

# Fenwick Employment Brief

October 17, 2006

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## CALIFORNIA EMPLOYERS SHOULD REVISE SEPARATION AND RELEASE AGREEMENTS

A California appellate court decision, *Edwards v. Arthur Andersen*, previously reported at [http://www.fenwick.com/docstore/Publications/Employment/EB\\_09-01-06.pdf](http://www.fenwick.com/docstore/Publications/Employment/EB_09-01-06.pdf), has stirred considerable debate within the employment law community about the enforceability of broad general release and covenant-not-to-sue provisions. *Edwards* did not specifically address the enforceability of a signed separation agreement. Rather, the case arose from an employee's refusal to release claims against a predecessor employer as part of the sale of a portion of the predecessor's business to a new employer. When plaintiff refused to release the predecessor from any and all claims, the new employer refused to hire him. He sued the predecessor for interference with his prospective employment, arguing that the proposed general release and covenant-not-to-sue violated public policy by requiring him to release his statutory indemnity rights. The court agreed, holding that an employer may not require an employee to waive such statutory rights.

*Edwards* is distinguishable from the scenario where an employer and employee voluntarily enter into a general release and covenant-not-to-sue as part of the settlement of a lawsuit or as consideration for a separation package. However, in an abundance of caution, we suggest the following changes to settlement and separation agreements:

- The general release should state that: (i) the parties intend it to be enforced to the fullest extent permitted by law, (ii) it does not cover claims that may not be released as a matter of law (i.e. indemnity claims), and (iii) disputes regarding the scope of the release will be resolved through arbitration.

- The covenant-not-to-sue should contain language permitting the employee to file an administrative complaint with specified government agencies. (While an employee may release claims for individual relief, the covenant may not restrict the employee's right to file an administrative charge with certain government agencies, which may decide to proceed against the employer for injunctive relief on behalf of other employees.)
- In addition, any nondisparagement clause (also common in release agreements) should expressly permit the employee to provide truthful information in response to a subpoena or other legal process.

Please contact an Employment Practices Group attorney to assist with the revision of your agreements.

## PAYCHECKS ISSUED FROM OUT-OF-STATE BANKS MAY TRIGGER LABOR CODE VIOLATIONS

In *Fleming v. Dollar Tree Stores Inc.*, a federal district court in San Francisco denied a motion to dismiss a proposed class action alleging that Dollar Tree issued payroll with checks from an out-of-state bank, causing employees to incur check-cashing fees and experience extended waiting periods for deposits.

California Labor Code section 212(a)(1) prohibits payment of wages by check unless the check is "negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument." Dollar Tree allegedly paid employees with checks drawn on Wachovia Bank, N.A., an out-of-state bank with no California branches. The court rejected Dollar Tree's various arguments for why Section 212 should not apply to it, including the arguments that Section 212 violates

the Commerce Clause and discriminates against out-of-state employers. The court also noted that all employers can satisfy the requirements of the Labor Code in a number of ways: (1) offer to cash an employee's checks at one of its business locations; (2) retain a check cashing service; or (3) make arrangements with California banks to pay any check cashing fees that would otherwise be charged to the employee.

In denying Dollar Tree's motion to dismiss, the court held that employees could potentially recover specific check-cashing costs going back four years, as well Labor Code penalties pursuant to the state's Private Attorney General Act.

### NEWS BITES

Governor Schwarzenegger signed into law Assembly Bill 1835. The new law will increase the current minimum wage of \$6.75 by 75 cents in January 2007, and by an additional 50 cents in January 2008.

In *National Federation of the Blind v. Target*, a federal district court in San Francisco refused to dismiss a lawsuit against Target Corporation based on the allegation that the retailer's website is inaccessible to the blind. Plaintiffs alleged that Target's website fails to provide simple accessibility features, including embedded text that allows screen reading software to provide a vocal description of the text, and links to enable a blind person to navigate the site with a keyboard instead of a mouse. The court rejected Target's contention that its website is not a physical place of public accommodation and thus not covered by the ADA.

A California Court of Appeals held that an employer who installed video surveillance cameras in the office of two employees without their knowledge could be held liable for invasion of privacy, even if the employer did not view or record any private information. In *Hernandez v. Hillsides*, the defendant employer suspected that employees were accessing pornographic websites at night from office computers, and as a result, it installed

motion-activated video surveillance cameras in the workplace, including in the office shared by the plaintiffs. The employer argued that plaintiffs could not prevail on their claim for invasion of privacy as the videotapes from the surveillance cameras included only footage of plaintiffs' empty office and not a single image of the employees. The court disagreed, holding that plaintiffs need not establish that they were actually viewed or recorded in order to pursue a cause of action for invasion of privacy.

In *Leon v. IDX Sys. Corp.*, Mauricio Leon, a former technology director for a medical software company, alleged that he was terminated in retaliation for reporting financial and reporting irregularities to the Labor Department. A federal district court dismissed Leon's retaliation claims and imposed monetary sanctions against him in the amount of \$65,000 because he intentionally destroyed files from his company-issued laptop computer during litigation. The court found that Leon deleted entire directories of personal files, including pornographic material, and wrote a program to write over deleted documents. The Ninth Circuit Court of Appeals affirmed, finding that Leon had acted in bad faith and his behavior amounted to willful spoliation of evidence.