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California Employment Law Newsletter

What's New for California Employers?

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The following is a summary of the significant employment law developments since our last newsletter.[1]

WAGE & HOUR

Meal Break Regulations: Labor Code regulations were proposed on January 14 which would have clarified existing rules regarding employee meal break rights. The deadline for accepting the proposed regulations has now expired so that any clarifying regulations will have to result from brand new proposals. Accordingly, existing meal break laws and regulations remain in effect. They require generally that employees who work more than five (5) hours must be provided a thirty (30) minute, uninterrupted meal break. The meal break must begin before the start of the fifth hour of work.

Minimum Wage: Employees are entitled to be paid at least minimum wage for each hour they work, plus statutory penalties and interest, irrespective of the average hourly rate they receive. *Armenta v Osmose, Inc.* Employers *cannot* average the hourly pay employees receive to assess whether minimum wage was paid. *Comment:* The Appellate Court here held that the federal rule which permits averaging is not allowed under California state law.

Verdict: On 12/22/05, an Alameda Superior Court jury awarded $172,000,000 ($57,000,000 in general damages and $115,000,000 in punitive damages) to approximately 115,000 individuals who worked for K-Mart in California between 2001 and 2005. The lawsuit alleged that K-Mart had failed to provide thirty (30) minute unpaid lunch breaks to employees who worked more than five (5) hours per day. *Comment:* This verdict will undoubtedly be appealed; however, it is a reminder regarding the magnitude of risk associated with broad-based Labor Code violations.

Settlement: Retailer Polo Ralph Lauren will pay $1.5 million to settle separate class actions alleging store employees are required to buy clothes with their logo or face disciplinary action. *Young v Polo Retail, LLC*. The lead plaintiff alleged that since 1997 she had spent more than $30,000 to buy clothes which were necessary to retain her $22,000 per year job. *Comment:* Although this was a settlement and not a verdict, one can assume that Polo found some risk in proceeding with this lawsuit alleging that it failed to reimburse its store employees for Polo clothing which it required its employees to wear on the job.

DISABILITY DISCRIMINATION

Perceived Mental Disability: An employee who failed to disclose a significant criminal history during his employment application, nevertheless successfully pursued a wrongful termination action against his employer. *Josephs v Pacific Bell*. Here, the federal Appellate Court with jurisdiction in California (9th Circuit) affirmed the judgment in favor of plaintiff on the grounds that "the evidence simply did not compel the conclusion that,

[1] This summary is intended to be a brief overview of significant legal developments and does not go into 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.

in the eyes of Pac Bell, Joseph was not qualified for the service technician position because of his past (criminal) violent acts." Rather, the jury found that the employer refused to reinstate him because they regarded him as mentally disabled. *Comment:* This case underscores the need for employers to aggressively engage in the interactive process before terminating an employee for a disability or refusing to return him to work for that reason.

Safety of Others: Employee-drivers with monocular vision are "disabled" under California law, but nevertheless may pose an undue safety risk. *EEOC v UPS*. Here, the federal court with jurisdiction in California (9th Circuit) found that the risk to the "safety of others" trumped the disability rights of UPS truck driver applicants. *Comment:* This decision is significant because it arose under California disability discrimination law which is far more liberal than federal disability discrimination law (ADA). It follows federal law precedent that excludes from ADA protection employees who pose a substantial risk of injury to themselves or others.

SEXUAL HARASSMENT

A supervisor's demeaning remarks about women and an expressed preference for having men for certain jobs, created an entitlement to a jury trial on whether that supervisor's decision to hire a man rather than a woman for a particular job was discriminatory. *Dominguez-Curry v Nevada Transportation Department*. Here, plaintiff had made sexually explicit jokes and frequently indicated that men were better suited to perform certain construction jobs. *Comment:* Once a supervisor makes discriminatory comments, all of his/her future employment decisions are subject to question regarding discriminatory motive.

Training Regulations: The regulations proposed by the Fair Employment and Housing Commission (FEHC) will not take effect until after all members of the public have had a chance to comment or until February 10th. The law requires employers doing business in California that have more than fifty (50) employees (regardless of where those employees are located), to train their California supervisors in harassment prevention before January 1, 2006. The following are the more important aspects of the proposed regulations:

- Training must be "interactive," using live, audio, video or computer technologies, with the opportunity to obtain feedback, ask questions and have questions answered, and testing that measures the progress and acquisition of knowledge. The feedback or participation component must occur every fifteen (15) minutes so that employees are "measurably engaged in the training."
- "Having fifty (50) or more employees" means employing fifty (50) or more employees for each working day in any twenty (20) consecutive week period.
- An "employer" includes any entity who employs fifty (50) or more employees, contract workers, or agents, directly or indirectly.
- An "employee" includes full-time, part-time, temporary and contract work, and the fifty (50) employees need not work at the same location or reside in California.

- "Supervisory personnel" need not be located in California so long as they supervise California employees.
- "Training" includes classroom training, in-person instructor training, "e-learning" and "webinar" (web-based seminar created by a qualified instructional designer).

