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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

Age Preference: Discounted theatre tickets for baby-boomers to attend a musical about their generation were not arbitrary nor invidious age discrimination. *Pizarro v. Lambs Players Theatre.* In this case, half-price tickets were offered on Wednesday nights to persons born between 1946 and 1958. The court cited numerous age-based distinctions appearing in federal law (social security) and state programs (senior discounts at state parks, waivers of university fees for seniors, permitting car rental companies to refuse to rent to drivers under 25), etc. *Comment:* The courts have routinely found a little age discrimination to be a good thing, so long as it does not arbitrarily disadvantage people.

Lawsuit Releases: Releases signed in settling lawsuits may not "limit either party's right, where applicable, to file or participate in an investigative proceeding of any federal, state or governmental agency." *U-Haul Company Co. v. California.* Employers are required to ensure that, when providing money and benefits in return for release agreements, individuals must understand that the release cannot prevent a governmental agency claim. *Comment:* While employers may require that employees waive any individual claims that they might have, as a part of the settlement, they cannot preclude the employee from participating in an investigation or action by a federal agency maintained in the federal agency's name and for the federal agency's goals.

ADEA Release: A release containing confusing language was invalid to release a worker's Age Discrimination In Employment claims. *Syverson v. IBM.* In this case, IBM sought to settle a case with a general release, which included the usual waiver language, but also included a covenant not to sue, providing that if the employee unsuccessfully brought a lawsuit in violation of the release, the employee would have to pay IBM's attorneys' fees. The federal court with jurisdiction in California (9th Circuit) held that an employee reading through both the release and covenant not to sue language could easily be confused as to whether it was possible to bring a future lawsuit against IBM. *Comment:* Employers who pay the price to settle the claims brought by their employees must be careful that the release that they are purchasing contains appropriate language. For instance, it must expressly include waiver of ADEA (age discrimination) claims; must not waive future claims; must provide the employee with something to which they are not otherwise entitled; must advise the employee to consult with counsel; must provide that workers over 40 have 21 days to consider the agreement and 7 days after signing to rescind.

[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.

Constructive Notice of Disability: An employee was permitted to proceed with a disability discrimination claim even though the employee did not expressly request a disability accommodation. *Sealock v. Costco.* In this case, the employer received notice that an employee could work with accommodations. Shortly thereafter the employee was dismissed. There were conflicting opinions between the employer's examining physician and the employee's treating physician. *Comment:* When an employer receives, from any source, notice that an employee might be able to perform the essential duties of his/her job with a reasonable accommodation, the employer is *at least* required to engage in the interactive process to examine that issue.

Sexual Harassment: Sexual harassment complaints must be investigated, like any other form of discrimination. However, where the complaining employee impedes the employer's ability to investigate, the employer's duty to investigate may be excused. *Hardage v. CBS Broadcasting, Inc.* In this case, the employee repeatedly requested that the employer not investigate the matter, that he would handle it himself; and he refused to specifically describe the nature of the conduct constituting the harassment. *Comment:* This lawsuit applying federal law is helpful to employers, as far as it goes. However, the outcome would have been slightly different under California state law which does not provide that a failure to complain about sexual harassment is necessarily a complete bar to the claim. Employers should use diligence in attempting to investigate sexual harassment complaints – even when the employee requests that they not do so.

Harassment by Third Parties: A female prison guard was permitted to proceed with her sexual harassment claim against the California Department of Corrections and Rehabilitation (CDCR) for repeatedly being exposed to lewd conduct by prisoners. *Freitag v. Ayers.* In this case, a female prison guard at Pelican Bay complained about repeatedly being exposed to masturbation and other sexual obscenities by prison inmates. Her supervisors ignored the various complaints made by plaintiff and allegedly subjected her to disciplinary action. C*omment:* While employees must know that they may be exposed to sexual harassment within certain environments, an employer is not relieved of its duty to take reasonable steps to avoid exposure to sexual harassment where possible.

EMPLOYMENT CONTRACTS

At-Will Provision: An employee was foreclosed from proceeding with suit against his employer based on alleged oral representations that he could be terminated, only for cause. *Dore v. Arnold Worldwide.* In this case, the California Supreme Court again confirmed the principle that unambiguous at-will language in an employment agreement will foreclose alleged collateral promises to the contrary. *Comment:* Employers must assure that their employment agreements or policies clearly notify employees that their employment can be terminated at any time, for any reason and that the at-will nature of their employment can be changed only through a writing signed by a corporate officer.

