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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *May/June 2015*

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I.

LEGISLATIVE

Federal

EEOC Issues Proposed Regulations Regarding Employer Wellness Programs

The Equal Employment Opportunity Commission has issued a notice of proposed rulemaking as to how Title I of the Americans with Disabilities Act applies to employer wellness programs that are part of a group health plan. The proposed regulations define "wellness programs" as "programs and activities typically offered through employer-provided health plans as a means to help employees improve health and reduce health care costs." A wellness program may be offered as part of a group health plan under ERISA, or may be offered outside of an ERISA group health plan.

All employee wellness programs must be voluntary and must be reasonably designed to promote health or prevent disease. Additionally, all such programs must comply with anti-discrimination laws. This includes providing reasonable accommodations that enable employees with disabilities to fully participate.

Employee wellness programs that include disability-related inquiries or medical examinations will be subject to additional requirements. Such programs are subject to limitations on incentives, and will have heightened notice requirements. Employee wellness programs that do not include disability-related inquiries or medical examinations are not subject to the incentive limitations or increased notice requirements. For example, a smoking cessation program that merely asks employees whether or not they use tobacco is not a disability-related inquiry or medical examination, so the incentive limitations would not apply to such a program.

The proposed regulations further define what it means for such programs to be "voluntary," what incentives an employer may offer as part of a group health program that asks for medical inquiries, and what requirements apply concerning notice and confidentiality of medical information. Additional information can be found at: http://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm.

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California

Heat Illness Prevention Regulations

Changes to the regulations regarding heat illness prevention went into effect on May 1, 2015. Employers who have employees working outdoors should familiarize themselves with the new regulations and update their heat illness prevention plans and training. The amended regulations apply to outdoor workers and include the following:

- Water must be pure, suitably cool, and provided free to outdoor workers. It must be located as close as practicable to where employees are working.
- When temperatures exceed 80 degrees Fahrenheit, shade is required for all workers on break, and for all those who take their meal periods onsite. For climates cooler than 80 degrees, shade must still be made available upon request.
- Workers who take cool-down periods must be monitored and asked if they are experiencing heat illness symptoms.
- Employers must ensure that supervisors and workers are adequately trained to recognize and react to heat illness signs and how to contact emergency medical services.
- Any workers who display or report symptoms of heat illness must not be left alone or sent home without being offered on-site first aid or emergency medical services.
- Any worker newly assigned to a high-heat area must be observed by a supervisor or designee during the first fourteen days of employment.
- Training must be provided for all outdoor workers before starting any work involving heat illness risk. The training must be presented in a language that employees understand, and must be documented.

Guidance on the new requirements may be found here: http://www.dir.ca.gov/dosh/documents/Heat-Illness-Prevention-Regulation-Amendments.pfd

Legislature Considers Bill Requiring Certain Employers to Provide Work Schedules at Least Two Weeks in Advance

The California Legislature is considering AB 357 (Chiu), which would require "food and general retail establishments" to provide employees with at least two weeks' notice of their schedules, and to pay those employees additional pay for: (1) each previously scheduled shift that the establishment moves to another date or time or cancels; (2) each previously unscheduled shift that the establishment requires an employee to work; and (3) each on-call shift for which the employee is required to be available but is not called into work.

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The bill defines "food and general retail establishment" as a retail sales establishment, including, but not limited to, a food retail, grocery, general merchandize, department, or a health and personal care store, that has 500 or more employees in California and ten or more other retail sales establishments in the United States, and maintains two or more of the following: (1) a standardized array of merchandise; (2) standardized façade; (3) standardized décor and color scheme; (4) uniform apparel; (5) standardized signage; and/or (6) a trademark or service mark. The bill specifies that its requirements do not apply in certain circumstances, including when operations cannot begin or continue due to causes outside the establishment's control. This bill is currently in the Assembly Appropriations Committee suspense file.

