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California Employment Law Newsletter

What's New for California Employers?

NEW YEAR'S 2007 EDITION

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

LEGISLATION

San Francisco Paid Leave Ordinance: Effective February 5, 2007, employers within the geographical boundaries of the city of San Francisco are required to allow employees to accrue 1 hour of paid sick leave for every 30 hours worked. *Proposition F.* The hourly accruals can occur only in full-hour increments and can accrue up to 72 hours for most employees; but only 40 hours for employees of "small business" (i.e., fewer than 10 people). Employers are *not* required to pay departing employees' unused sick time.

Discrimination: Sexual orientation has been added as a protected classification under the law of discrimination. *Senate Bill 1441.* Thus, discrimination based on sexual orientation is prohibited to the same extent as discrimination based on race, age, disability, etc.

Safety: Effective July 1, 2008, it will be illegal to drive a motor vehicle while using a wireless telephone unless the phone is designed and configured to allow hands-free listening and talking and is used in that way while driving. *Senate Bill 1613. Comment:* This law will most directly affect individuals but employers should alert their employees to this law to avoid potential liability related to their employees' improper use of cell phones while driving on company business.

Sexual Harassment Training: Employers are required to provide sexual harassment training only for supervisors physically located within the state of California. *Assembly Bill 2095.* This legislation clarifies that employers are not required to provide sexual harassment training to their supervisors who are physically located outside California.

Minimum Wage: The minimum wage in California is $7.50/hour effective January 1, 2007, and $8/hour effective January 1, 2008.

Overtime Accounting: An employer complies with the Labor Code if overtime hours worked in a given pay period are itemized as corrections on the paperwork for the following pay period.

Mandatory Sexual Harassment Regulations: The California Fair Employment & Housing Commission has completed a year-long process of approving its final regulations interpreting California's mandatory sexual harassment training by large employers (California Government Code Section 12950.1). *Assembly Bill 1825.* The regulations are expected to become effective in February 2007. The final regulations are similar to the prior drafts and clarify (1) what training formats may be used; (2) what subjects may be included; (3) what subjects must be included; (4) who can conduct the training; (5) who must be

[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.

trained; (6) who falls within the mandatory training laws; (7) what tracking records must be used; (8) what rules apply to duplicate/follow-up training; (9) how to verify that training has occurred. *Comment:* These rules are too lengthy to treat within this abbreviated newsletter. Contact the author or your employment lawyer to further clarify the mandate of this legislation.

RETALIATION

Adverse Employment Action: A claim of retaliation can be maintained under federal law where the adverse action involves conduct that a "reasonable employee would have found (to be) materially adverse" and which in turn "might have dissuaded a reasonable worker from making or supporting a charge of discrimination". *Burlington N. & Santa Fe Ry. vs. White.* This U.S. Supreme Court decision is being followed by lower federal courts in assessing other forms of retaliation such as FMLA violations. *Foraker vs. Apollo Group Inc. Comment:* For a change, the reach of federal law is greater than state law as to retaliation cases. That is, conduct which may not qualify as "adverse employment action" to support a claim of retaliation under state law may be sufficient to support a claim of retaliation under federal law.

Adverse Employment Action: Stripping an employee of supervisory responsibilities/authority and blocking the employee's promotion constituted adverse employment action sufficient to maintain a retaliation claim. *Taylor vs. City of Los Angeles.* In this case, after a subordinate supported a co-workers EEOC complaint alleging racial discrimination, the supportive employee was replaced as a lead supervising engineer and denied a promotion to a more senior engineer position. *Comment:* Although the supervisor's action did not lead to an immediate loss of income, the action "materially affected the terms and conditions of employment" and were thus sufficient to support a claim of retaliation. Employers should closely monitor all adverse action taken against any employee who has recently supported a co-worker's claim of discrimination – even if the claim turns out to be unfounded.

Adverse Employment Action: The placement of a memorandum in her supervisor's file noting that a plaintiff had left her post unattended; the issuance of a letter of instruction directing plaintiff to familiarize herself with her employer's attendance rules; an investigation into whether plaintiff had improperly contacted a patient's family; and a transfer to another of her employer's facilities did not effect a material change in the terms and conditions of employment as would a retaliation claim. *MacRae vs. Department of Corrections & Rehabilitation.* Here, the plaintiff had complained that she was retaliated against after she filed the complaint alleging that she was denied a promotion based on her race. *Comment:* Happily for employers, not all disciplinary action will substantiate a claim of retaliation. Routine disciplinary action is still within an employer's lawful realm of discretion.

