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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

Workplace Discussions / Postings: While an employer may prohibit all non-work related communications at work, it may not prohibit only union organizing conversations. *Scripps Health/Scripps Memorial Hospital, Encinitas v The California Nurses Association.* An employer selectively enforced its ban on non-work related conversations by prohibiting only union organizing discussions. However, making only half of an employee bulletin board available for union activities (and the other half for non-union activities) was not violative of the National Labor Relations Act (NLRA). *Comment:* If an employer prohibits unionizing discussions at work, *all* non-work related conversations must also be enforced. Selective enforcement only against concerted action is illegal.

Single-Employee Bargaining Unit: The NLRA does not protect a single employee who picketed for union representation. *International Transportation Services, Inc. v NLRB.* A California container terminal operating company did not commit an unlawful business practice when an employee was fired for picketing for a single-employee bargaining unit. *Comment:* Common sense prevails. One can only imagine the disruption that would be occasioned by protection for individual employees seeking to "collectively" bargain for themselves only.

Nurses Union Buttons: A hospital did not violate the NLRA by barring its nurses from wearing buttons stating, "RNs demand safe staffing," in any area where they might encounter patients or patients' families. *NLRB, Sacred Heart Medical Center.* The National Labor Relations Board (NLRB) found that the message was inherently disturbing to patients and their families as it implied that the hospital's staffing levels were unsafe. *Comment:* The NLRB balanced the nurses' rights to organize with the patients' rights to be secure in their hospital environment.

Unfair Labor Practices: Petitioning for Court of Appeal's review of NLRB decisions is the exclusive mechanism for federal court review of decisions made in unfair labor practice proceedings. *AMERCO v NLRB.* Labor petitioners cannot bring their claims first in the appellate courts as an alternative to the NLRB. *Comment:* Overall, this is probably a positive development for employers who can proceed through NLRB arbitration, rather than the civil courts, in the first instance. Arbitration proceedings are generally more cost effective and less time consuming.

Employer Interrogations: An employer violated federal labor law when its director "coercively interrogated" an employee for distributing literature critical of the union. *NLRB, Children's Services International, Inc.* The NLRB went on to

[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.

find that the interrogation did not constitute an illegal reprisal against other employees and that the subsequent termination of two union activists (including the one interrogated) was not unlawfully motivated. *Comment:* This decision exhibits a balanced review process by the NLRB, which is generally thought to be a pro-employee forum.

Retaliatory Termination: The NLRB ordered the reinstatement of two slaughterhouse workers who were terminated for insignificant activities after actively engaging in union organizing efforts. *NLRB, Central Valley Meat Company.* One such employee was terminated after refusing to punch-in ten to twenty minutes before his starting time (without pay). In addition, a butcher was terminated for failing to sanitize his knife. Both employees solicited and distributed union authorization cards, attended union meetings, and acted as union representatives. *Comment:* Union organizing activities are protected under the law. Employers must use care in their employment decisions regarding employees who have identified themselves as union activists.

WAGE AND HOUR

Final Pay: The California Supreme Court has ruled that employees who leave their jobs after limited assignments should be paid as quickly as employees who are fired. *Smith v Superior Court of Los Angeles.* Hair model, Anza Smith, prevailed in her claim against L'Oreal USA, Inc. stating that she was entitled to immediate final pay after a specific assignment ended. *Comment:* Employees hired for a finite assignment are entitled to the same immediate final pay under CLC §§ 201 & 203 as employees who are fired for cause or otherwise.

Deductions from Exempt Employee Salaries: Employers may not deduct from the salaries of exempt employees (or otherwise require them to reimburse the employer) for damage to or loss of company equipment without jeopardizing the employee's exempt status under the Fair Labor Standards Act (FLSA). *Wage and Hour Opinion Letter FLSA 2006 21.* The employer had requested the United States Department of Labor Wage and Hour Division to issue an opinion on whether exempt employees could be fined for the repair costs of cell phones, laptop computers or other company equipment damaged by them in their jobs. *Comment:* In general, employers should use great care in making deductions from exempt employees' salaries. The consequences could be the loss of their exempt status while triggering an employer's obligation to pay overtime to those employees, along with related penalties, interests and possible attorneys' fees.

Uniform Cleaning: Restaurant employers may not deduct uniform and cleaning expenses from the tips and wages of employees, even where those employees sign agreements permitting the same. *Wage and Hour Opinion Letter FSLA 2006 21.* The Department of Labor's Wage and Hour Division issued an opinion letter to an employer whose written policy required that "employees must wear clean uniforms while on duty," and the assurance that servers will always appear in clean, freshly pressed uniform tops, finding that those things were a convenience and benefit to the employer. *Comment:* This decision underscores that

employers should avoid passing any form of business expense on to non-exempt employees.

