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]

ARBITRATION

Unconscionability: Only a court, not an arbitrator, has the power to decide whether an arbitration agreement was unconscionable. *Ajamian v. CantorCO2e, L.P.* This is so even where an agreement is so broadly worded to suggest that an arbitrator might have such authority. Further to this, the arbitration agreement was unconscionable (thus unenforceable) because the plaintiff claimed that she had to sign the arbitration provision in order to receive a bonus. *Comment*: Several recent decisions have questioned the enforceability of arbitration agreements where there is any hint of impropriety in either (1) procuring the arbitration agreement or (2) unfair terms contained therein.

Ambiguity: Ambiguity in an arbitration agreement caused the enforceability issue to be one for the courts and not for an arbitrator. *Peleg v. Neiman Marcus Group, Inc.* In this case, an inconsistency between the agreement's delegation and severability provisions indicated the parties did not clearly and unmistakably delegate enforceability questions to the arbitrator. The delegation provision stated that the arbitrator was to decide enforceability; the severability provision gave that authority to the court. Further, the arbitration agreement was illusory because it provided defendant employer with the unilateral right to amend it on 30 days' notice. *Comment*: This case contains the recurring theme that to be enforceable, an arbitration agreement should not be subject to unilateral modification by an employer.

Class Actions: Parties to an arbitration agreement did not authorize the class arbitration in their arbitration agreement making dismissal of class claims appropriate. *Kinecta Alternative Financial Solutions, Inc. v. Superior Court.* The court reviewed the recent case law dealing with enforceability of arbitration agreements claiming class action waivers. *Comment*: The law regarding enforceability of class action waivers is currently unsettled.

DISABILITY DISCRIMINATION

Unspecified Leave Duration: A leave of absence for an unspecified duration is not a reasonable accommodation under the Americans with Disabilities Act. *Valdez v. McGill.* Additional leave can be a reasonable accommodation, but only where the employee gives the employer an anticipated return date. *Comment*: This decision highlights an employee's obligation to be reasonably certain in specifying the disability accommodation requested.

Personal Attendance: A nurse whose position required her regular attendance as an essential function of the hospital unit in which she worked, was not entitled to an exemption from the attendance policy of the hospital as a reasonable accommodation under the Americans with Disabilities Act. *Samper v. Providence St. Vincent Medical Center*. The employee was thus not "qualified" for protection under the ADA where she was unable to be physically present for a job that required her personal attendance. *Comment*: Every once in a while the law and common sense intersect. This is such a case.

Discriminatory Harassment: An employer can be liable for off-duty harassment of one employee by other employees where the employer was on notice of the harassment. *Espinoza v. County of Orange.* In this case, the harassment took the form of blogs by co-workers criticizing the co-worker's physical disability. *Comment*:

[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.

This case is somewhat unusual in that the employer had adequate notice and a plea by the victim for assistance but ignored the request. Plaintiff was awarded nearly a million dollars in damages.

MISCELLANEOUS

Employer Duty to "Provide" Meal Periods: An employer must only relieve an employee of all duties during a meal period and is not required to supervise how an employee uses that break. *Brinker Restaurant Corporation v. Superior Court*. If an employee chooses to continue work, and the employer is aware of that, the employee will be entitled to straight pay compensation; not premium rate compensation. *Comment*: This decision was more fully summarized in our earlier *Client Alert*. (You may contact our firm to obtain another copy of that *Client Alert* if needed.)

NLRB Poster: The U.S. District Court for the District of Columbia has ruled that the NLRB had the authority to require employers to display an oversized poster informing employees of their rights to unionize. That decision is on appeal. But last week, a U.S. District Court for the District of South Carolina reached the opposite conclusion. An appeal is expected. Sparing the employers the uncertainty of whether to comply with the D.C. court's ruling, that court issued an emergency injunction pending the outcome of the appeal of its decision. *Comment*: For now, employers have a further reprieve in posting the subject posters pending the outcome of these conflicting court decisions.

Wrongful Termination. The National Labor Relations Act (NLRA) does not require reinstatement of an employee who later engaged in unprotected misconduct. *Human Services Projects, Inc. d/b/a Teen Triumph*, 32-CA-025262 (2012). Here, the unrepresented employee who had been discharged in violation of the NLRA, lost the right to be reinstated when several months after the discharge, he accosted a former co-worker who was still employed by respondent employer and verbally abused her in a "profanity-laced tirade" about a matter unrelated to his discharge. *Comment*: An employee's ongoing poor conduct can disqualify him for further employment despite earlier mistakes by the employer in a prior termination of the same employee.

Revised Wage Theft Prevention Act Form: In mid-April 2012, the DLSE substantially revised its template form and revised answers to frequently asked questions regarding the required Wage Theft Prevention Act form (discussed in prior newsletters). The new form can be accessed through the California Department of Industrial Relations' website at www.dir.ca.gov\DLSE\governor_signs_wage_theft_protection_act_of_2011.html. Happily, the DLSE's revised template form is shorter and more straightforward than its predecessor.

Attorney's Fees Award: An attorney's fees award to a prevailing employee in a wage and hour litigation should be made payable directly to the attorney who litigated the case on behalf of the employee, in the absence of an agreement between them to the contrary. *Henry M. Lee Law Corporation v. Superior Court (Chang)*. In this case, the litigation resulted in a $62,264 judgment in favor of the client (Chang) and the court awarded $300,000 in attorney's fees. *Comment*: Attorney's fees agreements typically contain language which alters who is to receive an attorney's fees award.

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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.