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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]

EMPLOYMENT POLICIES

Social Media/Background Checks: When social media content is used as part of a company's background check process, the company needs to make certain that they do not run afoul of the Fair Credit Reporting Act (FCRA). *Business Center Blog on Federal Trade Commission Bureau Website:* This applies only to employers who use people outside the company to collect information. If the web search is done internally, it falls outside the FCRA. *Comment:* Violations of the FCRA are frequent and it is anticipated that we will see more litigation in this area when more employees or applicants become aware of the reach of the FCRA.

Class Actions: The U.S. Supreme Court recently validated class action waivers in arbitration agreements as a matter of federal law under the Federal Arbitration Act (FAA). (*AT&T Mobility LLC v. Concepcion*). But a recent California court held that *Concepcion* did not bar class actions in the form of Private Attorney General Actions (PAGA). (*Brown v. Ralphs Grocery Store Co.*) *Comment:* California courts have long been hostile to arbitration agreements which diminish the rights of employees as a condition of employment. This court found that the federal law did not bar PAGA class actions because PAGA is designed primarily to be an enforcement tool regarding California labor laws.

[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.

MISCELLANEOUS

Sexual Harassment: A sexual harassment victim can introduce evidence that the harasser harassed other employees, but not in the victim's presence, even where the conduct was not directed to the plaintiff. *Pantoja v. Anton*. This is so even though the evidence was generally inadmissible character evidence in that it sought to prove that the harasser was a bad person because he mistreated others in a similar way. *Comment:* This so-called "me too" evidence is an extremely powerful proof vehicle for plaintiffs attempting to prove sexual harassment in a "he said, she said" situation.

False Social Security Numbers: An employee was foreclosed from bringing a disability discrimination case where it was discovered that he used a false Social Security number to obtain employment. *Salas v. Sierra Chemical Co.* In this case, the court found that the after-acquired evidence rule/unclean hands doctrine foreclosed the employee's ability to sue the employer—even for a potentially legitimate claim. *Comment:* Although undocumented employees have the same legal protections as documented employees, where the employee fraudulently obtained employment in the first place, the court was unwilling to protect his right to ongoing employment.

Arbitration: An arbitration agreement in an employee handbook was unconscionable and a contract of adhesion because it failed to give adequate notice of the arbitration rules that will apply and the agreement lacked mutuality. *Zullo v. Superior Court*. In this case, the arbitration agreement was found in an employee handbook with other policies and employees were required to sign the handbook acknowledgment as a condition of employment. The main procedural omission was that the arbitration agreement failed to give notice of the applicable arbitration rules and allowed the employer a full range of remedies while limiting the employees' access to the same. *Comment:*

There were a number of problems with the arbitration agreement in this case: (1) the agreement was found only in the employee handbook (as opposed to a separate arbitration agreement); (2) the arbitration rules were not published to the employee at the time of entering into the arbitration agreement; and, (3) the employee was forced to sign the arbitration agreement as a condition of employment (which by itself was not a problem).

FMLA: An employer has the burden of proving that it had a legitimate reason to deny an employee's reinstatement following leave under the Family Medical Leave Act (FMLA). *Sanders v. City of Newport.* In this case, the employer refused to return the employee to work because it could not guarantee that her workplace would be safe for her due to her "sensitivity to chemicals and lack of knowledge as to the chemicals or concentrations that may cause reactions." *Comment:* This decision clarifies that an employer must justify with substantial reasons its refusal to return an employee to work following leave.

Discrimination: An engineer of Iranian descent can proceed with race and national origin discrimination claims. *Zeinali v. Raytheon Company*. In this case, an employer terminated an employee after he was denied security clearance by the Department of Defense. But the employee produced evidence that other employees who were denied security clearances were nevertheless hired by the company. *Comment*: Termination decisions regarding employees in protected classes must be fully scrutinized for disparate treatment.

Privacy: An employer can provide wellness incentives without violating the Genetic Information Nondiscrimination Act (GINA). *Bureau of National Affairs Opinion Letter from Peggy Mastroianni*. However, the employer must do so with the following procedures: (1) the employee first provides a knowing and voluntary written authorization allowing wellness providers to request information regarding wellness measures; (2) the paperwork that an employee has filled out clearly designates questions that may elicit "genetic information," and clearly indicates that the employee does not have to answer those questions and will not forfeit any part of the incentive by refusing to answer; (3) if the employee chooses to answer and provides "bad information," the employer cannot use that information as the basis of any adverse employment action against the employee; (4) the wellness provider may use the information to recommend a disease management program for the employee; but (5) the wellness provider may not disclose any individually identifiable health information to the employer, although it may disclose aggregate information.

Wage and Hour: A plaintiff could proceed to trial on a claim for vacation pay where the pay was tied to a sabbatical leave. *Paton v. AMD*. The question here was whether the sabbatical was in fact a paid vacation or an incentive for the employee to remain an employee and improve his productivity upon return to work (from sabbatical). *Comment*: Sabbatical leave can avoid treatment as vacation pay (i.e., wages) by conditioning its use.

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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.

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