MISCELLANEOUS

Tax: Non-economic damages awarded for mental or emotional injury are not "income" taxable under the Internal Revenue Code. *Murphy vs. IRS.* Here, the Department of Labor awarded a claimant $45,000 for emotional distress and $25,000

for injury to reputation after being black-listed. *Comment:* This ruling has had a significant impact on the resolution of employment cases. Employees are usually motivated by their net recovery in settling cases. Now that they do not have to worry about paying a portion of their settlement to the government, they are generally more willing to accept smaller settlement sums which will yield a sufficient net recovery.

At Will Employment: An employment letter stating the employment is "at will" and may be terminated "at any time" was enforceable by an employer in defending a wrongful termination law suit. *Dore vs. Arnold Worldwide Inc.* In this case, the employee tried to claim that he was given oral assurances that he would be terminated only for cause. *Comment:* The California Supreme Court here again confirmed that employers are protected against claims of wrongful termination in breach of contract where the employment contract clearly states that the employment relationship is at will.

Non-Compete Agreements: Where non-solicitation agreements are enforceable, they are so only against the seller of a business who later solicits the buyer's employees and customers. *Strategix Ltd. vs. Infocrossing West Inc.* In this case, a would-be seller of a business could not be prohibited from soliciting a would-be buyer's employees and customers pursuant to a would-be non-solicitation agreement that the parties signed during the process of negotiations. *Comment:* This is an unusual ruling that is somewhat difficult to understand. Suffice it to say that non-compete agreements are generally unenforceable and, when enforceable, will be narrowly applied.

Rightful Termination: An employer successfully defended a law suit alleging age, disability, and medical leave discrimination where the employer proved that the termination was the result of a business necessity. *Seever vs. Copley Press.* In this case, plaintiff, an 18-year employee, was terminated along with 17 other people based on uncontradicted evidence that the employer was suffering through financially difficult times. *Comment:* While employers should use extra care in terminating very long-term employees, it can be lawfully done so long as economically motivated.

USERRA: The federal district court with jurisdiction in California (Ninth Circuit) recently upheld a $256,800 jury verdict in favor of a Navy Reservist who claimed that his supervisors punished him for repeated military leaves. *Wallace vs. City of San Diego.* Here, plaintiff alleged that he was denied promotions and was never considered for job openings and was also given assignments far from his home with undesirable or reduced duties. *Comment:* Juries (and most employers) are fairly protective of servicemen and women who are called away from work for duty. Employers should carefully review the proposed discipline of recent returnees to ensure that military service leave is not being punished in violation of the Uniformed Service Employment and Re-Employment Rights Act.

ERISA: Recently, the most significant pension legislation since the Employee Retirement Income Securities Act has been passed. *Pension Protection Act of 2006.* The main purpose of the legislation is to shore up and protect the nation's ailing employee pension system and encourage more employees to prepare for retirement by

participating in defined contribution plans. Employers are both incented to have healthy pension plans and penalized for imprudently changing/eliminating them. *Comment:* This legislation has been applauded on both sides of the political divide – especially in regard to its provisions on defined contribution plans. It is hoped that the legislation will deter more employers from abandoning their retirement plans.

Expense Reimbursement: An employer must indemnify an employee for legal fees and costs incurred in defending a law suit based on conduct taking place during a former employee's employment with the employer. *Cassady vs. Morgan, Lewis & Bockius.* In this case, a former employee of defendant firm was required to defend himself in a law suit brought against him based on conduct that occurred during his employment with employer. *Comment:* Legal defense costs fall within the ambit of costs which must be reimbursed to employees as business expenses under California Labor Code Section 2802.

Arbitration: Last year, a California appellate court confirmed that employees can lawfully waive their rights to bring a class action against an employer unless the amounts of damages sought by class members are sufficiently small that a class action is the only way to effectively enforce rights against the employer. *Discovery Bank vs. Superior Court.* But where an employee cannot demonstrate that he is seeking only minimal damages through arbitration, he will not be able to defeat the arbitration clause containing the class action waiver. *Konig vs. U-Haul Co. of California. Comment:* This case strengthens the enforceability of arbitration agreements through which employees waive class action rights against an employer.

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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.

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