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CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

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Ronald J. Souza
Bruce E. Weisenberg
LYNCH, GILARDI & GRUMMER
A Professional Corporation
170 Columbus Avenue, 5th Floor
San Francisco, CA 94133
(415) 397-2800

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

ARBITRATION

Federal Law: Although federal law generally mandates enforceability of arbitration agreements, the agreements can still be invalidated if unconscionable. *Sonic-Calabasas v. Marino*. An agreement is unconscionable if it is "unreasonably one-sided." *Comment*: This is the State Supreme Court's latest effort to resist the federal mandate enforcing arbitration agreements in employment cases.

Unconscionability: Arbitration agreement was not unconscionable because the employer did not attach the arbitration service's rules governing the arbitration proceedings. *Peng v. First Republic Bank*. However, the rules should be attached if the arbitration agreement provisions are in conflict with the arbitration service's rules. *Comment*: The decision does not require that employee-friendly provisions be attached but at least online links should be identified for employee use. If the employee is not given time to review the arbitration agreement before signing it, it is more important to attach the rules.

Federal Law: Reinforcing earlier decisions regarding the enforceability of arbitration agreements, the U.S. Supreme Court has held that state courts cannot refuse to enforce an arbitration agreement that precludes class-based arbitration because the cost of successfully arbitrating a statutory claim on an individual basis exceeds the potential recovery. *American Express Co. v. Italian Colors Restaurant*. Although this is not an employment case, the reasoning and language will undoubtedly apply to California cases. *Comment*: This is the latest pronouncement of the U.S. Supreme Court mandating State Court compliance with federal law regarding arbitration agreements.

LEGISLATION

Immigration: An employer may lose its business or professional license, face stiff civil penalties, and serious criminal charges for retaliating or taking an adverse action against an employee, former employee or applicant on the basis of their citizenship and immigration status, or that of their family when that individual engages in protected activity. *SB666*. Under this new law, reporting applicants or employees or former employees suspected of citizenship or immigration status violations to a federal, state or local agency because they are engaged in protected activity would constitute a violation of this Act. *Comment*: This law is designed to discourage employers from penalizing immigrants for complaints re violations of employment laws.

Immigration: Individuals without legal immigration status can obtain a driver's license. *AB60*. This law becomes effect on January 1, 2014. *Comment*: This law reverses prior law which prohibited the DMV from issuing a driver's license or identification card to a person who failed to submit proof of immigration documentation.

Immigration: An undocumented worker can be admitted to practice law upon certification by an examining committee that the applicant has fulfilled the requirements for admission to the practice of law. *AB1024*. This law applies only to the practice of law and no other professional license. *Comment*: Thus, applicants who are not lawfully present in the United States might still be admitted to practice as an attorney at law.

Protected Status: "Military and veteran status" has been added to the list of categories protected from discrimination under 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. *NOTE*: These cases have not been updated/cite-checked since they were first reported.

AB566. The law also provides an exemption for an inquiry by an employer regarding military or veteran status for the purpose of awarding veterans' preference as permitted by law. *Comment*: Thus, military status is protected under the anti-discrimination laws along with such things as race, gender, religion, etc.

San Francisco Flexible Schedule Ordinance: Employers of more than 20 employees must consider flexible schedule requests by employees with at least six months of service who work more than eight (8) hours per week. *SF Administrative Code Chapter 12Z.* A request can range from fixed schedules, to telecommuting, to regular hours per day. *Comment*: This ordinance applies only to San Francisco workers and does not require that an employer agree to any request.

DISCRIMINATION

Pregnancy Discrimination: An employee alleging that she was wrongfully terminated due to her pregnancy had to prove that her pregnancy was not merely a motivating reason for her discharge, but that it was a "substantial" motivating reason. *Alamo v. Practice Management Information Corp*. Federal law on this issue requires only that plaintiff prove the decision was a motivating reason. *Comment:* This distinction actually can make a difference to a jury which is following the law in its deliberations.

Interactive Process: Supervisor failure to engage in the interactive process with a disabled employee may convert the employee's resignation into a constructive discharge. *Suvada v. Gordon Flesch Company, Inc.* The employee expressed concern about her ability to meet her job responsibilities in the future and asked whether any easier jobs might be available. *Comment*: Although this is a U.S. District Court case from Chicago, it may express the law should this issue be presented to a California court.

Punitive Damages: Punitive damages (i.e., those designed to punish the wrong-doer) may be suitable where employee complaints were ignored. *Davis v. Kiewit Pacific Company*. Here, plaintiff was one of two women who worked on a construction project and repeatedly complained about inadequate and unclean toilet facilities. The court held that this employee could pursue a claim for punitive damages under California's anti-discrimination law (FEHA). *Comment*: Ignoring employee complaints, especially regarding toilet facilities, is a common source of discrimination litigation.

PRIVACY

Fair Credit Reporting Act: The FCRA contains important protections from lawsuits targeting employer background check programs. *Fair Credit Reporting Act & Fair and Accurate Credit Transaction Act of 2003 (FACTA).* FACTA provides that certain reports on employees related to employer "investigations" are exempt from most of the usual requirements of the FCRA. *Comment:* The violations of federal and state credit reporting acts are fairly common and not generally understood by employees.

Facebook Posts: Viewing private Facebook posts may subject an employer to liability under the Stored Communications Act (SCA). *Ehling v. Mammoth-Ocean Hospital Service Corp*. In this case, a nurse posted on her Facebook wall her opinion that law enforcement should have killed a white supremacist that opened fire on a Washington D.C. Holocaust Monument. Her employer received a copy of that post from a co-worker who was a Facebook "friend" of the employee. The case was eventually dismissed because the employer had received the post voluntarily from a person authorized to view the post. *Comment*: Although this was a New Jersey federal court, at least one court has found that an employee's private Facebook posts fell within the protection of the SCA.

Criminal Records: Public sector employers will be barred from asking about criminal records on employment applications (a so-called "ban the box" law), effective July 1, 2014.

Labor Code § 432.7. Through this legislation, California joins a growing list of states with expanded protections for individuals with criminal records.

WAGE AND HOUR

On-Duty Meal Class: The federal Appellate Court with jurisdiction in California has upheld the certification of a class of employees alleging an "on-duty" meal period violation for security guards. *Abdullah v. U.S. Security Associates, Inc*. At issue here was whether employees qualified for on-duty meal breaks which are permitted only when the nature of the work prevents an employee from being relieved of all duty and where written agreement by the parties so provides.

Home Care Employees: A new rule requires that home care employees be paid minimum wage and overtime by their direct care employers. *U.S. Department of Labor Rule, effective January 1, 2015*. This rule applies only to individuals employed by home care companies. *Comment*: Caregivers employed directly by the household are still exempt from these labor laws.

OTHER DEVELOPMENTS

Employee Retirement Income Security Act (ERISA): An employee terminated to avoid an employee's eligibility to receive retirement benefits may violate ERISA. *Rodriguez v. The Scotts Company, LLC*. ERISA section 510 makes it unlawful for an employer to discharge, fine, suspend or otherwise discriminate against a participant or beneficiary for exercising any right to which he or she is entitled under the provisions of an employee benefit plan. *Comment*: This is a little known or utilized legal option for employees terminated shortly before eligibility for retirement benefits.

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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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