Legislature Considers Bill Creating "Rebuttable Presumption" Favoring Employer for Certain Overtime Claims

The California Legislature is considering AB 1470 (Alejo), which would limit certain claims for overtime compensation. This bill would establish a rebuttable presumption that an employee is exempt from overtime pay if the employee earns total gross annual compensation of at least $100,000 and regularly performs any of the exempt duties and responsibilities of an executive, administrative, or professional employee as set forth in the Industrial Welfare Commission Wage Orders. In order to rebut this presumption, an employee would have to produce evidence that he or she did not earn total gross compensation of at least $100,000, did not earn at least $1,000 per week, or did not regularly perform at least one exempt duty of an executive, administrative, or professional employee.

Notably, the bill would only apply to employees whose primary duty includes office or "non-manual work." The bill would not apply to employees in maintenance, construction, and similar occupations, regardless of the amount of their compensation. The bill also would not apply to employees covered by valid collective bargaining agreements that expressly provide for the wages, hours of work, and working conditions of employees. This bill is currently in the Assembly Labor and Employment Committee.

II.

JUDICIAL

Federal

Ninth Circuit Questions Viability of "No Employment" Provision in Settlement Agreement

In *Golden v. California Emergency Physicians Medical Group*, the Ninth Circuit Court of Appeals ("Ninth Circuit") issued a ruling that may curtail employers' ability to include "no employment" clauses in settlement agreements.

Golden was employed as an emergency room physician by the California Emergency Physicians Medical Group ("CEP"), a staffing consortium that provides physicians to medical facilities throughout the state. Following the loss of his staff

membership at a particular hospital, Golden sued CEP, asserting a number of claims arising under both state and federal law. Golden and CEP eventually negotiated a tentative settlement of Golden's claims. The draft settlement agreement contained a clause stating that Golden would agree to waive the right to future employment with CEP "at any facility that CEP may own or with which it may contract in the future."

Golden refused to sign the settlement agreement and requested a ruling from the trial court that the "no employment" provision violated California Business & Professions Code section 16600 ("Section 16600") by preventing him from lawfully practicing his profession. The trial court denied the request, holding that the "no employment" provision did not violate Section 16600's prohibition against covenants not to compete. Golden appealed.

The Ninth Circuit held that the trial court's decision was "overly myopic," noting the novelty of the issue before the court: whether California's prohibition against covenants not to compete could be extended to situations in which an agreement does not prevent an employee from seeking employment with a competitor. Relying on previous rulings by the California Supreme Court, the Ninth Circuit noted that the main focus of Section 16600 is not specifically on agreements not to compete, but rather on clauses that prevent employees from "engaging in a lawful profession, trade, or business of any kind." Based on this broad interpretation of Section 16600, the court overturned the trial court's decision, holding that the "no employment" clause *could* violate the intention of the statute. The court did not, however, hold that the clause was void. Instead, it remanded the matter to the trial court for additional consideration as to whether the "no employment" provision did in fact constitute a "restraint of substantial character" on Golden's ability to practice his chosen profession.

This decision may signify the beginning of the end for "no employment" clauses in California. While it remains to be seen how California's state courts will address this issue, employers should be cognizant of the fact that these types of restraints may be ruled unenforceable should they ever be reviewed by a court.

Ninth Circuit Enforces Employer Arbitration Agreement Where Employee Had Sufficient Notice

In *Ashbey v. Archstone Property Management, Inc.*, the Ninth Circuit Court of Appeals ("Ninth Circuit") enforced an arbitration agreement where the plaintiff employee received adequate notice thereof.

Archstone Communities LLC ("Archstone") employed Michael Ashbey ("Ashbey") from 1996 to 2010, when he was discharged. In 2009, Ashbey signed an acknowledgement ("Acknowledgement") affirming that he had been provided access to Archstone's employment policies and agreed to abide by the terms contained therein. The Acknowledgement twice advised that his employment was subject to Archstone's "Dispute Resolution Policy." Pursuant to this policy, all disputes between Archstone and Ashbey were to be resolved via binding arbitration.

