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California Employment Law Newsletter

What's New for California Employers?

Ronald J. Souza
Lynch, Gilardi & Grummer
475 Sansome Street, Suite 1800
San Francisco, CA 94111
(415) 397-2800

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

ARBITRATION

Class Action Waivers: Waivers of an employee's right to bring a class action in arbitration will not be enforced if the trial court determines that the class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration. *Gentry v. Superior Court of Los Angeles.* In this case, the California Supreme Court found unenforceable a class action waiver in an overtime case alleging that salaried customer service managers were legally misclassified as "exempt managerial/executive employees" when in fact they were non-exempt. *Comment:* Here, the California Supreme Court restricts its earlier decision in *Szetela v. Discover Bank*, in which it held that class action waivers could be enforceable in arbitration agreements in some instances.

Excluded Claims: Some claims expressly excluded from arbitration agreements can be filed separately in civil court. *Clark v. First Union Securities.* Here, the National Association of Securities Dealers (NASD) Arbitration Agreement excluded class action claims from arbitration. *Comment:* This case and *Gentry* (above) somewhat erode the optimism that surrounded earlier case law, which seemed to indicate that employers could use arbitration agreements as a tool to avoid class action lawsuits.

OTHER DEVELOPMENTS

Wage and Hour: Employers may lawfully use net-profit based incentive plans to compensate employees without violating the California Labor Code prohibition against deducting from wages cash or merchandize shortages or other business expenses. *Prachasaisoradej v. Ralph's Grocery Company.* In this case, an employer's net-profit based incentive plan was upheld as lawful. The bonus plan was based on target profit and target bonus figures, where profits were reduced for business expenses such as workers compensation claims, cash shortages, merchandise shortages or shrinkage, and the cost of non-employee tort claims as well as costs of goods sold, utilities and rental expenses. The Court found that because the deductions were not made for specifically defined wages, nor made from an individually calculated incentive as a dollar-for-dollar recovery of costs, and because employees received their promised wages and salaries during the period at issue, the bonus scheme did not run afoul of the California Labor Code. That is, the bonus was an amount over and above the employee's regular pay. *Comment:* This decision is somewhat at odds with an earlier Supreme Court decision, and employers should use care when crafting their bonus plans to avoid taxing employees for business expenses.

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[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.

Social Security No-Match Numbers: A California federal judge has issued a restraining order prohibiting the Department of Homeland Security (DHS) from mailing no-match letters or taking any other action to implement its August 15, 2007 regulation entitled "Safe Harbor Procedures for Employers Who Receive No-Match Letter" (see prior newsletter). *AFL-CIO v. Chertoff.* The court has set a hearing date of October 1, 2007 for a preliminary injunction which, if granted, will stop the implementation and enforcement of the regulation. *Comment:* Employers are still required, as always, to respond in a reasonable manner to no-match letters; i.e., they should assure that current workers and new hires have appropriate documentation. This continues to be a priority issue for the DHS.

Violence Policies/Practices: An employer properly obtained a restraining order against third party who was stalking one of its employees, while on duty. *City of Los Angeles v. Glair.* In this case, a public park director was visited several times a day by a citizen who tracked the activities of the park director, both on duty and off. The court upheld the restraining order obtained by the employer to protect its employee against potential future violence. *Comment:* While this case says only that it is permissible for an employer to take such steps to protect its employees, it may be incumbent on employers to do so, in particular cases.

Defamation/SLAPP: A university football coach was barred from suing two university officials for defamation. *McGarry v. University of San Diego.* The coach brought his defamation claim based on statements in a newspaper article stating the reasons for his discharge and the president's statements concerning the discharge made during a meeting of the football players' parents. The court found that because the coach was a limited-purpose public figure, and comments concerned public issues, they were constitutionally-protected speech. *Comment:* Employers should use great care in comments made about terminated employees, as the potential for defamation in this context is high. Here, the employer escaped liability because the comments involved a quasi-public figure and a matter of public concern.

Retaliation: Temporal proximity between adverse employment action and protected conduct is sufficient to allow an employee to at least commence a lawsuit for retaliation. *Loggins v. Kaiser Permanente International.* Here, plaintiff complained about race discrimination on August 11, 2003, and was terminated for other reasons on November 10, 2003. However, the employer ultimately overcame the presumed connection between the termination and the protected activity by demonstrating that the employee was misusing company resources. *Comment:* As practical matter, employees making claims protected by public policy are *de facto* protected during the weeks and months following the complaint. Employers must scrutinize all adverse actions against those employees during that time to guard against retaliation claims.

Disability Discrimination: An employee who can state a claim of disability discrimination must nevertheless prove that they are able to perform the essential functions of their job in order to recover in a lawsuit seeking damages for disability discrimination. *Green v. California.* Thus, even if an employee can prove that they were subject to disability discrimination, they can recover back wages only if they can prove that they were able to work during the time of the alleged wage loss. *Comment:* Happily, the court did not automatically punish the employer here for discrimination, without proof that the employee actually suffered a loss from alleged acts of the employer.

No Hire Provision: A no-hire provision in a consulting agreement between two businesses was unenforceable. *V.L. Systems, Inc. v. Unisen, Inc.* In this case, the consulting agreement provided that Defendant company would not hire plaintiff's employees for 12 months after the termination of their contract. *Comment:* The Court found that the no-hire provision in this consulting agreement was too much like a non-compete agreement, which would limit the mobility of employees and was thus at odds with California public policy.

Non-Compete Agreement: Individuals who sold a business were foreclosed from competing with the buyer, where the sales agreement contained a covenant not to compete. *Huong Que, Inc. v. Luu. Comment:* One of the few exceptions to the rule against enforcement of non-compete agreements occurs where there is a sale of a business and consideration paid for good will for a finite period of time.

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