DISABILITY DISCRIMINATION

California's Anti-Discrimination Law (FEHA) requires an employer to engage in the interactive process and reasonably accommodate employees or applicants that it perceives to be disabled. *Gelfo v Lockhead Martin Corp.* An employee who received a permanent disability rating from a workers' compensation carrier claimed (and demonstrated) that he was able to return to work. Nevertheless, the employer rescinded a job offer based on his doctor's work restrictions which were incompatible with the physical requirements of his job. *Comment:* This is a troublesome decision for employers as it obligates employers to return employees to jobs that are incompatible with job restrictions. There is a risk that the employee could re-injure him/herself, resulting in further liability and work disruption to the employer. Nevertheless, if an employee is allowed to return to work and demonstrates his/her ability to return to work, the employer must consider that (along with stated work restrictions) in discussing the employee's possible return to the workplace.

Qualified Individuals: An employer did not engage in disability discrimination when it filled an employee's position while she was on medical leave because the employee was not a "qualified individual with a disability." *Williams v Genentech, Inc.* An employee was out on medical leave for seven months, at which time she was replaced. The court held that she did not establish that she was a "qualified individual with a disability" because she presented no evidence that at the time of her discharge she was able to return to work with or without an accommodation. *Comment:* The court noted that the defendant had held her job open for seven months and was not required to wait indefinitely for the employee's medical condition to be corrected.

ETHNIC DISCRIMINATION

$61,000,000 Jury Verdict: A California jury awarded two Lebanese-American Federal Express drivers $61,000,000 in their ethic discrimination and harassment claims against the company and one of its terminal managers. *Issa v Roadway Package Systems*. Plaintiffs were subjected to name-calling, including "camel jockeys," "sand niggers" and other epithets over a two year period by Stacy Shoun, Terminal Manager for the Oakland FedEx ground facility. *Comment:* Plaintiffs' counsel claims that this was a case of first impression under California law which extended the State's anti-discrimination rules (FEHA) to independent contractors.

RETALIATION

Definition of Retaliation: A unanimous US Supreme Court broadened the definition of retaliation under federal law to include acts that are "materially adverse" to a reasonable employee, including transfer or suspensions that do not result in a loss of pay, benefits or privileges. *Burlington & Santa Fe Railway Company v White.* Here, the plaintiff was transferred from her forklift job to a more physically strenuous job and suspended, before eventually being reinstated with pay after complaining about sex discrimination. *Comment:* This case

will have limited importance in California as plaintiff-employees prefer suing under the more liberal state law. However, California's state law is somewhat more restrictive (i.e., favorable to employers) than federal law regarding the breadth of conduct that will constitute "retaliation."

Severance Offer: A federal district court ruled that an employer unlawfully retaliated against an employee by offering her a severance package on the condition that she dismiss a pending EEOC charge and refrain from pursuing future charges against the company. *EEOC v Lockhead Martin Corporation.* A broadly-worded release agreement offered to an employee illegally conditions receipt of an employment benefit on the employee's giving up a right to engage in protected activity. *Comment:* While this federal court sits in Maryland, California employers should use care in crafting severance offers so that they do not inadvertently constitute prohibited retaliation.

OTHER DEVELOPMENTS

Injunctive / Equitable Relief: A federal judge refused to halt a temporary injunction requiring a defendant not to retaliate against its employees who complained about sexual harassment. *EEOC v Harris Farms, Inc.* Rejecting a defendant's motion to stay the injunction pending appeal of a verdict, the federal appellate court with jurisdiction in California (9th Circuit) found the employer had failed to show a strong probability of winning on appeal. *Comment:* Injunctive relief may become a new weapon of plaintiffs seeking to enforce judgments in underlying actions.

Social Security No-Match Rules: On June 14, 2006, the Department of Homeland Security (DHS) released proposed regulations that would make it easier for employers to deal with "no-match" letters received by the Social Security Administration (SSA) regarding employees. *Comment:* These regulations prescribe (1) "good faith efforts" to resolve any noticed discrepancies, (2) further "reasonable steps" if the legal status of an employee cannot be verified within sixty days, and (3) if the above steps do not rectify the problem, the employer can terminate the employee in question or face potential governmental action for immigration law violations.

At-Will Employment: An employer who advised a candidate that an offer letter would include the employer's right to terminate his employment "at any time" was a clear expression of the company's at-will employment policy. *Dore v Arnold Worldwide, Inc.* The California Supreme Court held that the right to terminate "at any time" was sufficient to convey the employer's at-will intention. *Comment:* It is of course better practice to explicitly indicate in an employer's at-will policy that either party can end the relationship at any time, for any reason, or for no reason at all.

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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.