Backdating Options: The SEC has recently focused investigations on the dating and accounting for stock option grants made by public companies. Backdating stock

options to more favorable dates (i.e. when the company's stock had lower value) "strikes at the heart of investor confidence in our capital markets" according to SEC Chairman Christopher Cox. *Comment*: Employers should use great care in fairly valuing their stock options, including the date upon which the valuation of the stock is set.

Non-Compete Agreement: A case containing unusual facts focused on the enforceability of a limited covenant not to compete in California. *Edwards v. Arthur Anderson LLP*. In this case, the non-compete agreement was limited to clients on whose account the plaintiff had worked during the 18 months before his termination and was further limited to one year in duration. Nevertheless, the California Appellate Court again proclaimed non-compete agreements to be unenforceable and in violation of California's Business & Professions Code § 16600. *Comment:* With limited exceptions, non-compete agreements are unenforceable and should not be included in employment (or similar) agreements. In fact, some courts have held that it is a violation of public policy to require employees to sign such non-compete agreements as a condition of employment (whether or not the employer later sought to enforce the same).

Commission Back-Charges: Employers can deduct from subsequent earnings amounts previously advanced to sales associates as commissions, where orders are later cancelled. *Koehl v. Verio.* The court reasoned that the commissions were an "advance" and not a "wage" under the California Labor Code, as all conditions for performance had not been satisfied. *Comment:* Employers wishing to retrieve commissions on sales that were later cancelled, should obtain signed agreements from sales personnel acknowledging that right of the company.

LEGISLATION

Minimum Wage California's new minimum wage law will require minimum wage employees to receive $7.50 an hour during 2007 and $8.00 thereafter. *Comment:* This new law will cost employers an extra $50 a week, or $2,600 a year, for each minimum wage employee. .

EEO-1Filing Requirements: All private companies with 100 or more employees and all companies subjected to federal Affirmative Action requirements must annually file the Employer Information Report commonly known as the "EEO-1" report. Covered employers should continue to use the same procedures specified in their 2006 EEO-1 report, which is due electronically, no later than September 30, 2006. The 2006 reports must include a numerical breakdown of the company's workforce by gender, five race/ ethnicity categories and nine job categories.

Sexual Harassment Training Regulations: California's Fair Employment and Housing Commission (FEHC) has issued a third version of proposed regulations relating to mandatory sexual harassment training. The new regulations provide: (1) Employers using non-classroom training must provide supervisors with a mechanism for answering questions within a reasonable time, but no less than two business days after the question is asked; (2) Training must last no less than two hours; (3) Trainers must have legal

education or practical experience in harassment, discrimination or retaliation training and a knowledge of both California and federal laws; (4) New supervisors who have received training within the past two years need only be given a copy of the new employer's anti-harassment policy within six months of assuming the new supervisory position; (5) Only supervisors located within California must be trained; (6) The fifty-employee requirement includes employees outside California. There are other modifications related to training year tracking, record retention and the permissible inclusion of training regarding other forms of harassment or discrimination during the training. *Comment:* Our firm routinely conducts sexual harassment training, fully compliant with California law, for its employer-clients.

PRIVACY

Hidden Video-Cameras: Employees were allowed to sue for invasion of privacy when their employer hid a video-camera in their office. *Hernandez v. Hillsides Inc.* The employees did not have to establish that they were actually viewed or recorded to achieve success in their privacy claim. *Comment:* The use of sneaky surveillance techniques is generally risky. On the other hand, employers can generally conduct surveillance which is open or where the employees have clearly been informed of the employer's right to do so.

Company Computers: An employee had no protected privacy right to access child pornography online using the company's computer. *United States v. Zeigler.* In this case, the FBI monitored the employee's online activities with the cooperation of the employer. *Comment:* Well-crafted workplace policies will generally destroy any privacy rights that an employee may have regarding the use of a company's computer.