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In 2011, Ashbey filed a lawsuit alleging that his 2010 discharge constituted unlawful retaliation under Title VII. Archstone moved to compel arbitration pursuant to the Dispute Resolution Policy. The trial court denied the motion on the ground that Ashbey had not knowingly waived his right to a trial by signing the Acknowledgement. Archstone appealed.

The Ninth Circuit reversed the trial court's ruling, holding that Ashbey was required to arbitrate his claim. The court's decision turned on the fact that the Acknowledgement specifically and repeatedly notified Ashbey that he would be subject to the Dispute Resolution Policy. His signing of the Acknowledgement confirmed that he had been provided access to the Dispute Resolution Policy, and that he agreed to be bound by it. Based on this conduct, arbitration was the required means of adjudicating Ashbey's Title VII claim.

Ashbey confirms that employers can increase the likelihood that their arbitration agreement will be enforced by clearly and repeatedly disclosing the terms of any such agreement to their employees. While not the case in *Ashbey*, it is always a good idea for employers to have a separate, stand-alone arbitration agreement that employees are required to affirmatively acknowledge (sign).

U.S. Supreme Court Clarifies Interpretation of Pregnancy Discrimination Act

In *Young v. United Parcel Service, Inc*., the U.S. Supreme Court found that the Fourth Circuit Court of Appeals improperly interpreted the Pregnancy Discrimination Act ("Act"). Peggy Young ("Young") worked as a part-time driver for United Parcel Service ("UPS"). Her duties included pick up and delivery of packages. UPS required drivers to be able to lift packages weighing up to seventy pounds, and up to 150 pounds with assistance. After suffering several miscarriages, Young became pregnant. Her doctor advised her that she should not lift more than twenty pounds during the first twenty weeks of her pregnancy, and not more than ten pounds thereafter. UPS told Young she could not work while under the lifting restriction, and Young stayed home without pay for most of her pregnancy, losing her health care benefits as a result.

Young filed a lawsuit in federal court under the Act, alleging that UPS failed to accommodate her pregnancy-related lifting restriction. The Act states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work." Young argued that UPS accommodated other drivers who were similar in their inability to work, but failed to accommodate pregnant employees. Young presented evidence that UPS accommodated: (1) drivers who had become disabled on the job; (2) drivers who lost their Department of Transportation certifications; and (3) employees who suffered disabilities covered by the Americans with Disabilities Act ("ADA"). UPS argued that Young did not fall within any of those categories. UPS further argued that it did not discriminate against Young on the basis of pregnancy, but rather treated her the same way it treated all other relevant persons.

The trial court granted summary judgment in favor of UPS. The Fourth Circuit appellate court affirmed. The appellate court reasoned that Young was not similar to the other groups of employees granted accommodations by UPS. Young

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was not disabled under the ADA, and her lifting restriction was temporary and did not significantly restrict her from performing major life activities. The appellate court opined that "UPS crafted a pregnancy-blind policy" that was "at least facially a neutral and legitimate business practice, and not evidence of UPS's discriminatory animus toward pregnant workers."

The U.S. Supreme Court, however, determined that the lower courts had misinterpreted the Act, and that a jury could find that UPS treated pregnant employees differently than other employees similar in their inability to work. A pregnant worker can prove a disparate treatment discrimination claim with indirect evidence. A plaintiff's case can survive summary judgment and proceed to trial where there is evidence that the employer's policies impose a significant burden that gives rise to an inference of discrimination. For example, a plaintiff may offer evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers. In this case, the fact that UPS had multiple policies that accommodated non-pregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions were not sufficiently strong, and a jury could find an inference of discrimination.

Employers should examine their policies regarding accommodation requests to ensure that they are compliant with this interpretation of the Act. Employers should remember, however, that every request for accommodation is unique, and should evaluate each request on a case-by-case basis.

