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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]

LEGISLATION

Notice Requirement for New Hires: Non-exempt employees must receive at the time of hire written notice "in the language the employer normally uses to communicate employment-related information" which would include the following:

- The rate of pay;
- Allowances, if any, claimed as part of the minimum wage, including meal or rest break allowances;
- The regular payday designated by the employer;
- Employer's name, including any "doing business as" names;
- The physical address of the employer's main office;
- The employer's telephone number;
- The name address and telephone number of the employer's workers' compensation carrier.

California Labor Code § 2810.5

Credit Checks: A new law bans most employers (not financial institutions or businesses required by law to perform credit checks) from obtaining credit information about applicants or employees, except in limited circumstances. The law does not preclude criminal background checks, references, etc.—only credit information. *AB 22*

Health Insurance for PDL: Employers are required to extend group health coverage to employees on pregnancy disability leave (PDL) for the entire four-month leave. This extension of health coverage will apply even if there is no FMLA entitlement. *SB 299*

Independent Contractor Misclassification: This new law imposes fines of between $5,000 and $25,000 for "willfully" misclassifying someone as an independent contractor, and makes it a crime and imposes joint liability for a non-attorney consultant to advise an employer to do so. Employers also will not be able to make deductions from contractors' pay that they would not have been able to make had the contractors been employees. *SB 459*

DFEH Regulations: New rules will govern how the agency accepts and processes complaints of unlawful discrimination, harassment and retaliation. The DFEH will accept complaints electronically or on paper if they are filed within a year of the last allegedly unlawful practice. Electronic complaints are not signed and deemed filed when received electronically. Where a "right to sue" notice is requested, that must be issued within one year from the date the complaint was filed. *2 Calif. Code of Regulations §§ 10000 et seq.*

LABOR

Mandatory Notice Requirement: The National Labor Relations Board (NLRB) has postponed the effective date of its new rule mandating the workplace posting of an official Notice of Employee Rights under the National Labor Relations Act (NLRA). The rule had been scheduled to go into effect on November 14, 2011, but will now be effective on December 31, 2012. The stated reason for the postponement is "to allow for enhanced education and outreach to employers, particularly those who operate small and medium-sized businesses." Almost all private sector employees are subject to the NLRA.

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[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.

Facebook Postings: The administrative law judge for the NLRB continues to make onerous rulings regarding employment policies that could impinge on NLRA rights. For instance, the following policy was considered by the ALG - "Courtesy: Courtesy is the mutual responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and supplies, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the dealership." Incredibly, the ALG found that this policy might violate the NLRA because "employees can reasonably interpret it as curtailing their section 7 rights." According to the ALG, "the word 'disrespectful' could extend the communications in the context of union activity." *Comment:* These and similar ALG rulings seem to be unnecessarily restrictive on employer policies and may not withstand judicial review in civil court. However, it is important for employers to consider the impact of policies restricting employee activities which may impinge on employee NLRA rights.

SEXUAL HARASSMENT

Severe or Pervasive Conduct: Plaintiff's sexual harassment complaint alleged that she was subjected to the following conduct: (1) during a job interview, the director asked (plaintiff) if she was single and had any family; (2) one month later she was visiting the director in his office, while fully clothed he allegedly stroked his groin area, and moaned and groaned; (3) the next day while she was in the office, he stared at her breasts; (4) plaintiff alleged that the director subsequently stared at her breasts and on a few occasions moaned in her presence; (5) once they passed in a narrow hallway, the director brushed up against her as he was passing her; and (6) the director gave the employee a Christmas gift which was incense labeled "Hawaiian Pleasure" with package writing stating "for those pleasurable moments." *Ramaiya v. Pacific Coast Care Center LLC.* While the conduct was inappropriate (and would violate most companies' policies) it did not meet the standard for sexual harassment as being severe or pervasive so the case was dismissed. *Comment:* This is the latest in a series of cases which seem to raise the bar for the type of conduct necessary to satisfy the sexual harassment standard. While similar conduct should be discouraged/avoided, the courts seem to be more restrictive as to what will be allowed to proceed to jury trial.

Severe or Pervasive Gender-Based Harassment: A company owner frequently asked plaintiff about her personal relationships and sex life. Her agency manager later referred to plaintiff as a "big-titted, mindless one" and on three occasions over four years, agency principals engaged in conduct that was derogatory towards other women. *Brennan v. Townsend & O'Leary Enterprises, Inc.* The court found this conduct not to be sufficiently "severe" or "pervasive" to be actionable. *Comment:* As with the *Ramaiya* case (above), courts are taking a more restrictive view of what is minimally necessary to be actionable sexual harassment.

MISCELLANEOUS

Employment Policies: An employer had his right to modify the compensation terms of an at-will employment agreement where the employer never made a written protest to the modification and the employee continued to accept the modified compensation offered. *Foust v. San Jose Construction Company, Inc.* Here, the company's president indicated that bonuses would be paid at 10% going forward and the employee continued working under the changed compensation terms for two years. *Comment:* The right to terminate "at will" usually imports the right to change work conditions, including compensation, so long as that is not done for unlawful reasons (e.g. discrimination, retaliation, etc.).

FMLA: An assistant manager's failure to return an employee's phone calls while she was out on FMLA leave was sufficiently antagonistic to constitute a *prima facie* case of retaliation under the FMLA. *Hofferica v. St. Mary's Medical Center.* Eventually, the employer terminated the employee because her leave expired and she did not return to work. *Comment:* It is generally advisable for employers to be both responsive and flexible with employees returning from FMLA leave.

Discrimination: Specific and substantial evidence of employer's more lenient treatment of younger employees was enough to allow an employee to proceed with her lawsuit for age discrimination. *Earl v. Nielson Media Research, Inc.* In this case, plaintiff was terminated without notice when she was 59 for failure to accurately verify the address of a survey participant while younger, similarly-situated employees were not disciplined for more egregious conduct. *Comment:* Employers should carefully review decisions to terminate employees over 50 years of age (unless the workplace has many employees of that age or older).

Noncompete Agreement: A federal court (with jurisdiction in California) found a broad noncompete agreement to be enforceable based on the possibility that it could be revised. *Edwards v. Arthur Andersen.* The court recognized that the nonsolicitation and noninterference provisions in the nondisclosure agreement are likely to be found unenforceable under California law; however, there was a possibility that the agreement could be reformed to render it enforceable. *Comment:* This case does little to dislodge the normal rule that noncompete/nonsolicitation clauses should be avoided when drafting employment agreements.

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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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