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California Employment Law Newsletter

What's New for California Employers?

Ronald J. Souza
Lynch, Gilardi & Grummer
475 Sansome Street, Suite 1800
San Francisco, CA 94111
(415) 397-2800

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

SEXUAL HARASSMENT

Insufficient Severity: The trustee of an estate did not sexually harass a widow/ beneficiary sufficient to give rise to a claim for sexual harassment. *Hughes v. Pair*. Defendant had not physically touched the widow, and his "coarse and vulgar" comments to the widow were ambiguous and were part of an "isolated incident." Further, the actions were not sufficiently extreme or outrageous to constitute intentional infliction of emotional distress. *Comment:* The key for the court here was that the conduct did not span a lengthy period of time and did not involve physical touching.

Protected Employees: A covered "employee" under FEHA (California's anti-discrimination statute) is broadly defined to include an individual temporarily working at a California prison under a contract with another company. *Bradley v. California Department of Corrections and Rehabilitation*. Further, the court found that the employer had a duty to immediately stop a co-worker's sexual harassment and that simply referring the matter to a lengthy investigative process was insufficient to end the harassment. *Comment:* This case confirms that independent contractors are also protected against sexual harassment under California law. Also, the case reminds us that an employer must do more than simply begin an investigation in addressing a sexual harassment complaint.

PROCEDURE

Removal: A defendant that removes an action to federal court, from state court, bears the burden of proof regarding damages. *Geglielmino v. McGee Food Corp.* Here, plaintiffs affirmatively alleged that damages suffered by each of them were less than $75,000, but the court found that defendants had established by a preponderance of the evidence that the damages actually exceeded $75,000. *Comment:* This is an issue more important to attorneys. Removal to federal court is an important tactical tool for defendants in that federal courts are typically more conservative than state courts.

Res judicata: An employee's administrative claims (to the Department of Labor) did not preclude their subsequent civil action for fraudulent inducement to enter employment. *Noble v. Draper*. In this case, plaintiffs had brought an administrative claim before the Department of Labor and then later sought the same damages in a civil action. *Comment:* Generally, a claim to the Department of Labor has no effect on an employee's subsequent right to bring a civil action except that the employer will not be required to pay the same damages twice.

[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.

Statute of Limitations: The statute of limitations did not preclude all FEHA (discrimination) claims where the employee alleged certain acts within the limitations period. *Hammond v. L.A.* In this case, the employee alleged a pattern of racial discrimination, which began outside the statute of limitations but continued to a period within the statute. *Comment:* Cases alleging a pattern and practice of discrimination can usually avoid the statute of limitations bar so long as some of the acts occurred within one year before the filing of the claim.

PRIVACY

Employment Application: NASA's employment questionnaire and general waiver for release of information may violate an employee's privacy rights. *Nelson v. NASA.* Here, the pre-employment questionnaire inquired into counseling that employees may have received in the past, and required that they waive their privacy rights thereby allowing the employer to inquire into such matters. *Comment:* An employer's pre-employment screening must be focused on issues directly related to job eligibility and not to a person's personal traits.

LABOR

Union Leafleting: The right of free speech allows Union leafleting at shopping malls. *Fashion Valley Mall v. NLRB.* Here, the leaflets urged customers in a shopping mall to boycott its stores. *Comment:* A shopping mall, even if privately owned, is considered a public forum where people are entitled to exercise their freedom of expression.

OTHER DEVELOPMENTS

Preemption: An employee's wrongful termination claims were preempted by the National Labor Relations Act (NLRA). *Luke v. Collotype Labels USA, Inc.* In this case, the employee alleged that he was wrongfully terminated in violation of public policy because he was discharged for participating in discussions with other employees about concerns they had about unfavorable working conditions. In dismissing the claims, the trial court found that the claims were "nothing more than an unfair labor practice" charge that was controlled by the company's CBA. *Comment:* Conduct which constitutes concerted action regarding "unfavorable working conditions" is specifically addressed by the NLRA, which is the exclusive means to obtain a remedy.

Internal Exhaustion: An employee's FEHA claim was not barred by an employee's failure to first complete the company's internal grievance procedure. *Ahmadi-Kashani v. U.C.* In this case, the fact that the employee had begun the internal grievance procedure made no difference as "it did not provide for a 'quasi-judicial' hearing" with sufficient due process to generate a legally binding result.