California

California Supreme Court Raises the Bar for Recovery of Costs by Prevailing Defendants in FEHA Cases

In *Williams v. Chino Valley Independent Fire District*, the California Supreme Court held that a prevailing defendant in a Fair Employment and Housing Act ("FEHA") case can only recover costs of suit where the plaintiff's action was objectively groundless.

Loring Williams ("Williams") worked as a firefighter for Chino Valley Independent Fire District ("Chino Valley"). Williams sued Chino Valley, alleging disability discrimination in violation of the FEHA. The trial court granted summary judgment in Chino Valley's favor and awarded it costs totaling $5,368.88. The court of appeal affirmed, holding that the prevailing party was entitled to court costs as a matter of right pursuant to Code of Civil Procedure section 1032(b) ("Section 1032(b)"). However, a defendant should only be awarded attorneys' fees if the plaintiff's suit was baseless and unfounded.

On appeal, the California Supreme Court held that a defendant prevailing in a FEHA action is entitled to recover its ordinary costs only in the discretion of the trial court. Section 1032(b) guarantees that prevailing defendants are "entitled as a matter of right" to recover the costs expended in litigation "[e]xcept as otherwise expressly provided by statute." The court reasoned that Section 12965(b) of the Government Code expressly excepts parties in a FEHA action from this entitlement. The FEHA statute states that costs are awarded in the discretion of the

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trial judge: "[i]n civil actions brought under this section, the court, in its discretion, may award to the prevailing party, reasonable attorneys' fees and costs." Thus, the trial court has discretion in deciding whether to award ordinary court costs to a prevailing defendant in a FEHA action.

In holding that a prevailing defendant should only recover its costs and attorneys' fees if the plaintiff's action was objectively groundless, the California Supreme Court opined that plaintiffs should not be forced to bear such a high risk in order to "vindicate their statutory right against workplace discrimination." Because even ordinary litigation fees can be substantial, the possibility of their assessment could significantly chill the vindication of employees' civil rights.

Pursuant to this ruling, a prevailing plaintiff will generally be able to recover his or her costs and attorneys' fees while a prevailing defendant likely will not be awarded costs or attorneys' fees unless the court determines that the plaintiff's claims were frivolous.

Court of Appeal Finds Discharged Employee Improperly Denied Unemployment Benefits

In *Robles v. Employment Development Department*, a California Court of Appeal found that the Employment Development Department ("EDD") improperly refused to award benefits to a discharged employee.

Jose Robles ("Robles") was employed as a service technician for Liquid Environmental Solutions for four years until his discharge in January 2010. Robles was fired for misconduct after he attempted to buy shoes for a friend using his personal $150 shoe allowance. Robles expressed regret to his employer, explaining that he already had a good pair of work shoes and had just wanted to help his friend, who was in need of shoes. Nonetheless, Robles' employment was terminated due to this incident. The EDD denied Robles' application for unemployment benefits on the ground that he "broke a reasonable employer rule."

Robles appealed the decision to the California Unemployment Insurance Appeals Board ("Board"), which affirmed that Robles had been discharged for misconduct, and that even though he may have had good intentions, he breached a serious obligation to his employer.

The Court of Appeal disagreed with the Board's decision, finding that Robles' conduct evidenced "at most a good faith error in judgment." According to the court, this was insufficient to disqualify Robles from benefits under Section 1256 of the Unemployment Insurance Code, which requires a finding of "misconduct" (*i.e.*, culpability or bad faith, including a "willful or wanton disregard of an employer's interests"). Accordingly, Robles was entitled to unemployment benefits, with interest, beginning from the date of his discharge.

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Court of Appeal Upholds Mandatory Arbitration Agreement

In *Serafin v. Balco Properties Ltd., LLC*, a California Court of Appeal upheld an employer's arbitration agreement, rejecting the employee's arguments that no agreement existed and that the policy was unconscionable. The employee ("Serafin") signed an arbitration agreement prepared by her employer ("Balco"). After Serafin's employment ended, Balco submitted a demand for arbitration pursuant to the agreement, seeking to recover overpayment of wages. When Serafin filed a civil complaint against Balco for employment-related claims, the trial court granted Balco's motion to stay the litigation pending the completion of arbitration. Ultimately, the trial court confirmed the arbitrator's decision and award in favor of Balco.