MISCELLANEOUS DEVELOPMENTS

Class Certification: A class of grocery managers was denied the right to file a class action against Albertson's Inc. for overtime compensation violations, claiming that the employer misclassified grocery managers as executives. *Dunbar v. Albertson's Inc.* The class certification was denied because the grocery managers performed work that varied significantly from store to store and week to week and thus lacked the commonality required for a class action under California law. C*omment:* While the managers were still entitled to proceed individually, the loss of the class certification generally signals the end of this type of lawsuit because the financial incentive for attorneys to handle these actions is lost.

ANTI-SLAPP Action: A physician was foreclosed for bringing an action against his employer for defamation, abuse of process and interference with his medical practice. *Kibler v. Northern Inyo County Local Hospital District.* In this case, the doctor sought to bring an action based on oral and written statements made in connection a hospital peer review proceeding that resulted in his suspension. Because the peer review procedure is required by law, it qualifies as an "official proceeding authorized by law" and the hospital was entitled to a dismissal of the action as a legitimate pursuit of its legal duties. *Comment:* These ANTI-SLAPP (Strategic Lawsuits Against Public Participation) are becoming a more common

vehicle for fending off suits designed to inhibit free speech or the exercise of lawful duties.

Settlements: An employee who declined an offer to settle, and later received a verdict for an amount less than previously offered by the employer, was later ordered to pay the employer's costs in defending the lawsuit. *Ditsch v. Peppertree Cafe.* In this case, the employee rejected a $15,000 offer, electing instead to proceed to trial where she obtained a verdict of $8,600. The court then ordered the employee to pay the employer's litigation costs of more than $5,000 (netting the employee about $3,000). *Comment:* Earlier offers are an important strategic tool for employers for at least one other reason. Aside from exposing employees to the employer's costs (if the employee does not obtain a verdict in excess of the earlier offer) the employer may be successful in denying an employee recovery of attorneys' fees which is many times greater than the court costs (i.e., out-of-pocket expenses) incurred by the employer.

RICO Lawsuits: Employees are using a broad State statute to combat employer's use of illegal immigrants to reduce labor costs. *Global Horizons v. Mungher Bros.* In this case, Global Horizons, a California temporary employment agency that supplies farm workers, filed the suit in Kern County against a grower and two competing employment agencies. The suit alleged an anti-trust violation occurred when those employees cooperated to achieve an anti-trust objective of fixing prices or allocating customers and markets through violation of immigration laws. *Comment:* Employees and unions can be expected to use State law to avoid procedural impediments to bringing such actions under parallel Federal statutes.

Private Attorney General's Act: An employee seeking to recover for wage-related Labor Code violations did not have to exhaust the administrative remedies prescribed by PAGA. *Dunlap v. Superior Court.* Here, the employer sought to dismiss the employee's lawsuit because the employee had not complied with PAGA, but the Court found that the employee did not seek any penalties that were recoverable only through PAGA but rather sought penalties which were always recoverable under the Labor Code prior to PAGA. *Comment:* PAGA was the statutory response to abuses of the prior Unfair Business Practices Act whereby individuals could sue for violations to third parties. PAGA limits an employee's ability to sue on behalf of other employees by requiring an employee to first bring an administrative claim with the Department of Labor to allow an employer to cure the alleged violation.

Arbitration Appeal: An employer was unable to challenge an arbiter's award which was alleged to have been made through the erroneous application of law. *Baize v. Eastman Companies.* In this case, the arbitration agreement required that "The arbiter shall apply the substantive law . . . of the State of California" and the arbitrator shall be constrained by the rule of law and any arbitration award shall be based thereon", but the agreement did not specifically permit appeals to be reviewed. *Comment:* Arbitration is not always the great panacea which many employers perceive it to be. Here, the employer allegedly received an unlawful award but was unable to rectify the same. However, if the agreement had specifically provided that

the arbiter's award could be reviewed as to its application of California law, the result may have been different.

CFRA: A plaintiff/employee could not proceed with an action under the California Family Rights Act where there was a legitimate non-discriminatory reason for her termination. *Neisendorf v. Levi Strauss & Company*. In this case, the plaintiff took a four-week disability leave after learning that she was not eligible for a separation package and claimed that that leave was entitled to protection under CFRA. She was returned to work following leave, but was told that her continued employment was conditioned of the redress of previously-stated performance deficiencies. *Comment:* While care must be used in terminating employees following a return from protected leave, termination may be proper as long as well-documented performance issues are involved.

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