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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

Employee Free Choice Act (EFCA): This legislation is working its way through Congress. It would replace secret ballot elections with automatic recognition of union bargaining units if a majority of employees sign cards or petitions seeking any recognition. It would modify the current process for negotiating a first union contract with a newly-certified union. It would also establish an accelerated negotiating process where an arbitration panel would write a binding 2-year collective bargaining agreement if the union and employer do not reach an agreement within 120 days. Finally, the proposed legislation would subject employers, but not labor unions, to significant civil penalties for violation of its provisions. *Comment:* The EFCA would represent the most significant change in the country's labor laws in over 60 years. However, this legislation is encountering some difficulty in obtaining passage in the Senate due to the backlash resulting from the anticipated elimination of the secret ballot election as the primary NLRB certification process. Stand by.

Solis Appointment: Hilda Solis has been confirmed as Obama's Labor Secretary. She has been a proponent of the EFCA and has voted with the AFL-CIO 90% of the time during her time in Congress. Her appointment is expected to be followed by pro-labor appointments to the three open positions on the National Labor Relations Board (NLRB). *Comment:* These developments are likely to accelerate union organizing efforts in the coming months.

Federal Government Contracts: President Obama has signed an Executive Order, effective immediately, authorizing executive agencies of the federal government to require every contractor or subcontractor on large-scale construction projects to negotiate, or become a party to a Project Labor Agreement, with one or more labor organizations.

Unprotected Walkouts: When six drivers left work without permission to attend a bargaining session, over the effects of closing their unionized facility, they were fired for violating the union contract's no-strike provision barring "strikes, work stoppages, or other concerted interferences with normal operations." The NLRB later found that the termination of the truckers violated the NLRA. However, the U.S. District Court of Appeals for the District of Columbia disagreed, finding that the walkout to obtain information from management about their future employment was not related to an ongoing labor dispute and that the drivers did not have a compelling reason to attend the bargaining session. *Comment:* Workers cannot invoke the NLRA as justification for walking off the job to attend union activities.

[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.

LEGISLATION

WARN Act: An employer satisfied the "unforeseeable business circumstances" exception under the Worker Adjustment and Retaining Notification Act (WARN) when it implemented a layoff just days after losing its biggest customer. *Gross v. Hale Halsell Company.* WARN's unforeseeable business circumstances exception applied because the customer's withdrawal and attendant 40% loss of potential business was not reasonably foreseeable. *Comment:* Sudden economic/financial downturn justifies an exception to the WARN Act, which otherwise requires 60-day notice and other procedural benefits to mass termination of employees.

OSHA Posters: California employers must post in their workplace a summary of work-related injuries and illnesses during 2008. According to Cal/OSHA, the summary must be displayed in a visible area from February 1 through April 30 for employees to review. *Comment:* The Form 300A can be downloaded from the following website: www.dir.ca.gov/DOSH/Dosh/Reg/ApndxB300AFinal.pdf.this link.>

COBRA: Employees who are terminated "involuntarily" between 9/1/08 and 12/31/09 will be eligible for a subsidy of 65% of their health insurance premiums for up to 9 months following their termination. This subsidy is payable initially by the employer, who can then retrieve the 65% contribution through a tax credit. This subsidy would not apply to employees (or their dependents) who have an adjusted gross income of more than $125,000/$250,000 filing jointly. However, the subsidy is added directly to the former employee's income tax liability in the relevant year. *Comment:* The IRS has released new guidance that will help employers claim credit for COBRA subsidy that they pay for their former employees under the ARRA. Guidance in this regard and the IRS Form 941 that employers must use to claim the tax credit can be found on the IRS website at www.irs.gov/newsroom/article/0,,id=204708,00.html.

Private Attorney General Act (PAGA): The State of California is not required to approve a class action settlement agreement in order for class members to be able to waive PAGA claims. *DeLeon v. Verizon.* This case provided some much-needed guidance in interpreting *PAGA, California Labor Code sections 2898, et seq. Comment:* This case will make it easier for employers and class-action employees to settle class action lawsuits founded on Labor Code/wage and hour violations.

