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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]

WAGE AND HOUR

Meal Breaks: To prove a violation of Labor Code Sections 512 and 226.7, a plaintiff/employee must show that the employer forced them to forego missed meal periods. *Salazar v. Avis Budget Group, Inc.* In this class certification action, the court followed recent Appellate Court decisions, including *Brinkley v. Public Storage, Inc. Comment:* These cases were reviewed in our prior newsletters. This matter is currently being reviewed by the California Supreme Court, which will issue a final decision in this regard. In the interim, employers should take meaningful steps to assure that (1) employees are advised of their rights to meal/rest breaks, and (2) are given a meaningful opportunity to take them.

Non-Residents: The California Labor Code applies to non-residents working in California. *Sullivan v. Oracle Corp.* In this case, workers who resided outside California conducted training sessions in California. The federal court with jurisdiction in California (Ninth Circuit) ruled that California's Labor Code applies to all work being performed within the state. *Comment:* While this is a federal court ruling, it is consistent with similar California state court precedents.

Statute: The California Labor Code was amended to render null and void the execution of any release on account of wages due. *Labor Code Section 206.5.* Thus, any attempt to settle an earnings loss dispute for less than the full amount of wages claimed is void. *Comment:* Care must be used in structuring settlements seeking to resolve wage claims. Releases which compromise claimed wage loss for less than the full amount of the claim are vulnerable to attack pursuant to this Code section.

Limitations: A recent opinion has affirmed that the statute of limitations for waiting time penalties (i.e., where employers fail to pay all wages owing at the time of discharge) is one year. The limitations period for unpaid wages is three years – probably four years if an Unfair Business Practices claim is pled. *Pineda v. Bank of America*. This case affirms an earlier Supreme Court decision on this issue. *Comment:* For all practical purposes, employers should assume that employees can "reach back" four years in bringing claims for unpaid wages (including meal/rest break and overtime claims).

DISABILITY DISCRIMINATION

Summary Judgment/Dismissal: Summary adjudication of a disability discrimination claim was improper where plaintiff raised a triable issue of fact that defendant did not provide her with reasonable accommodation that would have allowed her to continue her employment with defendant. *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* In this case, plaintiff could not perform the essential duties of her former position, with or without accommodation, but asked to be considered for other positions. Defendant's human resources manager refused to explore other possible assignments until she received a release

[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.

from plaintiff's physician defining what jobs she could perform. *Comment:* An employer's duty to engage in discussions regarding possible disability accommodations (i.e., the interactive process) has become more demanding than the actual accommodation of disability. Employers are advised to bend over backwards in discussing with employees the potential conditions upon which the employee would be able to return to work.

Alternative Accommodations: An employer providing an accommodation to an employee has the ultimate discretion to choose between effective accommodations and may choose a less expensive accommodation or one that is easier to provide. *Wilson v. Orange County.* In this case, plaintiff's claim was dismissed where she claimed that the employer accommodated her, but not soon enough. *Comment:* This decision provides a little refuge for employers engaged in the interactive process with employees claiming disability accommodation. An employer is entitled to take a reasonable time to assess the possibilities, and then to choose any effective accommodation that suits both (1) the employee's needs, and (2) the employer's business needs.

LEGISLATION

S.F. Health Care Security Ordinance: Despite legal challenges, San Francisco's Health Care Ordinance became effective in 2008 for certain for-profit and non-profit employers engaged in business in San Francisco. The ordinance requires covered employers to spend a specified dollar amount on health care for certain employees who work in San Francisco. Effective January 1, 2009, the following three significant changes were made to the ordinance: (1) reduction in hours necessary to qualify as a covered employee; (2) increase in compensation necessary for exclusion from coverage; and (3) increase in required health care expenditure rate.

Discrimination Limitations: The date of the last, not the first, act of discrimination signals the commencement of an employee's time to bring an action under federal law. *Lily Ledbetter Fair Pay Act of 2009*. This legislation was intended to overrule the U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire and Rubber Company. Comment:* As most discrimination claims are brought under California's state discrimination statute (FEHA), it is doubtful that this decision will have significant impact on California employers.

MISCELLANEOUS

Individual Rights: In July, 2008, the General Counsel of the National Labor Relations Board (NLRB) issued guidelines to employers concerning employee participation in political advocacy activity. The guidelines provide that non-disruptive political advocacy for or against a specific issue, related to a specifically identified employment concern that takes place during the employee's own time and in non-working areas, is protected by the National Labor Relations Act (NLRA).

Religious Discrimination: An employer may not refuse to provide a service to a customer due to its sexual orientation based on religious beliefs of the employer's employee. *North Coast Womens Care Group, Inc. v. Superior Court.* In this case, one of the medical clinic's physicians refused to provide fertility treatment to a lesbian patient. *Comment:* In this case, discrimination

against a protected classification trumped an individual's religious freedom rights. Presumably, it was incumbent upon the employer to find another physician or alternative means of providing the service on a non-discriminatory basis.

Class Action: A trial court could not deny a class certification based on its finding that the underlying lawsuit had no merit. *Ghazaryan v. Diva Limousine, Ltd.* This case involved claims related to the denial of meal and rest breaks. *Comment:* The court found that the court's only role in determining whether cases entitled to class certification is whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. A court has jurisdiction to dismiss cases through other procedures (e.g., summary judgment).

Arbitration: An arbitrator's award leaving details of "make whole" remedy was unenforceable. *Mossman v. City of Oakdale.* In this case, the arbitrator found for the plaintiff but left to the parties to determine how to make the plaintiff "whole." *Comment:* To be enforceable, an award must be sufficiently certain to give the parties an opportunity to comply with its mandate.

Retaliation: An employee can engage in protected activity in responding to questions from her employer during an investigation. *Crawford v. Metro Government of Nashville & Davidson County, Tennessee*. In this case, the employee was found to have "opposed" unlawful conduct (sexual harassment) in responding to questions by her employer during a sexual harassment investigation. *Comment:* Employers should treat information received during discrimination/harassment investigations as complaints regarding that discrimination.

Labor: We can anticipate more Labor-friendly action from the current administration. Recently, President Obama has signed three executive orders that may fall into that category: (1) federal contractors will not be reimbursed for expenses undertaken to influence workers in union-organizing efforts; (2) successor federal contractors, and their subcontractors, will be required to offer jobs to current workers when contractors change; and (3) require federal contractors to notify workers that they can limit their financial support of unions that are serving as their exclusive bargaining agents.

If you have questions regarding any of the aforementioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.