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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]

WAGE & HOUR DEVELOPMENTS

Meal and Rest Period "Wages": The California Supreme Court has issued a long-awaited ruling that the one hour of additional pay due to employees for each day that they are not provided with meal or rest period constitutes a "wage" rather than a "penalty" under the California Labor Code. *Murphy v. Kenneth Cole Productions Inc.* The practical significance of this ruling is that the premium-pay requirement for meal and rest period violations is subject to a three-year statute of limitations (which effectively is extended to four years as a further claim under California's Unfair Competition Law, Business & Professions Code § 17200, et seq.) Employers also may be subject to additional waiting time penalties of up to 30 days pay under Labor Code § 203 for failing to pay the premium wage to employees upon termination of their employment. *Comment:* This decision allows employees to reach back four full years in claiming meal and rest period compensation. It has the practical effect of greatly increasing the value of these cases.

Salaried Employees: Salaried employees such as vice presidents are also protected by the Labor Code provision governing payment of wages. *Online Power v. Mazur*. Whether paid hourly or through salary, workers are entitled to attorneys' fees should they prevail on claims under California Labor Code § 218.5 alleging nonpayment of fees. *Comment:* This case dispels the popular myth that only blue collar workers are protected under the labor laws.

DISCRIMINATION

Disability: Loss of a preferred job assignment without loss of pay or promotion did not constitute adverse employment action to establish discrimination. *Malais v. LAFD*. Here, the LAFD refused to assign plaintiff, a Captain II, to command a fire station, his desired assignment, after the loss of his leg during a work-related accident. *Comment:* An employee cannot base his claim on the fact that his wishes were not honored so long as he was offered comparable alternative positions.

Disability: A bipolar employee who was fired after an angry outburst with her supervisor could proceed with a claim of disability discrimination if the outburst for which she was fired was a "part of" her known disability. *Gambini v. Total Renal Care, Inc.* In this case, the jury deciding this trial was not given a chance to say that plaintiff's mental disability was a substantial factor in the employer's termination decision. *Comment:* I question whether plaintiff was "qualified" to perform her job, and thus protected by the discrimination laws, if she could not perform her job duties without being insubordinate. Employers do not have to accept from disabled employees conduct that is below the standards applied to other employees.

Summary Judgment: An employer may not be able to obtain summary dismissal of a case (without having to proceed to jury trial) where it has stated two different reasons for its refusal to rehire a former employee. *Hernandez v. Hughes Missle Systems Company.* In this case, one manager stated that plaintiff was not rehired because he had a history of on-the-job substance abuse and failed to show he was rehabilitated.

[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.

At another time, the same manager said that plaintiff's job application was rejected because of the company's policy not to rehire individuals terminated for misconduct (such as on-the-job substance abuse). *Comment:* Inconsistent reasons for an employment decision can deprive an employer of the opportunity to dispose of a case without the time and expense of a jury trial (through a motion for summary judgment).

LABOR

Organized labor has mounted a significant campaign to strengthen unions across the nation by urging congressional supporters to amend the National Labor Relations Act (NLRA) in fundamental ways. *Re-Empowerment of Skilled and Professional Employee and Construction Trade Workers Act ("RESPECT"):* The Act amends the term "supervisor" in the NLRA to expand the class of persons who could be protected for unionization activities. *Comment:* Practically, this legislation would include millions of employees currently excluded from protection under the NLRA.

Unfair Labor Practices: The National Labor Relations Board (NLRB) has upheld an administrative law judge's ruling that an electrical contractor violated Section 8(a)(3) of the NLRA by discriminating against potential employees with union ties. *NLRB Decision and Order, February 28, 2007*. In this case, an employer representative stated in a phone conversation that he wouldn't hire union employees and took other steps to reject employment applications of individuals who had been union organizers. *Comment:* Employers must be careful to justify adverse job decisions involving individuals who are active in union organizing. Further, anti-union utterances can be used as proof that employment decisions were based on anti-union bias.