ARRA Whistleblower Protection: The recently enacted American Recovery and Reinvestment Act (ARRA) contains whistleblowing provisions that apply to non-federal employers who receive funds under the ARRA. These provisions prohibit the employer from taking adverse action against an employee for disclosing to a covered entity various forms of misfeasance regarding the finances of companies. *Comment:* This provision seeks to provoke some accountability on the part of companies receiving funds under the government's recent bail-out programs.

FAMILY LEAVE

Ability to RTW: The Family and Medical Leave Act (FMLA), which protects the leave of individuals suffering from a serious health condition, does not protect an employee's right to return to work, where that employee is unable to resume his/her normal job duties. *Roberts v. The Health Association.* In this case, the plaintiff's treating doctor opined that she would not be able to return to work until a date beyond her 12-week protected leave. *Comment:* This holding came from a circuit (2d. Circuit) not having specific jurisdiction in California. However, it does interpret applicable federal law and does clarify that leave is only protected for a maximum of 12 weeks, at which time the employee must be able to return to his or her former job (or a like job).

New FMLA Regulations: The U.S. Department of Labor (DOL) has issued regulations seeking to clarify recent changes to the FMLA. Among the topics treated by the regulations were the following:

- "Serious health condition" was defined with modifications to the tests for "incapacity" and "treatment."
- The process of obtaining certification was clarified and employers are required to give employees written notification of any deficiencies in the certification provided by the employee, along with an additional 7 days to cure the deficiency.
- Fitness for duty certifications can address the specifics of the employee's ability to perform his/her job duties, and an employer can require recertification every leave year for any serious health condition that lasts longer than a year.
- Notice – Employers must give (1) general notice, (2) eligibility notice, (3) rights and responsibility notice, and (4) designation notice.
- As previously reported in our CNL, military families are entitled to protected leave under the FMLA.

Guidance regarding the FMLA regulations can be found on the web at www.dol.gov/esa/whd/fmla/finalrule.htm.

WAGE AND HOUR

Release of Claims: In litigation between a restaurant and its employees about overtime compensation, the California Labor Code did not prohibit the release of a claim for unpaid wages where there was a bona fide dispute over whether any wages were owed. *Chindarah v. Pick Up Sticks, Inc.* In this case, a group of restaurant workers sued for unpaid overtime, interest and penalties due to their misclassification. They then settled their individual claims with defendant, but then unsuccessfully sought to rejoin the class alleging that the settlement violated California law prohibiting waiver of unpaid wages. *Comment:* This case provides clarification of the law which effectively prevents

employers from settling overtime or other wage claims for fear that their compromise might be invalid as an unlawful waiver of wages owing.

Overtime for Non-Residents: The federal court with jurisdiction in California (9th Circuit) recently withdrew its opinion that non-residents of California were entitled to overtime pay under California's Labor Code, for work performed in California. *Sullivan, et al, v. Oracle Corp.* Instead, it submitted to the California Supreme Court a request for clarification of California law regarding whether (1) California Labor Code applied to overtime performed in California, for a California-based employer of out-of-state plaintiffs; (2) the unfair claims statute (Business & Professions Code § 17200) apply to overtime or other Labor Code entitlements by non-resident workers.

MISCELLANEOUS

Privilege: An employee could not avoid termination for refusal to answer employer's questions, asserting the privilege against incrimination. *Spielbauer v. County of Santa Clara.* In this case, a public defender declined to answer his employer's questions regarding the suspicious disappearance of a witness for trial. He was terminated for insubordination and misconduct. *Comment:* An employer is entitled to an employee's cooperation in investigating allegations of misconduct. Refusal to cooperate with a lawful employment request is insubordination, which can lead to termination.

Immigration: The new Form I-99 must be used beginning February 2, 2009. It contains new requirements, including a prohibition against accepting expired documents and changes the list of documents that are acceptable for I-9 verification. (See prior newsletter.)

Age Discrimination: The Age Discrimination in Employment Act (ADEA) provides the exclusive enforcement mechanism for claims of age discrimination under federal law. *Ahlmeyer v. Nevada System of Higher Education.* In this case, claimant was not able to proceed with an age discrimination claim under an equal protection theory based on federal statute (42 U.S.C. § 1983.) *Comment:* Once again, this federal discrimination decision will probably have little impact on age discrimination claims brought in California. The reason is that most plaintiffs invoke California statutory law as the basis of such claims as those laws are more liberal/pro-employee.

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