INDIVIDUAL RIGHTS & LIABILITIES

Landowner Liability: The California Supreme Court has recently clarified that a landowner hiring an independent contractor may be liable to the contractor's employee if (1) the landowner knew or should have known of a latent or concealed pre-existing hazardous condition on his property, (2) the contractor did not know and could not have reasonably discovered the hazardous condition, and (3) the landowner failed to warn the contractor about it. *Kinsman v Unocal Corporation*. Here, a carpenter hired by an independent contractor who had been hired by a landowner was able to sue the landowner for asbestos exposure, claiming that only the landowner knew the existence of the hazardous substance. *Comment:* This case has obvious implications for any employer who hires vendors/contractors who are in turn exposed to unforeseeable risks/hazards.

Dismissal of Frivolous Suit: An employer's suit against a former manager for breach of a non-disclosure agreement and conversion stemming from the employee's taking and disclosing documents to third parties was properly dismissed. The employee contended he discovered many violations of workers' safety and environmental regulations and that the company refused to correct the conditions which caused him to experience debilitating stress. *Greka Integrated, Inc. v Lowrey*. The trial court granted the employee's motion to dismiss (anti-SLAPP) on the ground that the employee had met his burden of showing that the complaint arose from protected speech (depositions and trial testimony in response to subpoena) and that the employer had little probability of success on the merits. *Comment:* Courts seem willing to scrutinize employer suits against former employees to determine whether they had been brought for ulterior motives. If so, courts are willing to dismiss the suit and award fees and costs against the employer.

Employee Loyalty: An employer's lawsuit against a former employee was dismissed as frivolous because there were few instances of inappropriate conduct that amounted to significant monetary loss to the employer. *Jocer Enterprises v Attig*. The court further found that the company had sued in bad faith and awarded attorneys' fees of $100,000 to the former employee. *Comment:* Once again, employers must use care in choosing their battles against former employees. Courts will usually scrutinize such lawsuits to determine whether they are driven by ulterior motive.

MISCELLANEOUS DEVELOPMENTS

Arbitration: The California Court of Appeals has recently upheld the validity of a mandatory pre-dispute arbitration agreement that precluded class arbitrations. *Gentry v Superior Court*. The arbitration agreement required all employees to (1) bring their covered dispute to arbitration instead of court, and (2) bring those disputes only as individuals and not as representing a class. *Comment:* This is a significant development for employers because it ostensibly eliminates the potential for employment

class actions against them. Employers should consider immediately including such provisions in their arbitration agreements.

Retaliation/Whistleblower: A high school principal who was reassigned to a different school could proceed with her retaliation claim related to her earlier complaints that the school was making unauthorized use of public assets. *Patten v Grant Joint Union High School District.* Here, the court found that plaintiff had been subject to "adverse employment action" when the school district transferred her from an "underperforming school… requiring immediate intervention" to a smaller magnet school where she would not be able to "make her mark" as readily. *Comment:* This case is a significant expansion of the law of retaliation. Prior cases had held that reassignments, demotions, etc. were not sufficiently "adverse" to support a retaliation claim. The appellate courts are now more closely reviewing whether an action in response to an alleged protected act was "adverse" in view of a recent California Supreme Court ruling (*Yanowitz*- previously reported).

WARN Act: Employees who are transferred from one employer to another were not "laid off" under California's WARN Act. *MacIsaac v Waste Management Collection and Recycling, Inc.* California's WARN Act requires that employers laying off fifty (50) or more employees must provide sixty (60) days notice of the lay off. *Comment:* Here the court found that an employer who protected its employees' rights through reemployment with the successor corporation did not have to comply with WARN.

Worker's Compensation: An injured worker who was not notified by either his employer or his lawyer about his eligibility for worker's compensation benefits was not later barred by bringing a tardy claim. *Davenport v WCAB.* When a worker is injured on the job, the employer must supply a notice that includes information about how to start a proceeding for worker's compensation benefits and what happens after the claim is filed. He must be advised that he also has a right to disagree with the decision about the claim, provide a description of available benefits, tell him how he might obtain treatment, list his rights concerning the physician and treatment, inform him that he can obtain information from the California division of worker's compensation, and discuss the prohibition against employers discriminating for seeking benefits. *Comment:* This decision reminds employers that they should notify their worker's compensation carrier upon receiving notice of any work-related injury/accident.

FMLA/CFRA: An employee who failed to return to work after protected leave, and failed to request an extension of leave (per company policy) was foreclosed from later bringing an action. *Calomarde v Central State Credit Union.* The employer provided in its policies that an employee could request additional leave in compliance with its procedures. But here, plaintiff made no such request. *Comment:* If an employer wished to extend the potential for an extended leave, it should clearly state the procedures for making such a request and clearly reserve to the employer the right to deny any such extended leaves.

Taxation: The US Supreme Court has held that contingent attorneys' fees are

taxable income to plaintiffs. *Commissioner v Banks.* Thus, plaintiffs who settle for sums which include a contingent attorney fee component will be taxed on the entire amount of the settlement (even though 30 - 40% will go to the attorney as fees). *Comment:* While this law will make it more difficult to settle cases (because plaintiffs will be looking for larger sums to assure that a sufficient amount reaches their pockets) this case will not generally apply to employment cases. The reason is that Congress has passed the American Jobs Creation Act of 2004 which permits plaintiffs to make an "above-the-line" deduction for attorneys' fees, allowing them to completely offset the income inclusion.

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If you have questions regarding any of the afore-mentioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.