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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]

WAGE AND HOUR

Tip Pooling: The California Labor Code (CLC) and Unfair Competition Law (UCL) do not prohibit an employer from permitting shift supervisors to share in the proceeds placed in a collective tip box. *Chau v. Starbucks Corporation.* The court drew the distinction between tips placed in a collective tip box and those given to an individual personally. *Comment:* Employers should continue to use great care in setting policies regarding the sharing of tips where management personnel might participate in the tip distribution. Allowing management personnel to participate in tip sharing is considered to be a taking of the tips by employers, which is prohibited under the CLC.

Post-Termination Commissions: An employment agreement precluding the recovery of commissions following an employee's termination is enforceable. *Nein v. HostPro, Inc.* Also, the forfeiture of post-termination commission collections is not a violation of the implied covenant of good faith and fair dealing.

Comment: This case clarifies a conflict between the various appellate courts on whether an employer can contractually require an employee to forfeit commissions earned but not paid prior to termination.

Meal/Rest Break Penalties: California employers are liable for double premium pay for both (1) missed meal and (2) rest breaks. *Marlo v. United Parcel Service*. California law provides for a one-hour regular pay penalty, for each day that an employee is denied either a (1) meal or (2) rest break. *Comment:* This decision clarifies that employers are liable for a cumulative two hours per day (rather than only one hour previously as held by some courts).

DISCRIMINATION

Disability: The California Supreme Court has clarified that to establish actionable disability discrimination under California State law (FEHA); an employee need not prove an *intent* to discriminate. *Munson v. Del Taco, Inc.* The Supreme Court answered this question in the context of a request directly from the U.S. Court of Appeals in California (9th Circuit). *Comment:* Thus, a disabled employee need only prove that he was subject to disability discrimination (e.g., failure to accommodate, engage in interactive process, etc.), not that an employer intended to do so, for there to be recovery.

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[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.

Same Sex Marriage: The California Supreme Court recently upheld Proposition 8, an initiative approved by a majority of California voters on 11/4/2008. *Strauss v. Horton*. Thus, only same-sex marriages lawfully occurring before the Supreme Court ruled in *Strauss* are legally recognized. *Comment:* However, employers should note that same-sex couples who are registered domestic partners have workplace rights nearly equivalent to heterosexual married couples. However, domestic partners must register to achieve this status.

MISCELLANEOUS

Arbitration: A former employee waived his rights to a hearing before the California Labor Commissioner for alleged unpaid vacation through a signed mandatory arbitration agreement with his employer. *Sonic-Calabasas A, Inc. v. Moreno.* The court found that the arbitration agreement did not act as a waiver of unwaivable rights, which would have been against public policy. *Comment:* This case provides another incentive for employers to establish mandatory arbitration agreements as employment policy.

Class Action: Under the current Private Attorney General Act (PAGA), any individual can bring a class action only where he/she is a "person who has suffered an injury in fact and has lost money or property as a result of (such) unfair competition." Recently, the California Supreme Court has clarified that only the individual class *representative* (and not unnamed class members) must satisfy the afore-mentioned requirements. *In re Tobacco II Cases.* Also, a class representative proceeding on a claim of mis-representation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive conduct or statements. *Comment:* It's too soon to tell whether this clarification of PAGA will have any significant impact on employment claims.

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

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