintiff's employment effectively constituted a termination, the law recognizes an employer's contractual right not to renew as avoiding a "termination" for lawsuit purposes.

Non-Compete Agreement: A non-compete covenant in an employment agreement for an acquired entities key employee that targeted his fundamental right to pursue his profession, was statutorily void and unenforceable. *Phillpoint, LLC v. Maas*. The exception to that rule allowing non-compete agreements where they are a part of the sale of a business,

[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.

did not apply here. *Comment*: Here, the three-year, non-compete prohibition was satisfied before plaintiff was rehired by a successor employer.

Attorney's Fees Award: An employee's untimely appeal of a labor commissioner's award precluded the award of attorney's fees for the appeal. *Arias v. Kardoulias*. This is so despite the fact that attorney's fees are awarded to prevailing party in an unsuccessful labor commissioner award appeal. *Comment*: Had the employee timely and successfully appealed the award, he would have been entitled to an award of attorney's fees.

"At Will Employment" Disclaimers: An "at will employment" disclaimer can violate the National Labor Relations Act (NLRA). *NLRB v. American Red Cross*. The offending language here read "I further agree that the at will employment relationship cannot be amended, modified or altered in any way." *Comment*: This may be a new enforcement target for the NLRB.

Legislation: The recent U.S. Supreme Court decision upholding ObamaCare requires employers to distribute summaries of benefits and coverage during open enrollments. *Health Care and Reconciliation Act of 2010*. The summaries must be provided on the first day of the first open enrollment period after 9/21/12 and the employer must also issue appropriate W2's for 2012 that include the cost of the group healthcare coverage. *Comment*: There are a number of other obligations on employers imposed by this Act.

****

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