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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

Attorneys' Fees Recovery: Attorneys' fees are not recoverable for meal or rest period violations. *McGann v. UPS.* This decision is somewhat paradoxical, as the California Supreme Court earlier held that awards for meal or rest period violations are "akin to wages" and prevailing parties are entitled to attorneys' fees for the recovery of "wages." *Comment:* The time for notice of appeal or certification/ decertification has not yet run, and this decision may be challenged.

Exempt Classification: Pharmaceutical sales representatives were exempt from FSLA corporate time requirements. *Christopher v. Smith Kline Beecham Corporation.* Pharmaceutical industries' sale representatives are "outside salesmen" exempt from FSLA overtime entitlement. *Comment:* The courts have generally upheld the durability of this exemption for persons working on commission, away from the employer's place of business (and not in their own homes).

Meal/Rest Break Penalties: An employer who fails to provide an employee with meal and rest period breaks entitles the employee to one hour for each missed break, per day. *UPS v. Superior Court.* Thus, where an employee is denied both meal and rest breaks in a given workday, said employee is entitled to two hours of premium pay for each day that both breaks were missed. *Comment:* Prior conflicting authority suggested that an employer was subject to only one hour of premium pay for each day that both breaks were denied.

DISCRIMINATION

EEOC Complaints: The U.S. Equal Employment Opportunity Commission (EEOC) has announced that private sector workplace discrimination charge filings hit the highest level ever, with nearly 100,000 filed during 2010. This statistic included discrimination, harassment, retaliation against individuals in various protected classes (race, religion, gender, disability, etc.). In the last three years, the number of claims has significantly increased. *Comment:* This surge was probably related to the down economy. That is, whereas employees used to be able to simply move on to another job (rather than sue) that potential has disappeared, and employees are far more likely to be unable to return to work immediately and instead turn to the courts for a form of severance benefit. Retaliation and disability claims were notably on the rise in these statistics.

[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.

Discrimination Liability: The U.S. Supreme Court has clarified the standard under which an employer can be liable for discrimination undertaken by an innocent supervisor but motivated by a lower-level employee. *Staub v. Proctor Hospital.*

This is so even if the decision maker did not share the lower-level supervisor's animus, but the lower-level supervisor tainted the information on which the supervisor acted. *Comment:* It is important for an employer to examine the basis of all information upon which an adverse employment decision is made following protected activity by an employee.

OTHER DEVELOPMENTS

Independent Contractor: Unionized truckers were allowed to proceed with their lawsuits where they owned their own trucks and were paid by a broker to transport cargo between ports and facilities of the broker's customers. *Arzate v. Bridge Terminal Transport, Inc.* In this case, the employer executed a collective bargaining agreement that represented the owner-operators of trucks to be "employees" and issued W-2 tax reporting forms, withheld taxes, and offered health benefits. *Comment:* The truckers' relationship appeared at first blush to be a true independent contractor relationship, but the inclusion of the CBA terms created a question which the truckers were entitled to pursue in court.

Arbitration: An arbitration agreement in a standard-form independent contract agreement between real estate firms and salespersons were unconscionable, and therefore unenforceable. *Wherry v. Award, Inc.* The court found that the plaintiffs lacked any meaningful opportunity to negotiate the terms of the arbitration agreement, there is no provision for discovery (obtaining information from the employer), the plaintiff was subject to fees and costs prohibited by FEHA and the limitations period for bringing the actions were shorter than allowed by law. *Comment:* Employers who try to create undue advantage through arbitration provisions may cause those arbitration provisions to become unenforceable.

FMLA: An employer had the burden to show a legitimate reason to deny an employee's reinstatement under FMLA. *Sanders v. City of Newport.* In this case, the employer refused to return the employee to work on the grounds that it could not provide a safe work environment due to uncertainty regarding her sensitivity to chemicals in the workplace. *Comment:* This case is particularly significant to attorneys as it clarifies that employers have the burden of proof to establish that it had a legitimate reason for denying reinstatement.

ADA: A company's rule against hiring job applicants who had previously tested positive for drug or alcohol did not violate the Americans with Disabilities Act. *Lopez v. PMA.* The court held that the one strike rule, that permanently eliminated employment consideration of candidates who had earlier tested positive for drugs, did not violate the ADA. This was so even though the applicant

had ceased using drugs. *Comment:* This decision is somewhat surprising, and employers should use caution in making employment decisions related to former drug use or employees who are seeking treatment for drug/alcohol rehabilitation.

Privacy: The California Supreme Court has held that "a zip code constitutes 'personal identification information'" as that phrase is used in the California statutes regulating the use of credit cards. *Pineda v. Williams-Sonoma Stores, Inc.* That statute prohibits a business from requiring customers who use credit cards to provide personal identification information. *Comment:* California courts earlier identified social security numbers as personal identification information, and it can be anticipated that drivers license numbers and telephone area codes will receive similar treatment.

SLAPP Motions: An employer could proceed with a defamation and interference claims against employees who protested their terminations. *Overhill Farms, Inc. v. Lopez.* In this case, terminated employees (self-described "community activists") participated in protests outside of Overhill's two plants and outside the business of one of Overhill's customers. *Comment:* Employers should be careful in suing former employees for protests or criticisms of employment policies, as such actions are commonly subject to dismissal and can subject employers to penalties and attorneys' fees (through SLAPP motions).

Suitable Seating: Employees may proceed with a Private Attorney General's Act (PAGA) claim based on lack of suitable seating. *Bright v. 99 Cent Only Stores.* A wage order issued by the California Industrial Welfare Commission requires that "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." In this case, a cashier led this class action based on failure to provide suitable seating for her and similarly situated employees. *Comment:* This result seems a little extreme, but should alert employers to be wary of obscure wage orders.

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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.