On appeal, the court rejected Serafin's contention that she never entered into an agreement to arbitrate. Balco's arbitration policy was a freestanding, two-page, clear document; it was not hidden among other policies. Moreover, the arbitration policy clearly explained its purpose, stating that "[a]ny and all claims arising out of or in any way connected with your employment with [Balco] must be submitted to binding arbitration." Further, Balco maintained a practice of having a human resources representative explain the policy and answer any questions. In light of these facts, "every effort was made to call Serafin's attention to the arbitration policy she was agreeing to." Moreover, the arbitration agreement was not illusory, even though Serafin was the only party to sign it. Balco agreed to be bound by the arbitration agreement because Balco drafted the agreement, printed it on its letterhead, and specifically invoked the arbitration process to recover the overpayment to Serafin; it was thus immaterial that no one signed on Balco's behalf.

Finally, the court determined that the agreement was not unenforceable due to unconscionability. The adhesive nature of the arbitration agreement "[did] not render it automatically unenforceable as unconscionable," especially where the arbitration policy was a two-page, stand-alone document, which Serafin received and signed. Additionally, Balco's failure to attach the American Arbitration Association ("AAA") rules that would govern arbitration was not fatal given that the policy expressly stated that Serafin could obtain a copy of the rules from the human resources department or AAA. Further, though a provision requiring each party to bear its own costs (including attorneys' fees) was substantively unconscionable, the term was easily severable from the agreement. Therefore, the trial court did not err in compelling the parties to arbitrate their dispute.

Court of Appeal Interprets Labor Code's Exhaustion of Administrative Remedies Requirement

In *Gallup v. Superior Court*, a California Court of Appeal found that an employee failed to exhaust her administrative remedies pursuant to Labor Code section 1102.5 ("Section 1102.5") before bringing a lawsuit against her employer.

Emily Gallup ("Gallup") was employed as a mediator for Family Court Services ("FCS") by Superior Court of Nevada County ("SCNC"). Gallup raised concerns both verbally and in writing to her supervisors about FCS' failure to follow applicable legal and ethical mandates, after which she was subjected to

criticism of her work. Gallup filed a grievance pursuant to SCNC's Personnel Manual, and then went on a medical leave of absence. Upon her return, Gallup found a document of journal entries written by her supervisor that had been left on a copier. Gallup showed the document to her attorney before returning it to her supervisor. The following day, she was discharged for disclosing confidential information.

In April 2011, Gallup filed a complaint against SCNC alleging Labor Code violations, including retaliation for whistleblowing pursuant to Section 1102.5. SCNC sought to dismiss the complaint, claiming Gallup's claims were barred because she failed to exhaust her administrative remedies pursuant to Labor Code section 98.7. The trial court agreed and dismissed all of Gallup's claims, except her Section 1102.5 claim. At trial, the jury found in Gallup's favor, awarding her $313,206 in damages.

SCNC appealed, arguing Gallup was required to exhaust the administrative remedy provided by Labor Code section 98.7. Gallup argued the Legislature amended Section 98.7 in 2013 to state that "there is no requirement that an individual exhaust administrative remedies." Gallup further argued that Senate Bill 666, also passed in 2013, added language that "an individual is not required to exhaust administrative remedies." Notably, this language took effect on January 1, 2014 (after Gallup's trial had concluded). The court of appeal found that the amendments by the Legislature did not contain an express retroactivity provision, and thus did not apply to Gallup's case.

This decision clarifies that the exhaustion requirement is still in effect for cases filed before January 1, 2014. However, employees who initiate lawsuits under Section 1102.5 after this date are not subject to the exhaustion requirement.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Heather Stone, Ryan Nell, Lauren Bates, Jennifer Suberlak or Shannon Finley at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.

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