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CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

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Ronald J. Souza
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

ARBITRATION

Enforceability: An arbitration agreement was not barred by the California Labor Code section which prohibits an employer from requiring an employee to execute “a release of a claim or right on account of wages due” (CLC § 206.5) *Pulli v. Pony International, LLC*. Further, in this case, the employer waived its right to have an arbitrator determine the CLC § 206.5 issue by submitting that issue for judicial determination by the court. *Comment:* The arbitration agreement was not a “release of a claim or right on account of wages due;” rather, an agreement to litigate disputes in an arbitration forum (rather than a court of law).

Waiver of Right to Arbitrate: An employer’s active participation in litigation for more than a year barred it from later seeking to compel arbitration. *Hoover v. American Income Life Ins. Co.* For 15 months, the defendant actively litigated the matter—twice seeking to remove the case to federal court and propounding extensive written discovery documents. *Comment:* Although courts will generally not find a waiver of the right to arbitration where there is a limited amount of litigation beforehand, this defendant clearly went too far before seeking to enforce its arbitration rights.

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.

Class Action Waivers: A California Court of Appeal upheld employers’ rights to use class action waivers. *Iskanian v. CLS Transportation of Los Angeles*. This decision ignores a prior decision that permits trial courts to reject certain class action waivers in employment agreements. *Comment:* The enforceability of class action waivers in California remains unsettled as there is a split of authority within the California Appellate Courts. Ultimately, the California Supreme Court will need to rule on this issue.

DISCRIMINATION

Statistical Evidence: Employees can use statistical evidence to establish a *prima facie* case of age discrimination under California’s disability discrimination law (FEHA). *Schechner v. KPIX-TV*. But the statistics must clearly show a disparate impact on protected classes. Further, in this case, the plaintiff/employee failed to overcome the “same actor inference” in support of the employer’s legitimate business reason (i.e., the same person did the hiring as did the firing). *Comment:* While statistical evidence is a useful tool, it must: (1) involve a statistically significant sampling; and (2) demonstrate clear disparate impact on protected classes.

DFEH Complaint: A claimant can lawfully file a written complaint with the Department of Fair Employment and Housing, online, over his/her attorney’s signature. *Richards v. United Parcel Service*. The appellate court reversed the trial court’s dismissal of the case on the grounds that the employee/claimant had not filed a verified complaint. *Comment:* The courts generally give some latitude to procedural technicalities in the filing of DFEH complaints.

OTHER DEVELOPMENTS

Employee Insubordination: Where an employee refuses an employer's request to sign a document acknowledging disciplinary action, that act is insubordination. *Paratransit v. UIAB.* Further, that misconduct was grounds for termination and the loss of eligibility for unemployment compensation benefits. *Comment:* Care should be used in following this decision as it also involved a union contract that required employers to prove disciplinary steps (i.e., through signed writings).

Wage and Hour: Pharmaceutical sales representatives were exempt from overtime pay under the Fair Labor Standards Act exemption for "outside salesmen." *Christopher v. SmithKline Beecham Corp.* The FLSA exemption for an "outside salesman" applies to an employee if both of the following criteria are met: (1) the employee's primary duty is either "making sales" or "obtaining orders" for his employer; and (2) the employee is customarily and regularly away from the employer's place of business while performing such exempt work. *Comment:* This U.S. Supreme Court decision resolves a split between the lower courts on this issue.

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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