SETTLEMENT

Attorneys Fees: A statutory settlement offer (CCP § 998) that did not clarify that the settlement offer is intended to also compromise attorneys' fees claims was found to allow a later claim for attorneys fees. *Online Power Inc. v. Mazur*. Here, while the defendant intended to include attorneys' fees claims in the settlement, it did not so specify in the settlement offer. *Comment:* The obvious lesson from this case is to be sure that waiver of all claims, including attorneys' fees, are in any settlement offer.

Taxation: Legislation currently pending before Congress has the potential to increase the amount of employment discrimination cases settled before trial. *The Civil Rights Tax Relief Act of 2007*. The Act would eliminate taxes owed by employees on non-economic damages, and may reduce the tax rate applicable to lump sum back-pay awards. *Comment:* Many times, settlements are stalled because plaintiffs insist on net after-tax amounts. This legislation should assure that more settlement dollars finds their way to plaintiffs' pockets (rather than government coffers).

CFRA: An employee can provide an employer with notice of the need for protected leave, even where the employee does not *expressly* request leave under the California Family Rights Act. *Faust v. California Portland Cement Company*. In this case, the employer admitted that the work status report of plaintiff's chiropractor contained sufficient justification for leave under CFRA. *Comment:* While employees are generally obligated to provide clear notice of a request for protected leave, an employer cannot ignore information that obviously entitles an employee's leave to protection under that Act.

Arbitration: A law firm's mandatory arbitration agreement with its employees was unenforceable as procedurally and

substantively unconscionable under California law. *Davis v. O'Melveny & Myers.* This international law firm's arbitration agreement was procedurally unconscionable because it was presented to the employee on a "take it or leave it" basis. Additionally, the agreement was substantively unconscionable because it shortened the applicable statute of limitations and provided for overly broad confidentiality and entitlement to equitable/injunctive relief for violations of the agreement. *Comment:* Any arbitration agreement that seeks to do more than provide an alternative forum to a civil action risks unenforceability.

HIPPA: The IRS and DOL have finalized regulations that permit employers to implement wellness programs. *Health Insurance Portability and Accountability Act of 1996 (HIPPA) Regulations.* Under these rules, group health plans can provide rewards or impose surcharges of as much as 20% of the costs of coverage based on whether the covered persons satisfy objective health standards: *Comment:* Employer-sponsored wellness programs seem to bump up against Labor Code prohibitions on the regulation of off-duty conduct. Stay tuned to see how far employers can go in providing incentives for employees to lead healthy lifestyles.

MISCELLANEOUS

Wrongful Termination (Public Policy): An employer's conduct did not violate well-established public policy in terminating a teacher. *Carter v. Escondido Union High School District.* In this case, plaintiff alleged that he was terminated for violating a statute that prohibits assisting a student in taking physician-prescribed medication without first receiving a written statement from the physician and parent that he could do so. However, recommending that a student take a protein shake wasn't within the purview of the statute and thus not protected thereby. *Comment:* Only where an employee violated the public policy stated in a statute will there be liability for wrongful termination. Comment: Only where an employee violated the public policy stated in a statute will there be liability for wrongful termination.

Immigration: Undocumented workers were not foreclosed from pursuing claims against a public works contractor for failing to pay at the prevailing wage rate under California statutory law. *Reyes v. Van Elk Ltd.* Here, the employer had alleged that the Federal Immigration Reform and Control Act (ICRA) foreclosed enforcement of state labor laws. *Comment:* Undocumented workers are also protected under anti-discrimination and other state laws according to other recent case law.

Sexual Harassment: An employer will be "strictly liable" for sexual harassment by a supervisor who is off-duty (but not completely so). In this case, the supervisor made sexual advances shortly after sales calls, and thus the work day had been completed. *Myers v. Trendwest Resorts Inc.* The court found that the harassment wasn't sufficiently removed from the employment context to preclude liability. *Comment:* Even where a supervisor's overtures occur off-duty, a plaintiff can later claim that the rejection of those overtures were the basis of a later adverse employment action.

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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.