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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]

LABOR

Social Media Policies: The National Labor Relations Board (NLRB) is issuing complaints to employers who discipline employees for comments critical of their supervisors. However, in memos issued by the NLRB, it was noted that there is no violation of the National Labor Relations Act (NLRA) for concerted activities where the employee acts alone without conferring with co-workers regarding workplace conditions. *JT's Porch Saloon and Eatery Memo*. In another action, the Office of General Counsel (OGC) dismissed a Facebook-posting where the employee stated his own personal grievances rather than a call to concerted actions by co-workers. *NLRB Wal-Mart Advice Memo*. And where an employee makes negative references to the employer's clientele on her Facebook where her "friends" were not her co-workers, there was no "concerted action" as protected by the NLRA. *Comment*: While personal gripes, or criticisms stated to people who are not co-workers are generally not protected, employers would do well to confer with their employees for disparaging Facebook postings.

Notice of Employee Rights Posters: The NLRB has issued a final rule that employers post on their employee bulletin boards "Notification of Employees Rights Under the National Labor Relations Act." See poster at www.NLRB.gov/poster. That rule will take effect on November 14, 2011 unless it is blocked by a court order in response to a recent lawsuit brought by the National Association of Manufacturers (NAM) which has filed a federal suit seeking to block the implementation of this new rule. The rule would apply to both union and non-union employers.

Union Bargaining Units: The NLRB has cleared the way for "made to order" union bargaining units by revisiting the decades-old bargaining unit standard unique to non-acute care health-related facilities. *Specialty Health Care, 357NLRB No. 83 (8/26/11)*. The new standard is "any petitioned-for unit readily identifiable as a group of employees who share a community of interest, unless the employer or other opposing party could demonstrate an 'overwhelming' community of interest in a larger unit." *Comment*: By potentially reducing the necessary size of a bargaining unit, the NLRB is making employers more vulnerable to smaller-unit organizing campaigns.

Decertification Rules: The NLRB has decided in a separate case that the union-employer relationship must be protected from decertification after a change of ownership at a unionized company and after employer had voluntarily granted recognition to the union. *UGL-UNICCO Service Company, 357 NLGB No. 76 (8/26/11); Lamons Gasket Co. 357 NLRB No. 72 (8/26/11). Comment*: These rules make it more difficult for employers to decertify union recognition where a company is sold and there had been a prior voluntary recognition of the union.

OTHER DEVELOPMENTS

Disability Discrimination: An employee must meet legitimate job expectations in order to support a claim under the ADA. *Dickerson v. Board of Trustees of Community College District*. In this case, a mentally impaired individual was denied promotion from a part-time to a full-time position because he had a history of discipline and performance criticisms. The court pointed out that the employee had received performance warnings for the past six

[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.

years for failing to complete assignments and for leaving the jobsite without permission. Further, his 2007 performance evaluation was "unsatisfactory" and his supervisor had frequently recommended him for work-related issues. *Comment*: This case recognizes that an employee's prior performance can be the basis of disqualification for protection under the ADA.

Award of Attorneys' Fees: It was legal error for a lower court to have "calculated its final fee award as a portion of the damages" awarded to the plaintiff. *Millea v. Metro-North Railroad Co.* In this case, the plaintiff who "prevailed" in an FMLA action was awarded only $612 of the $144,792 attorneys' fees requested. *Comment*: This court upheld the propriety of a lodestar fee enhancer in this FMLA case. We can expect successful FMLA actions in the future to bring a substantial award of attorneys' fees (which can be the largest damage component of a claim).

EMPLOYMENT POLICIES

Computer Policies: An on-going federal action focuses on whether an employer's policy prohibiting access to the company's computers for personal reasons is sufficient to make actionable an employee's access to trade secret information. *En Pointe Technologies, Inc. v. Sarcom, Inc.* In this case, the company policy prohibited only personal use of the company's computers. *Comment*: This case reminds us that the employer's policies should preclude both (1) disclosure of company information; and (2) a policy that imposes a blanket restriction on access to company computers.

Facebook Blogs: In a case of first impression, an administrative law judge (ALJ) for the NLRB concluded that an employer unlawfully terminated five union employees for work-relating comments they made on their Facebook. After one of their co-workers became increasingly critical of their job performance and told them that she was going to raise her concerns with their supervisor, the employees posted several comments on a personal Facebook page. The comments included "this co-worker feels that we don't help our clients enough at the HUB. I about had it! My fellow co-workers how do you feel?" Five of the employees each posted comments in response including "what the F__ try doing my job I have five programs" and "what the hell we don't have a life as it is, what else can we do." The comments were made on a non-workday, posted on the employees' personal computers, and the employer was not unionized. *Comment*: Counsel should be consulted before disciplining employees for comments on their Facebook pages as this is an evolving area in the law.

INDEPENDENT CONTRACTORS

Vicarious Liability: When an employer in California hires an independent contractor, the hirer is not liable for injury to the contractor's employee who is injured on the job. *SeaBright Insurance v. U.S. Airways.* This is so even where the job injury results from the hirer's failure to comply with workplace safety requirements concerning the precise subject matter of the contract. *Comment*: The court explained that by hiring the independent contractor, the hirer implicitly delegates to the contractor any tort duty it owes to the contractor's employees to ensure their safety.

Misclassification: On 9/21/11, the IRS announced that it was launching a new Voluntary Compliance Settlement Program (VCSP) that will enable employers to resolve past work classification issues by paying a small amount of tax in exchange for reclassification of contractors as employees on a going forward basis. *IRS Announcement 2011-64*. Employers accomplish this by filing a new Form 8952 entitled *Application for Voluntary Classification Settlement Program. Comment*: Employers are well-advised to take advantage of this moratorium if there is a concern about misclassification of employees as independent contractors. This is especially so in view of the

IRS's recent efforts to coordinate with the Department of Labor on the misclassification issue.

WAGE AND HOUR

Attorneys' Fees Award: Prevailing employer was entitled to costs incurred in defending employees' claim of Labor Code violations. *Plancich v. UPS*: In this case, the employer successfully defended a claim for overtime compensation, failure to provide meal and rest breaks, conversion, and unfair competition. *Comment*: This case is good news for employers facing meal and rest break claims. However, the remaining issue might be collection from the employee on the award.

Law Clerk Overtime: Non-attorney law school graduate who worked overtime as a law clerk for the law firm was not entitled to overtime pay. *Zelasko-Barrett v. Brayton-Purcell LLP*. In this case, the court was unwilling to find a law clerk to be non-exempt and thus entitled to overtime. *Comment*: Employer should use care regarding the denial of overtime pay to non-professional clerks.

FMLA: Employee forfeited rights under California Family Rights Act (CFRA) when her leave exceeded 12 weeks. *Rogers v. County of Los Angeles*. In this case, plaintiff sought to return to work about 7 weeks after her leave had expired. *Comment*: Employers should use care that other protections regarding leave do not exist (e.g. ADA, Workers' Compensation, etc.).

Privacy: School district failed to present evidence that employee's association with former boss either did or would result in workplace disruption. *Nichols v. Dancer*. In this case, the district did not present evidence that an assistant's association with her former boss actually disrupted the workplace or reasonably threatened to do so. *Comment*: Discipline associated with an employee's association with current or former employees should be carefully considered as that may violate First Amendment Rights.

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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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