LYNCH, GILARDI & GRUMMER
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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]

LABOR

NLRB Rulings: In December, the National Labor Relations Board (NLRB) issued several decisions. The most significant were the following:

- *Alan Ritchey, Inc*.–When the Union and employer do not have an agreement addressing discipline, the employer must bargain over discretionary aspects of discipline of individual union members. The employer is required to maintain the *status quo* until a new Collective Bargaining Agreement (CBA) is reached.
- *WKYC-TV, Inc*.–The employer must continue to check off Union dues on behalf of bargaining unit employees after a CBA has expired.
- *American Baptist Homes of the West*–Witness statements obtained by employers in workplace investigations, under promises of confidentiality, no longer may be routinely withheld in response to Union requests.
- *Hispanics United of Buffalo, Inc.*–Employees were improperly discharged in violation of the National Labor Relations Act (NLRA) for criticizing a co-worker in Facebook posts.
- *Supply Technologies, Inc.*–A non-union employer's alternative dispute resolution policy that might be interpreted as blocking access to the NLRB, is a violation of the NLRA.

NLRB Rulings: A federal appellate court has held that President Obama's three recess appointments to the NLRB were unconstitutional. *Noel Canning v. NLRB*. Accordingly, the court vacated an unfair labor practices determination on the grounds that the NLRB lacked a legitimate quorum when it issued the decision. *Comment:* While the final determination will likely be made by the U.S. Supreme Court, this decision has the potential of nullifying hundreds of NLRB decisions, including those reported above.

Social Media: An appropriate disclaimer might avoid an adverse ruling by the NLRB as to employers' social media policies. *Cox Communications*. The saving language read as follows: "nothing in Cox's social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment. Cox employees have the right to engage in or refrain from such activities." *Comment*: This is the first decision affirming that such disclaimers might save the day.

Picketing: The California Supreme Court held that a private sidewalk in front of a retail store entrance in a shopping center is not a public forum for expressive activity including picketing. The retail

[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. *NOTE*: These cases have not been updated/cite-checked since they were first reported.

store may seek an injunction to enjoin such activity. *Ralph's Grocery Inc. v. United Food and Commercial Workers Local Union 8. Comment*: This case may weaken Labor's picketing rights in California.

DISABILITY DISCRIMINATION

Pregnancy Disability Regulations: The Department of Fair Employment and Housing (DFEH) will administer and enforce newly revised regulations regarding discrimination based on pregnancy. Among the highlights of the new regulations are:

- Employers are required to provide Pregnancy Disability Leave (PDL) in addition to leave under the California Family Rights Act (CFRA) for the birth of the child;
- Employers must engage in the interactive process to determine appropriate accommodations--as with any disability;
- Reworded posters/notices are required to be displayed for employees who are/might be affected by pregnancy and employers must give the pregnant employee a copy of the notice; and
- Employers must notify employees if they require medical certifications of disability.

Disability/Retaliation: An employee could not pursue a disability discrimination and retaliation claim, where it was undisputed that she could not perform the essential functions of her job. *Lawler v Montblanc North America, LLC*. In this case, it was undisputed the employee's medical condition would not permit her to work full-time on the retail floor as the job required. *Comment*: The court also held that a manager's abrupt and curt manner was insufficient to establish a hostile work environment or intentional infliction of emotional distress.

PROCEDURE/EVIDENCE

Liability Release: A plaintiff was bound by the express terms of a written release of liability that extended not only to the signatories but also to "all other persons, firms, corporations, associations and partnerships." *Rodriguez v. Oto*. In this case, an injured driver claimed that it was his understanding that, at the time he signed the release, it would apply only to the signatories to the agreement. *Comment*: Although not an employment case, this case reminds settling parties of the breadth of their settlements.

Parol Evidence: The California Supreme Court has significantly extended a party's ability to introduce evidence of promises that are at odds with a written contract. *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n*. In this case, plaintiffs were given the opportunity to prove that a loan agreement they signed was different from the one verbally promised to them. *Comment:* Although not an employment case, this decision will impact employers/employees seeking to enforce written employment agreements.

OTHER DEVELOPMENTS

Legislation: The California Fair Employment and Housing Commission (FEHC) has issued new regulations regarding disability discrimination. Among the highlights are:

- Regulations assume that individuals have disabilities so that the focus of the proceedings should be the interactive process and providing a reasonable accommodation;
- Employers should be prepared to welcome dogs and other animals into the workplace for not only visual/hearing assistance but also emotional "support";
- Job descriptions must be kept up-to-date if they are to be used to prove that a job function is “essential”;
- Performance reviews can establish an essential job duty;
- Employees must be able to show that a requested leave will likely allow the employee to return to the workplace within a reasonable time;
- Making a light-duty position permanent is not reasonable accommodation;
- Lowering quality or quantity standards are not a reasonable accommodations;
- A more comprehensive review of the regulations can be found at 2 Cal. Code Reg. § 7293.5, *et seq*.

Insubordination: An at-will managerial employee could be terminated for being uncooperative or deceptive in an employer's internal investigation of a discrimination claim. *McGrory v Applied Signal Technology, Inc.* The manager unsuccessfully sued the employer on the grounds that he was unlawfully terminated based on gender and for protecting privacy rights of employees during the employer's internal investigation. *Comment:* The investigation exonerated the manager of the discrimination claim but his own behavior in the investigation led to his termination.

Tip Pooling: California casino did not violate the State's labor and wage laws by requiring that card dealers contribute a portion of their gratuities to a pool for distribution to other employees. *Avidor v. Sutter Place, Inc.* In this case, the amount to be pooled never exceeded 15% of the tips received from customers by dealers. *Comment:* This decision eliminates uncertainty for service industry employers that generally believe tip redistribution is necessary to avoid morale problems.

Arbitration: An arbitration agreement can authorize either party to seek provisional remedies (such as injunctions) in court rather than arbitration. *Baltazar v Forever 21*. Also, a provision protecting the employer's confidential information contained in the arbitration agreement did not render it unenforceable. Further, it was proper for the agreement to provide for AAA Employment Dispute Rules but that the California Arbitration Act would apply if those rules are held unenforceable. *Comment:* Litigation regarding the enforcement of arbitration agreements is robust these days, in part due to the tension between California State and federal law on the issue.

SLAPP Motions: A cross-complaint for defamation filed in a suit alleging sexual harassment/battery was dismissed (and attorney fees awarded) under the anti-SLAPP statute (Strategic Lawsuit Against Public Policy). *Aber v. Comstock.* The cross-complaint alleged that the sexual harassment claim was defamatory. *Comment:* Lawsuits in any way attacking speech or due process rights should be carefully scrutinized for a potential violation of the anti-SLAPP statute as those motions can prove costly.

HIPAA Privacy Rule: The Omnibus Final Rule has been published by the HHS. The compliance framework remains fundamentally unchanged for employers and has not been expanded. Importantly, the rule clarifies that the employer's notification obligation extends only to disclosure of personal health information (PHI) that poses a significant risk of financial, reputational, or other harm to the plan participant or patient.

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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.