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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

SEXUAL HARASSMENT

Sexual Desire: A new amendment to the California Fair Employment and Housing Act (FEHA) clarifies that employees claiming sexual harassment need not show that the harasser was motivated by sexual desire. *Senate Bill 292.* This legislation is in response to a recent appellate court decision (*Kelley v. The Conco Companies*) which suggested that a sexual harassment claim requires proof of sexual desire. *Comment:* This legislation is merely a codification of existing law: any disparate treatment based on a protected classification is unlawful.

DISCRIMINATION

Same-Sex Marriages: The IRS has announced that it will consider a same-sex couple married for federal tax purposes if they were married in a state or country that recognizes same-sex marriage regardless of where the couple resides. *Revenue Ruling 2013-17.* This ruling clarifies that the IRS will not apply the more restrictive "domicile rule" for tax treatment. *Comment:* This ruling seems to align with recent Supreme Court decisions on same-sex marriages.

LABOR/NLRA

Facebook Posts: Facebook posts by employees critical of store management were

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.

protected concerted activity under the National Labor Relations Act (NLRA). *Design Tech Group LLC 359 NLRB 96.* In this case, three employees of a clothing boutique in an area frequented by homeless people asked their store supervisor about closing the store at 7 PM instead of 8 PM for security reasons. The employees were terminated. The National Labor Relations Board (NLRB) found that the conduct was protected concerted action. *Comment:* Employers should avoid adverse action against employees based on social media communications related to terms and conditions of employment.

WAGE & HOUR

Undocumented Workers: Undocumented workers are entitled to recover for unpaid overtime and minimum wage violations under the federal Fair Labor Standards Act (FLSA). *Lucas v Jerusalem Café.* The court in its ruling found that employers who hire unauthorized workers must otherwise comply with federal employment laws. *Comment:* This case reminds us that the courts will protect the welfare and safety of workers, even if undocumented. Further, employers may have to answer to the INS for their hiring practices.

LEGISLATION

Attorneys' Fees-Wage Claims: In a victory for plaintiffs, recent legislation requires that employers who prevail in litigation over nonpayment of wages, must show that the employee brought the claim in "bad faith" to recover attorneys' fees and costs. *Senate Bill 462.* The same restriction will not apply to prevailing plaintiff-employees. *Comment:* Both the courts and legislature have routinely found that the assessment of attorneys' fees against unsuccessful plaintiff-employees would unnecessarily chill the enforcement of labor laws.

ARBITRATION

Delay in Demanding Arbitration: A defendant-employer's alleged delay in asserting its contractual arbitration rights did not prejudice a plaintiff-employee. *Richards v. Ernst & Young LLP*. In this case, the court found that there had been no litigation on the merits and that plaintiff-employee was not prejudiced by expensive discovery. *Comment:* Nevertheless, employers should enforce arbitration agreements at the earliest opportunity or face potential loss of that contractual right.

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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