



LYNCH, GILARDI
& GRUMMER
A Professional Corporation

CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

February 2013

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

LABOR

DISCRIMINATION

Disability: The Fair Employment and Housing Commission has adopted new disability discrimination regulations. Among the highlights are:

- The definition of “disability” is to be construed as broadly as allowed by the Fair Employment and Housing Act (FEHA). The focus of inquiry should be on whether employers and employees have met their obligations to engage in the “interactive process”;

- The applicant/employee suing for discrimination has the burden of proving that he/she is an “otherwise qualified individual with a disability,” i.e., capable of performing the essential functions of the job, with or without a reasonable accommodation;

- “Assistive Animals” will be more liberally allowed into the workplace. That will include animals necessary for “emotional or other support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities such as major depression”;

- Employers cannot establish the affirmative defense that the employee presents a danger to his or her own health and safety, or the health and safety of others, without first having engaged in the interactive process;

- An employer can secure a medical examination by its own chosen health care provider provided that any such examination must be “job-related and consistent with business necessity.” Further, the examination must be “limited to determining the functional limitations that require reasonable accommodation.”

Comment: Remember that employers must engage in the interactive process not only at the request of the employee but also where the employer has reason to believe that a disability may be present. In that regard, “disability” has a very broad interpretation.

Disability: An employee, who has exhausted all permissible leave under California’s pregnancy disability leave statute (PDL) and the family rights act (CFRA) nevertheless, may sue their employer for refusing to give them additional leave under separate provisions of California’s Fair Employment and Housing Act (FEHA). *Sanchez v. Swissport*. The appellate court concluded that the PDL was meant to “augment rather than supplant” the leave rights otherwise afforded by FEHA. *Comment:* This means there is no statutory cap on pregnancy disability leave for employers with five or more employees. Employment law counsel should be consulted before terminating any employee who is on pregnancy leave.

Discrimination Proof: An employee suing for discrimination must prove that the discrimination was a substantial factor motivating the adverse employment decision. *Harris v. City of Santa Monica*. But if the employer proves that it would have made the same decision absent discrimination, a court may not award damages for back pay or order reinstatement; however, the employee may be entitled to declaratory and injunctive relief as well as attorney’s fees and costs. *Comment:* This case will most certainly make it more

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.

difficult for an employee to recover damages in a discrimination case.

LABOR

NLRB Decisions: The NLRB has issued decisions negatively impacting common handbook provisions. Among them are:

- An employment policy violated the National Labor Relations Act (NLRA) which provides: “[d]o not contact the media, and direct all media inquiries to the home services communications department.” A policy which provided “employees should not contact or comment in the media about the company unless pre-authorized by Public Relations” also violates the NLRA. The National Labor Relations Board (NLRB) concluded that both of these rules would prevent or dissuade employees from airing disagreements with the company in the media, and were therefore invalid.”

- Confidentiality rules which advised employees “never discuss details about your job, company business or work projects with anyone outside the company” and “never give out information about customer or (company) violated the NLRA because “company business” could be construed to cover disputes between employers and employees.

- Another rule providing “if law enforcement wants to interview or obtain information regarding a ‘company’ employee, whether in person or by telephone/email, the employee should contact the security department.” The NLRB found that the term “law enforcement” could be construed to include union officers.

Obama Recess Appointments: President Obama's appointments to the NLRB while Congress was in recess were invalid according to the U.S. Court of Appeals for the D.C. Circuit Court. This casts doubt on the validity

of the decisions made by the NLRB as it did not have a quorum.

OTHER DEVELOPMENTS

OSHA: Beginning in January of this year, employers must post an annual summary of all work-related injuries and illnesses that occurred on the job. The number of cases, days away from work, and the outcome of the injury or incident are also to be posted.

FMLA: The U.S. Department of Labor has released revised model Family and Medical Leave Act (FMLA) forms. The updated forms should be used immediately although they include no substantive revisions. The new forms will expire on 2/28/2015. Following are the URL addresses to the revised forms:
www.dol.gov/whd/forms/WH-380-E.pdf
www.dol.gov/whd/forms/WH-380-F.pdf
www.dol.gov/whd/forms/WH-381.pdf
www.dol.gov/whd/forms/WH-382.pdf
www.dol.gov/whd/forms/WH-383.pdf
www.dol.gov/whd/forms/WH-384.pdf
www.dol.gov/whd/forms/WH-385.pdf
and www.dol.gov/whd/forms/WH385V.pdf

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

© 2013 Lynch, Gilardi & Grummer, APC.
This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please contact your employment attorney in connection with any fact-specific situation in which you intend to take significant employment action. State or federal law may impose additional obligations upon you or your company, apart from the aforementioned legal authorities.

RJS Client Newsletter-2-13.doc