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]

PRIVACY

Health Inquiries: A retail chain's attendance policy requiring an employee to provide a doctor's note identifying the nature of a health-related absence, for such absence to be excused, violated the Americans with Disabilities Act. *EEOC v. Dillards, Inc.* In this case, the employer refused to excuse the absence because the note failed to describe the nature of the health condition leading to the absence. *Comment*: Employer *can* ask for a doctor's verification that an employee is unable to perform his job as a reason for the absence.

High School Diplomas: Inquiries into whether a job applicant has a high school diploma may violate the ADA if it screens out individuals who cannot obtain a diploma because of a learning disability, unless the employer can demonstrate that the requirement is job-related and consistent with a business necessity. *http://www.eeoc.gov/eeoc/foia/letters/2011/ada_qualification_standards.html* This pronouncement was in response to an inquiry from the public and did not constitute an official opinion of the EEOC. *Comment*: It could be argued that all but the most menial jobs require a high school diploma to perform the essential functions of the job.

Credit Checks: As previously reported, California now (along with six other states) prohibits the use of credit checks during the hiring process. This restriction, in addition to restrictions on the use of credit checks during employment, may be rendering credit checks useless to employers as a screening device.

GINA Record Keeping: The EEOC has extended its record keeping requirements under Title 7 of the Civil Rights Act of 1964 and the Americans with Disabilities Act to entities covered by Title 2 of the Genetic Information Nondiscrimination Act of 2008 (GINA). Title 2 prohibits employment discrimination against job applicants, current and former employees, labor union members, and apprentices based on their genetic information. *Comment*: Thus, covered employers should segregate any medical or genetic information about employees from other personnel records and make them accessible only to persons with a business need-to-know.

DISCRIMINATION

Disability Definition: A United States Court of Appeals has dismissed an employee's lawsuit holding that the individual's inability to work overtime hours was not a substantial limitation that would entitle him to protection under the ADA. *Boitnott v. Corning, Inc.* In this case, the employee was diagnosed with a form of leukemia that rendered him unable to return to his normal 12-hour job schedule. But, because the condition allowed him to work an 8 hour a day/40 hour a week job, he was not entitled to protection under the ADA. *Comment*: So, only a condition rendering an employee unable to perform a normal work-day/week is protected under the ADA.

Pregnancy and Caregiver Discrimination: In a public meeting, the EEOC discussed "recent trends in discrimination against pregnant workers and workers with caregiving responsibilities." The EEOC's advisory on the issue was "pregnancy discrimination persists in the 21st century workplace, unnecessarily depriving women of the means to support their families," said the EEOC Chair Jacqueline Berrien. "Similarly, caregivers – both men and women – too often face unequal treatment on the job. The EEOC is committed to ensuring that job

[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.

applicants and employees are not subject to unlawful discrimination on account of pregnancy or because of their efforts to balance work and family responsibilities." *Comment*: This advisory signals the EEOC's intention to focus on claims of pregnancy or disability leave violations in the coming months.

EEOC's 2011 Enforcement Statistics: Retaliation charges led the way as to increasing complaints to the EEOC (37.4% increase) within the approximately 100,000 total charges during 2011. Race and sex discrimination claims were the second and third most numerous (35.4% and 28.5% increases). In fourth and fifth place were charges of age and disability discrimination which increased during 2011 to 23.5% and 25.8% of the total charges, respectively.

OTHER DEVELOPMENTS

NLRB Social Media Decisions: The NLRB considered 14 cases in 2011 involving social media (1) policies and/or (2) discipline. *NLRB General Counsel Social Media Report*. The general instruction to be derived from these cases is (1) an employer's social media policy should not be so broad as to prohibit concerted action which is protected by federal labor laws (e.g., discussions of wages or working conditions among employees) and (2) an employee's social media comments are generally not protected if they are merely venting about the employer rather than invoking the opinion of co-workers. *Comment*: One approach might be for employers to expressly exclude from the policies, discussions regarding wages or working conditions which should also be brought to the attention of managers.

Employee Classification: Headhunters are commissioned salespersons because their jobs involve sales and their compensation is based on those sales. *Muldrow v. Surrex Solutions Corp.* Thus, these employees are exempt from overtime pay (and other Labor Code entitlements). *Comment*: The DLSE and reviewing courts have been fairly uniform in their affirmation of various commissioned sales employees as being exempt from overtime pay.

Arbitration Agreements: An arbitration agreement was found to be unenforceable because the employer could unilaterally modify the arbitration agreement. *John Carey v. 24 Hour Fitness USA, Inc.* In this case, the acknowledgment of receipt in the employee handbook provided that the company could change the terms of the handbook (including the arbitration policy) unilaterally. *Comment*: Although this was a federal District Court, in a jurisdiction outside California, employers would do well to heed the message as it may be followed by California courts also. Thus, an acknowledgment of receipt of the employee handbook might provide that the arbitration agreement, like the at-will employment clause, are subject to change only through a writing signed by both the employee and an appropriate employer representative.

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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.