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PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2013*

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I.

LEGISLATIVE/ADMINISTRATIVE

Federal

Employers Must Now Provide Notice Required by Patient Protection and Affordable Care Act

The Patient Protection and Affordable Care Act ("Act") requires all employers subject to the Fair Labor Standards Act to notify employees about the new federal health insurance marketplace. The notice must be provided in writing and inform employees that:

- they have coverage options, and include a description of the options, contact information, and a description of services provided in the new marketplace;
- they may be eligible for a premium tax credit if they purchase a qualified health plan through the marketplace;
- they may lose the employer contribution (if any) to any health benefits plans offered by the employer if they choose to purchase a qualified health plan through the marketplace; and
- all or a portion of such employer contribution may be excludable from income for federal income tax purposes.

Employers are required to provide the notice to current employees and to each new employee at the time of hire. For 2014, the Department of Labor will consider a notice to be provided at the time of hire if the notice is provided within 14 days of an employee's start date. The notice must be provided in writing in a manner calculated to be understood by the average employee. The notice may be provided by first-class mail. Alternatively, the notice may be provided electronically if the requirements of the Department of Labor's electronic disclosure safe harbor (which can be found at http://www.dol.gov/ebsa/newsroom/tr11-03.html) are met. Model notices and more information can be found at http://www.dol.gov/ebsa/newsroom/tr13-02.html.

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We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

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II.

JUDICIAL

California

Court of Appeal Upholds Use of "Mixed Motive" Defense in Discrimination Cases, But Sets Strict Pleading Requirements

Several California and federal courts have recently analyzed the use of the "mixed motive" defense in discrimination and retaliation cases. In *Alamo v. Practice Management Information Corporation*, a California Court of Appeal ruled that while the "mixed motive" defense is valid, it is only available when the employer raises the defense in its initial pleadings.

The plaintiff, Lorena Alamo ("Alamo"), first joined Practice Management Information Corp. ("PMIC") as a collections clerk in 2006. On January 15, 2009, Alamo began a pregnancy-related leave of absence. Her baby was born approximately two weeks later. On February 18, 2009, Alamo requested an additional six weeks of maternity leave to bond with her baby, which was granted. Alamo was scheduled to return to work on April 22, 2009.

While Alamo was on leave, PMIC hired temporary employees to handle Alamo's duties. According to PMIC, the temporary employees and management quickly discovered major failings in Alamo's performance, which she had been able to conceal while actively working. While PMIC had known Alamo had some minor deficiencies in her performance and personality conflicts with coworkers, they did not warrant discipline. However, in light of the newly discovered performance errors, the previously known performance issues, and a disputed incident in which Alamo went to PMIC's offices during her leave and engaged in an altercation with coworkers, PMIC discharged Alamo in April 2009. After the discharge, Alamo sued PMIC for wrongful termination and pregnancy discrimination.

Following a trial on the merits, the trial court ruled in favor of Alamo. PMIC appealed. The California Court of Appeal affirmed the lower court's ruling. PMIC appealed to the California Supreme Court, which withheld any action on the case pending its decision in *Harris v. City of Santa Monica*.[1] After ruling on *Harris*, the California Supreme Court vacated the appellate court's decision and remanded the case for review under the new *Harris* standard. PMIC and many observers believed that a review under *Harris* would result in a defense verdict, because the facts appeared to support the now valid "mixed motive" defense.

[1] In February 2013, the California Supreme Court ruled in *Harris* that a plaintiff bringing a discrimination claim under the Fair Employment and Housing Act must show that a discriminatory motive was a "substantial factor" in the relevant employment decision, not merely a "motivating factor." This decision allows employers to avoid a complete loss at trial when the facts indicate that an employment decision was based primarily on non-discriminatory grounds, even if some minimal element of discrimination existed ("the mixed motive defense"). A successful "mixed motive" defense precludes an award of monetary damages to the plaintiff, but courts are still empowered to award attorneys' fees, injunctive relief, and declaratory relief.

Before *Harris*, the plaintiff's burden was merely to establish the existence of *any* discriminatory motive, regardless of whether the discrimination was a trivial factor in the employment decision. *Harris* thus provides substantially more protection for defendant employers.

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However, the appellate court took a surprising approach and ruled that because PMIC had not specifically raised the "mixed motive" defense in its initial pleadings, the defense was unavailable at trial. According to the court, PMIC's failure to initially plead the defense constituted a waiver of the defense, which could not be resurrected at a later stage of the proceedings. Accordingly, the appellate court again ruled in favor of Alamo despite affirming the validity of both the "substantial factor" standard and "mixed motive" defense.

The lessons from *Alamo* are twofold: 1) The "mixed motive" defense is alive and well in California and should continue to provide a strong liability shield for employers in discrimination cases; and 2) Employers seeking to avail themselves of the "mixed motive" defense must assert the defense in their initial pleadings. Failure to plead the defense at the outset of a case may result in a waiver of the defense, irrevocably eliminating one of the best protections available to defendant employers. Working with experienced counsel can help employers ensure that this and other critical defenses are effectively preserved and utilized.

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Pettit Kohn Ingrassia & Lutz's
7th Annual

Employment Law Symposium

Wednesday, November 20, 2013
Hilton San Diego Resort

Visit our Events page to register and pay online now at www.pettitkohn.com.
For more information contact Cathy Johnson or Lana Tiley at events@pettitkohn.com.

This event is pre-approved for 6.25 (both sessions) (Specified-California) recertification hours toward PHR, SPHR and GPHR recertification through the HR Certification Institute. The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

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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 or Lauren Bates at (858) 755-8500; or Andrew L. Smith, Jennifer Weidinger or Tristan Mullis at (310) 649-5772.