LYNCH, GILARDI & GRUMMER
A Professional Corporation

CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

January 2012

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

WAGE AND HOUR

Waiting Time: An employee was not entitled to "reporting time pay" for attending scheduled meetings that ran shorter than expected because he worked at least half the scheduled time. *Aleman v. Air Touch Cellular*. In this case, employees sought a minimum of two hours reporting time for instances where they attended semi-monthly or monthly "store meetings" scheduled at least four days in advance where they were furnished with "work" of at least half of the scheduled meeting time. *Comment*: This case is good news for employers who may now schedule short meetings or work projects without being required to add reporting time premiums as long as the meetings last at least half of their scheduled duration.

Commissioned Employee: An employee who is paid on commission for the candidates that he recruited was statutorily exempt from entitlement to overtime wages. *Muldrow v. Surrex Solutions Corp.* In this case, the plaintiff recruited candidates for employment positions with clients of the employer. *Comment*: This case involved the Commissioned Employee Exemption from overtime and other Labor Code benefits.

ARBITRATION

Unconscionable/Unenforceable Clauses: An arbitration provision in a job application that bound the applicant but not the employer was unconscionable and thus unenforceable. *Wisdom v. AccentCare.* In this case, an alternative application did provide that the agreement to arbitrate was binding on both parties, while the one signed by plaintiff obligated only the plaintiff to arbitrate claims. *Comment*: Once again, employers should avoid crafting arbitration agreements which provide them with unfair procedural advantage. The arbitration forum itself should be sufficient benefit to the employer.

Class Action Waivers: As reported in the prior newsletter, the National Labor Relations Board (NLRB) has held that an employer violates the National Labor Relations Act (NLRA) when it requires employees to sign an agreement that precludes them from filing joint, class or collective claims regarding wages, hours or other working conditions. *D.R. Horton, Inc. and Michael Cuda*, Case 12-CA-25764(1/3/12). *Comment*: It is likely that the NLRB's decision will be appealed as it conflicts with the earlier U.S. Supreme Court case of *AT&T Mobility v. Concepcion*. Further, the NLRB may have exceeded its authority/jurisdiction in interpreting the NLRA in this manner.

OTHER DEVELOPMENTS

Privacy: The U.S. Supreme Court has held that a law enforcement agency wishing to place a global positioning system (GPS) device on a suspect's vehicle for purposes of tracking the vehicle's location must first obtain a search warrant. *Jones v. U.S.* In this case, a GPS was placed on the suspect's vehicle one day after a search warrant had expired. The GPS tracked the vehicle's movement which in turn led to an arrest for trafficking in cocaine. The court's decision was based primarily on a violation of the U.S. Constitution's Fourth Amendment precluding unlawful searches and seizures. *Comment*: A majority of the justices deciding this case were of the mind that location tracking does not infringe on any privacy interest because the location of the vehicle or person in a public place is fundamentally not private. However, in view of the uncertainty remaining in this area of the law,

[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.

employers would do well to limit any employee tracking to (1) working hours, (2) where the tracking does not reveal private information regarding the employee's personal life, and (3) the employer has a legitimate business interest in the tracking.

Independent Contractors: An at-will insurance agent was an independent contractor. *Arnold v. Mutual of Omaha Insurance Co.* In this case, the plaintiff was a non-exclusive agent who sold various lines of insurance and was paid solely on commissions; had no office space, unless she paid for it; and had no supervisors or other personnel "manage her." Her only job requirement was to submit at least one application for insurance every six months. *Comment*: Importantly, the court applied California's "common law" test which yielded little evidence of an employee-employer relationship. Happily, the court rejected the plaintiff's attempt to define employee more broadly as that term is used in the California Labor Code (which has no real definition of "employee").

FMLA: A worker who is not yet eligible for FMLA was protected from retaliation for commencing that leave. *Pereda v. Brookdale Senior Living Communities, Inc.* In this case, the plaintiff alleged that her employer found out about her pregnancy, which would yield a request for leave following the pregnancy. After so learning the employer allegedly began harassing, denigrating her job performance and disciplining her for contrived reasons. She worked for the employer for only 11 months and was thus not eligible for FMLA protection. *Comment*: This case signals that employees reach a zone of protection once they near eligibility for protected leave.

USERRA: President Obama has signed into law additional employment protection for veterans returning from the Iraq/Afghan wars. *VOW to Hire Heroes Act of 2011*. The new law (1) amends/expands protections under the Uniformed Services Employment and Reemployment Rights Act (USERRA), (2) amends the IRC to provide certain tax credits for tax exempt companies that hire veterans, and (3) creates new and expanded education, training and transition programs for veterans within the federal Departments of Labor and Veterans Affairs. *Comment*: The first of these provisions will make it easier for employees to sue employers for discrimination based on their military/former military status.

Wrongful Termination: An employee may lawfully be discharged for fabricating a sexual harassment claim. *Joaquin v. City of Los Angeles.* Further, the employee could not prove retaliation by showing merely that he was discharged; but rather, had to show that the discharge was retaliation for a good faith complaint of sexual harassment. *Comment*: This case provides a tool for employers to discourage employees from falsely accusing co-workers of unlawful harassment of any kind.

Labor: The deadline for the NLRB's "Employee Rights Notice" has again been extended–this time to April 30, 2012. *Comment*: This is the Notice, described in prior newsletters, which the NLRB is requiring be posted by virtually all employers. The Notice generally advises employees of their rights to bargain collectively and engage in concerted activity. The Notice has been the subject of litigation which has delayed the NLRB's implementation order.

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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.