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CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

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Ronald J. Souza
Bruce E. Weisenberg
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

Class Action Waivers: The Federal Arbitration Act (FAA) prohibits courts from invalidating contractual waiver of class arbitration on the grounds that the cost of arbitrating a federal statutory claim individually exceeds the potential recovery. *American Express Co. v. Italian Colors Restaurant.* This is so even if the effect of enforcing the waiver is to prevent the claim from being brought. *Comment*: Although this U.S. Supreme Court case was not an employment case, it reinforces employers' ability to avoid class actions through class action waivers in arbitration agreements.

Arbitrator Authority: The FAA gives an arbiter the authority to determine whether the parties "agreed to authorize class arbitration" *Oxford Health Plans LLC v. Sutter*. The decision was based solely on the broad contractual language precluding litigation and requiring arbitration of any disputes arising under their contract. *Comment*: This is another decision strengthening an employer's ability to preclude class-action civil suits through appropriate arbitration agreement language. Employers wishing to avoid civil class actions would do well to craft appropriate arbitration agreement language vesting the arbiter with authority to interpret all aspects of the employment agreement including the forum in which the proceeding should take place. *Caveat*: There are still certain provisions which if included in an arbitration agreement can invalidate the same.

Unconscionability: An arbitration agreement that is procedurally unconscionable (i.e., one side has no real bargaining power) was nevertheless enforceable where it was not substantively unconscionable (i.e., was not unfair in the rights that it conferred on the respective parties). *Leo's v. Darden Restaurants Inc*. In this case, the court found that a provision authorizing the employer to update the arbitration provision "as required by law" and another giving the arbiter the right to limit discovery were not substantively unconscionable and thus was enforceable.

OTHER DEVELOPMENTS

Discrimination: As you've undoubtedly heard, the U.S. Supreme Court ruled unconstitutional a law denying federal recognition of legally-married same-sex couples. *United States v. Windsor*. The court also effectively permitted same-sex marriage in California (by deferring a decision on California's Proposition 8). *Comment*: Some of the ramifications for employers are: (1) same-sex partners will be entitled to FMLA leave, (2) same-sex partners should be included in employers' medical insurance benefits which extend coverage to "spouses," and (3) the "spousal privilege" which protects confidential communications by spouses will extend to same-sex partners.

Harassment: An employer will be vicariously liable for the acts of a supervisor where the employer has empowered that employee to take tangible employment actions against the victim. *Vance v. Ball State Univ*. A "tangible employment" action means a significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a significant change in benefits. *Comment*: This case significantly reduces the types of employees

[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.

for whose conduct an employer can be legally responsible.

Retaliation: An employer is liable for retaliation only if it is proven that the employer would not have taken adverse employment action "but for" an improper motive. *Univ. of Texas Southwestern Med. Ctr. v. Nassar.* It is not enough that the employer had several motivations, only one of which was unlawful. *Comment*: This decision may not seem significant, but it is. It is far easier for a jury to find that there were various motives for decisions but hard to show that there was only one overriding (and unlawful) motivation.

Affirmative Action Programs: The U.S. Supreme Court held that a race-conscious student admissions process used by the University of Texas was unconstitutional. *Fisher v. Univ. of Texas*. Although suspect, race may be considered in the admissions process if the process meets strict scrutiny requirements. However, the court clarified no judicial deference applies to a university's judgment about the means that are employed to achieve the educational benefits of diversity.

Suitable Seating: California employers are required to provide "suitable seats" to employees when the nature of the work "reasonably permits" it. *Home Depot v. Superior Ct.* In this case, the court rejected defendant's contention that it only needed to ensure employees were not denied a seat, instead holding that the employer had an affirmative obligation to provide one.

Suitable Seating: A large retailer successfully defended its practice of requiring cashiers to stand citing "genuine customer service rationale." *Garvey v. Kmart Corp.* The company successfully argued that because customers are themselves standing in line, they are focused on the cashier's inefficiency and appearance of efficiency.

Public Notices re Human Trafficking: To raise awareness of human trafficking in California, certain businesses are required to post public notices regarding slavery and human trafficking or face stiff penalties. Civil Code § 52.6 Accordingly, certain businesses are required to post public notices addressing that issue including: bars, adult or sexually-oriented businesses, airports, intercity passenger rail stations, bus stations, truck stops, emergency rooms within general acute care hospitals, urgent care centers, farm labor contractors, and privately-operated job recruitment centers.

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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.