LYNCH, GILARDI & GRUMMER
A Professional Corporation

CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

Holiday Edition

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

FMLA/CFRA

FMLA Leave Abuse: A good-faith belief based on a cursory investigation that an employee is abusing FMLA/CFRA leave may not be enough to justify termination. *Richey v AutoNation, Inc.* In this case, the employee had a second part-time job as an owner of a seafood restaurant. The employer terminated the employee for working while he was on family leave. The employee's doctor provided clearance for the employee to have worked limited light-duty work. *Comment*: Terminating employees for abuse of protected leave is always a risky proposition.

Employer Response to Leave Request: An employer was not foreclosed from denying an employee's leave request because the employee neglected to provide the reasons for the leave request. *Olofsson v. Mission Linen Supply*. In this case, the employee had not worked the required number of hours in the preceding year to be eligible for protected leave. *Comment*: Unlike the prior case, the employee had never gained entitlement to protect leave (as compared with losing leave entitlement because of leave abuse).

Retaliation: An employer properly terminated an employee, even though the termination was two days after an FMLA leave request. *Brown v. ScriptPro, LLC*. Here, although the employer terminated the employee two days after a leave request, there were documented reasons for the decision to terminate that had nothing to do with the leave request. *Comment*: This is another case where proper personnel file documentation saves the day. The employer was able to demonstrate that there was a history of disciplinary problems to justify the termination.

OTHER DEVELOPMENTS

Americans with Disabilities Act (ADA): An employer's email to a "no call-no show" employee asking "what is going on" was not a "medical inquiry" under the ADA and, therefore, did not need to be treated as a confidential medical inquiry. *EEOC v Thrivent Financial for Lutherans*. In this case, the EEOC dismissed the employee's claim finding that there was no reason for the employer to believe that the absence was related to a medical condition. *Comment*: Every once in a while, the law and common sense intersect. This is just such a case.

Retaliation: California's whistleblower statute does not extend to purported violations of municipal law. *Edgerly v. City of Oakland*. In this case, the employee claimed that she was fired in retaliation for her refusal to violate the City's charter, municipal code, and civil service rules and resolutions. *Comment*: The court here found that the state statute did not extend protection to municipal law violations.

Attorneys' Fees Recovery: An award of attorney's fees to a defendant, who successfully defended a case for violation of disability, was allowed. *Jankey v Song Koo Lee*. Further, the ADA bar on fees 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.

defendants for non-frivolous actions does not preempt state law mandating fees when a suit is frivolous and making defense fees discretionary otherwise. *Comment*: Attorney fee awards are many times the largest component of damages in civil lawsuits.

Discrimination/Retaliation: At trial, the jury found that defendant had not hired the plaintiff due to her pregnancy. The verdict was reversed and the case remanded because the judge refused to give the jury a "business judgment" instruction that it should not find that the employer discriminated or retaliated against plaintiff based upon a belief that the employer made a wrong or unfair decision or an error in business judgment and that the employer could only be liable if the decisions made were motivated by discrimination or retaliation related to her being pregnant. *Veronese v. Lucasfilm*. Going forward some version of this "business judgment instruction," will be mandatory in all disparate treatment discrimination cases. *Comment*: Companies should not rely on this "business judgment" rule as it may not have much impact on the deliberations of real juries looking for logical reasons to explain what happened.

Labor: In a dramatic departure from prior precedent, the National Labor Relations Board (NLRB) decided that an employer's obligation under a Collective Bargaining Agreement (CBA) to deduct dues from the employee's pay continues even after the expiration of the CBA. *WKYC-TV, Gannett Co*. This was one of a number of last-minute NLRB actions taken just before the end of the term of an NLRB member (Brian Hayes).

Sexual Harassment: An employee claiming sexual harassment may proceed under the Ralph Act (Civil Code § 51.7) instead of the Fair Employment and Housing Act (FEHA). *Ventura v. ABM Industries Incorporated*. This is so even though the harasser is not motivated by negative feelings about the plaintiff. *Comment*: This is only significant because the action was brought outside FEHA, circumventing the need for bringing administrative charges.

NEW LEGISLATION

Don't forget a number of new laws go into effect January 1, 2013, as reported in prior newsletters. The following are highlights:

- *Personnel Record Inspection*: (1) Employers must create a written form by which current or former employees can make inspection requests; (2) The records must be produced within 30 days; (3) However, no such duty arises following institution of a lawsuit by the employee; (4) The employee may make only one such request per year; (5) Employers must maintain employment records for a minimum of three years and be able to provide employees with itemized wage statements for a three-year period. AB 2674.
- *Wage Statement Penalties*: Employees may recover statutory penalties not-to-exceed $4,000 plus attorney fees, if an employer fails to provide an itemized wage statement showing nine categories of specified information. AB 1255.
- *Temporary Employee Wage Statements*: "Temporary service employers" must include, on itemized wage statements, the employee's rate of pay and total hours worked at each temporary assignment. Employers must also provide their nonexempt employees with a written notice, at the time of hiring, which contains specific

information such as the rate and basis of the employee's wages and the employer's name, address and telephone number. Also, service employers must include an itemized wage statement of the employee's rate of pay and total hours worked for each temporary assignment. AB 1744.

- *Breastfeeding*: The Fair Employment and Housing Act prohibits discrimination against breastfeeding mothers. AB 2386.
- *Overtime for Nonexempt Employees*: Private agreements that attempt to modify the overtime regular rate calculation required for nonexempt, full time salaried employees, is prohibited. Payment of a fixed-salary to nonexempt employees must be deemed compensation only for regular, non-overtime hours worked. AB 2103.
- *Overtime Rates Revised for Software Employees and Physicians*: To be exempt from overtime pay requirements, computer software employees must be paid at least $39.90 per hour; physicians and surgeons–$72 per hour.
- *Commission Pay Agreements*: Employees paid on a commission basis must have a written agreement in place by January 1, 2013, setting forth the method by which commissions will be computed and paid.

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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.