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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]

DISCRIMINATION

Limitations: A plaintiff pursuing a long-standing discrimination claim based on unequal pay can only invoke acts occurring within six months before the filing of the claim. *Ledbetter v. Goodyear Tire & Rubber Company.* In this case, the U.S. Supreme Court held that discriminatory pay decisions dating back many years could not be the basis of a discrimination claim to the extent that they occurred before the six-month limitation period. *Comment:* This is an extremely important decision for employers being sued for discrimination under federal law (i.e., Title VII of the Civil Rights Act of 1964). However, the decision is unlikely to benefit California employers as lawsuits against them will be based primarily on California state law, which has a more extended limitations period.

Pretext: A plaintiff/employee can avoid summary judgment (i.e., dismissal of case as a matter of law) by presenting evidence: (1) undermining defendant's credibility, and (2) presenting evidence of unlawful favoritism. *Noyes v. Kelly Services, Inc.* In this "reverse" religious discrimination case, an employee was entitled to proceed with a lawsuit alleging that her boss repeatedly favored and promoted coworkers who were members of his religious congregation. She also produced evidence that a stated reason for being passed over was that she had stated she was not interested in becoming a manager–which plaintiff denied. *Comment:* This case is a reminder that stated reasons for employment decisions must be consistent and properly documented.

LABOR

Job Changes: An employer which is a party to a Collective Bargaining Agreement (CBA) cannot make unilateral job changes without negotiating with the union. *California Printers Inc., 349 NLRB 71.* In this case, the employer unilaterally established a new rule requiring that its employees be reachable and ready to work on their time off – 24 hours a day, 7 days a week. *Comment:* Employers who are parties to CBAs cannot unilaterally change the terms of their workers' employment unless the union clearly and unmistakably waives its rights to negotiate over those changes. The employer's rights to establish "shop rules" or exercise "management rights" do not allow employers to avoid this obligation.

Promotions/Pay Raises: Once a union is a certified bargaining representative for a group of employees, the employer may not give promotions and pay increases to members of the bargaining unit without talking to the union about it. *East Bay Automotive Council v. NLRB.* This is so even where there is some dispute about whether the union has the support of a majority of the employees. *Comment:* An employer cannot change terms or conditions of employment that are governed by a CBA, even when the changes benefit certain employees within the bargaining group.

OTHER DEVELOPMENTS

CFRA: An employer must clearly notify its employees of the steps that its employees must take to qualify for a protected leave

[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.

under the California Family Rights Act (CFRA). *Faust v. California Portland Cement Company.* In this case, the employer failed to describe the type of medical certification that an employee is required to provide to qualify for protected leave. Also, the employer here failed to make reasonable inquiries to determine whether an employee was qualified for CFRA leave after receiving information that an employee's condition might qualify for that protection. *Comment:* While employees are generally required to provide employers with clear notice of their request for protected leave, an employer on notice of that need, through independent knowledge of a serious health condition, must examine the situation rather than ignore it.

Retaliation: An employee was not able to claim that she was terminated in retaliation for complaints regarding racial discrimination where the employer had solid proof of violation of company policy. *Loggins v. Kaiser Permanente International.* Here, the employer had evidence that the employee had spent excessive work time and resources on her outside personal business in violation of company policy. *Comment:* All too often, undeserving employees gain protection from termination by making discrimination claims. But where an employer can produce solid evidence of independent grounds for termination, the employee will not be afforded that protection.

Independent Contractors: Delivery drivers were misclassified as independent contractors so that their employer was not entitled to recover contributions and penalties assessed against it by the Employment Development Department (EDD). *Air Couriers International v. EDD.* In this case, the EDD assessed contributions and penalties totaling $617,328.33, plus interest, against the employer for failing to withhold state income tax for its drivers. *Comment:* Misclassification of employees as independent contractors can have far-reaching consequences. EDD penalties is only one. Remember that the most important factor in determining whether a worker is an employee or an independent contractor is whether the employer exercises the right to control the manner and means of the assigned task.

Wrongful Termination: An employee, who was fired for complaining to his employer and the police about threats of workplace violence, could pursue a claim for wrongful termination in violation of public policy. *Franklin v. Monadnock Company.* In this case, the employee complained about threats by a coworker that he would have plaintiff and others killed. The court found that California public policy stated in various statutes required employers to provide a safe and secure workplace and encourages employees to report credible threats of workplace violence. *Comment:* Employees who have made recent complaints regarding health, safety or discrimination issues receive a measure of protection against retaliation under California law. Employers should use care in taking adverse actions against employees who have made such claims in the recent past.

Arbitration: Mandatory arbitration agreements that unreasonably imposed waivers of employee's rights to file wage and hour class action claims were unenforceable. *Massie v. Ralph's Grocery Company.* In this case, the company's various arbitration agreements required employees to forego class actions alleging overtime violations and imposed other restrictions on the employees' rights to pursue wage and hour claims. *Comment:* Properly-crafted arbitration agreements can effectively foreclose class action potential. But employers that go too far in restricting/

eliminating employees' rights in this regard risk losing the arbitration agreement through a judicial challenge.

FCRA: The U.S. Supreme Court has ruled that a "willful" failure to comply with a credit reporting statute covers both "knowing" and "reckless" violations. *Safeco Ins. Co. v. Burr*. The Fair Credit Reporting Act (FCRA) only permits recovery of actual damages for negligent violations, but permits statutory damages (from $100 to $1,000) and punitive damages for "willful" violations. An insurance company failed to provide first-time insurance applicants with "adverse action" notices after failing to give them the best rates based on their credit reports. *Comment:* This decision is helpful to employers who may make every effort to comply with the FCRA but unknowingly violate some technical provision for which no clear guidance was available. Generally, however, employers should be sure to provide employees with "adverse action" notices whenever there is any denial of employment, based on a background check that includes ordering a credit report or investigative consumer report.

SLAPP: A superintendent's criticism of a high school principal constituted an exercise of free speech concerning a matter of public concern and could not be a subject of a lawsuit. *Morrow v. L.A. Unified School District*. Here, the superintendent's criticism violated the Strategic Lawsuits Against Public Participation (SLAPP) Act. *Comment:* This law is becoming more commonly used to dismiss lawsuits that have a chilling effect on the exercise of constitutional rights of free speech. Statements made in connection with a public issue and a public forum in furtherance of the exercise of the right to free speech are considered protected activities.

Workers Compensation: An employer cannot require employees injured on the job, to use vacation time for medical appointments. *Anderson v. WCAB*. The court here found that such an employment policy violated California Labor Code section 132(a) prohibiting discrimination against employees making workers compensation claims. *Comment:* Employees who have made a workers compensation claim enjoy a degree of protection from adverse conduct that can be related to the making of the claim.

Exempt Classification: An employee is properly classified as non-exempt and entitled to overtime pay where the employee regularly engages in core day-to-day business of the company. *Eicher v. Advanced Business Integrators, Inc.* This case involved an employee who provided customer service and training regarding the company's software. He did not hire or fire employees, negotiate contracts, or consult with the company or its customers about business policies or practices. As such, he did not qualify for an Administrative Exemption. *Comment:* There are certain exempt classifications that are extended to employees in the technical or computer software field. Each such classification must be analyzed on a case-to-case basis.

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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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