Handbook Arbitration Clause: A handbook promise to agree to arbitration was not enforceable. *Amanda Mitri, et al. v. Arnel Management Company, et al.*

In this case, the employee signed an acknowledgement of receipt of an employee handbook, which provided all employment disputes must be submitted to binding arbitration. *Comment:* Appellate courts are more frequently refusing to enforce arbitration agreements where employers cannot produce a separate agreement signed by the employee to that effect.

Retaliation: An employee successfully claimed that he was terminated for complaining about fraudulent business practices. *Casella v. Southwest Dealer Services.* In this case, the employee claimed that his employer aided and abetted auto dealerships in defrauding their customers by helping them improperly inflate the finance terms for the purchase of vehicles. *Comment:* Adverse action in response to conduct prohibited by statute can support a claim of retaliation. Here, the employee alleged that his employer violated California Penal Code Section 487, which prohibits theft of a person's money or property based on fraud.

Workers Compensation: An employee who fell and died while attending a CPA's convention was not working within the "course of employment" for purposes of workers compensation. *City of Los Angeles v. WCAB.* Pivotal to the court's reasoning was that the employer did not reimburse the employee for CPA professional costs. *Comment:* While courts are usually liberal in finding that employees were within the "course of employment," attendance at a non-work related educational seminar was not sufficiently tied to employment to bring the employee within workers compensation laws.

Individual Rights/Wrongs: Criminal conviction of a former employee who threatened company officials was upheld by the California Court of Appeals. *United States v. Sutcliffe*. Here, the former employee was convicted on three counts of making interstate threats (via the Internet) to injure another and five counts of transferring social security numbers with the intent to aide and abet unlawful activities. *Comment:* This case provides authority for employers to prosecute former employees who threaten company interests.

Exempt Classification: An employer's disability leave policy did not affect a manager's exemption from overtime entitlement. *Sumuel v. ADVO, Inc.* Here, the company's policy of not paying supplemental salary replacement benefits to sick or disabled managers until they supplied proof of receipt of SEI benefits, did not violate the "salary basis test" for determining exemption from overtime. *Comment:* Generally, an employer's interference with an exempt employee's fixed salary can jeopardize the employer's entitlement to deny overtime pay. But here, the court found that the company's policy was a "bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability."

Trade Secrets: An employee who left his employer and took with him information regarding pending projects to enable him to "move forward with those projects" at a subsequent employer,

violated California's trade secret laws. *San Jose Construction, Inc. v. SBCC, Inc.* In this case, the employee copied documents and downloaded data from his former employer's files and computers and subsequently uploaded those on his next employer's computers. The Court of Appeals affirmed the former employer's right to proceed not only against the former employee, but also his subsequent employer. *Comment:* The subject conduct was sufficiently egregious and the financial stakes sufficiently high that the former employer elected to proceed against the former employee and his new employer.

WARN Act: The site of employment for purposes of the WARN Act is the actual work site, not the company's headquarters. *Bader v, Northern Line Layers, Inc.* Thus, where an individual construction work site did not employ at least 50 workers (as required to come within the WARN Act), the employer did not have an obligation to give the 60-day notice required by that Act. *Comment:* This case is helpful for employers wishing to avoid the procedural obligations of the WARN Act (and related salary continuations).

Payroll Retention Requirements: In recent weeks, the California Department of Labor has conducted sting operations on retail establishments throughout the state to ensure compliance with California's payroll retention requirements. *California Labor Code section 226.* That code section requires employers to keep payroll records reflecting all applicable deductions for each employee's "on-file … for at least three years at the place of employment, or the central location within the state of California." *Comment:* State investigators appear to be targeting out-of-state companies with multiple retail establishments in California.

S.F. Mandatory Health Care Ordinance: San Francisco employers should be aware that the City's health care security ordinance has been reactivated effective January 9, 2008. The ordinance is a local measure that requires certain San Francisco Employers to spend a specified minimum amount to provide health care coverage, from $1.17 to $1.76 per hour, to each employee working within the City. *Comment:* This ordinance applies only to employers with 50 or more employees and is limited to those conducting business with the City and County of San Francisco.

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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