LYNCH, GILARDI & GRUMMER
A Professional Corporation

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]

DISCRIMINATION

Age Discrimination: A former employee alleged circumstantial evidence of alleged age discrimination to be allowed to proceed with her lawsuit. *Sheppard v. David Evans and Assoc.* In this case, the employee alleged: (1) that she was at least 40 years old; (2) that her performance was satisfactory or better; (3) that she received consistently good performance reviews; and (4) that she was discharged while five similarly situated co-employees were retained. *Comment*: The court went on to note the fact that five younger peers kept their job gave rise to an inference of age discrimination because it suggested that the employer had a continuing need for plaintiff's skills and services.

Disability Discrimination: An indefinite exemption from the essential functions of a job is not a reasonable accommodation under the Americans with Disability Act (ADA). *Robert v. Board of County Commissioners of Brown County, Kansas*. Thus, where an employee returning from back surgery with an ongoing joint dysfunction, which rendered her unable to undertake the essential functions of her job, was discharged without violating the ADA. *Comment*: While this case is from a mid-west circuit, it properly applies the principle that an employee must be "qualified" to do her job before her discharge can violate the ADA.

WAGE & HOUR

Meal and Rest Breaks: Appellate courts continue to uphold the *Brinker* principle that while employers are required to make meal and rest breaks available to employees, they are not required to ensure that the employees use them. *Hernandez v. Chipotle Mexican Grill, Inc.* In this case, the employees provided evidence that not all employees took rest and meal breaks as reflected in the employees' timecards. *Comment*: This was one of a number of cases that had been pending in the appellate courts while awaiting the Supreme Court's *Brinker* decision (previously reported).

Reporting Time/Split Shift Pay: An employee whose only scheduled work for a day is a mandatory meeting of one and a half hours, and the employee works a total of one hour because the meeting ends one-half hour early, the employer is not required to pay reporting time pay pursuant to Wage Order 4, subd. 5(A) in addition to one hour of wages. *Aleman v. AirTouch Cellular*. This is because the employee was furnished to work for more than one-half of the scheduled time (i.e., one hour) but was not entitled to an additional one hour at the minimum wage, in addition to compensation for the hour actually worked. *Comment*: This means that an employee is not required to earn a split shift premium of one hour at minimum wage, unless he or she earns minimum wage hours worked in addition to one hour of minimum wage.

ARBITRATION

Class Action Waiver: An arbitration agreement that is silent regarding class actions cannot be read to require class-wide arbitration. *Reyes v. Liberman Broadcasting.* Further, an employer did not waive its right to

[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.

arbitration where it conducted lots of discovery in anticipation of the U.S. Supreme Court case of *AT&T Mobility v. Concepcion*. So the employer did not waive its right to arbitration when seeking arbitration would have been futile. *Comment*: The conflicting opinions regarding enforceability of arbitration agreements has recently been taken up by the Supreme Court in the *Iskanian* case.

Collective Bargaining Agreement Mediation: A union employee is deprived of a judicial forum only if the Collective Bargaining Agreement explicitly waives an employee's right to a judicial forum for statutory claims. *Ibarra v. UPS*. The mere presence of an anti-discrimination policy in the grievance policy could not be construed as an explicit waiver so plaintiff was able to press forward with a civil action. *Comment*: Although this decision was not from a California court, the principle is consistent with other decisions of California courts.

LEGISLATION

Disability Access Lawsuits: California has recently enacted legislation designed to curb rampant frivolous ADA access lawsuits in state courts. *Senate Bill 1186*. Among other things, the bill prohibits "demand for money" letters from attorneys in access cases and requires letters notifying businesses of potential violations to send a copy of the letter to the State Bar Association. *Comment*: According to the senator introducing the Bill (Dutton), the new law addresses a serious problem "where unscrupulous attorneys are filing shakedown lawsuits against businesses in an effort to gain an easy pay day with no intention of improving access for the disabled community."

Social Media Protection: California has recently enacted legislation barring employers and colleges from demanding the social media passwords of their workers and students. *Assembly Bill 1844 (Employees/Applicants); Senate Bill 1349 (Students)*. Employers may ask workers to divulge their social media content if they "reasonably believe" the information is relevant to an investigation of alleged employee misconduct. *Comment*: In signing these Bills into law, Governor Brown proclaimed "California pioneered the social media revolution" and "these laws protect Californians from unwarranted invasions of their social media accounts."

OTHER DEVELOPMENTS

Civil Procedure: In most civil cases, depositions may last for only one seven-hour day. *Assembly Bill 1875*. Most employment litigation would be exempted from this time limit due to its factual complexity. *Comment*: In this writer's experience, most depositions including employment law depositions can be concluded within the seven-hour time constraint.

Labor Code § 132a: Labor Code § 132a which prohibits the discharge of an employee for his or her filing of workers' compensation claim, cannot be used as the basis of a wrongful termination of employment in violation of public policy claim. *Dutra v. Mercy Medical Center Mt. Shasta*. The rationale for the decision is that Labor Code § 132a provides the exclusive jurisdiction to adjudicate workers' compensation retaliation claims. *Comment*: To have held otherwise would have eviscerated a significant protection of the workers' compensation exclusive remedy bar by permitting employees to proceed with civil actions after bringing workers' compensation claims.

Social Media Policy: The National Labor Relations Board (NLRB), which has recently sanctioned employers actions based on social media communication, has identified social media policy language that would be permissible. *Costco Wholesale Corp., 358*

NLRB, No. 106 (9/7/12). Permissible policies would include prohibitions on speech that is (1) "malicious, abusive or unlawful"; (2) "profane language" and "harassment"; (3) "injurious, offensive, threatening, intimidating, coercing or interfering with" other employees; and (4) "slanderous or detrimental to the company (e.g. 'sabotage or sexual or racial harassment')." *Comment*: While this proclamation provides little guidance on the outer bounds of what is permissible, social media provisions that prohibit damaging or defamatory speech must be contained within a list of categories of speech that unequivocally are not protected under the NLRA.

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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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