FENWICK & WEST LLP

Weekly Employment Brief

February 11, 2002

Amy Becker Contributor 650.858.7626
Thomas Moyer Co-Editor 415.875.2392
Allen Kato Co-Editor 415.875.2464

Alert: New California Law Affects In-House Investigative Consumer Reports

A new California law dramatically affects the ability of employers to perform internal background checks on applicants or employees without disclosing the results to the person. The provision provides that if the employer "collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates information on a consumer's character, general reputation, personal characteristics, or mode of living … in lieu of using the services of an investigative consumer reporting agency," the employer must "provide that information to the consumer at the time of the meeting or interview with the consumer, or within seven days of the date the person obtains the information regarding the consumer, whichever is earlier." A "consumer" includes an applicant or employee. Accordingly, when an employer conducts its background investigation, instead of using the services of an agency, it must provide the consumer with a copy of the information collected. This provision applies whenever a report is prepared for any "employment purposes" including, "evaluating a consumer for employment, promotion, reassignment, or retention as an employee." Some types of reports that may be affected by this new provision include reference checks, credit checks, and investigations into criminal history. Under Federal law (the Fair Credit Reporting Act) and former California law, reports prepared as the result of in house investigations by employers did not need to be disclosed to the employee. Employers must now instead disclose this information with the applicant or employee at the time of the meeting or interview, or within seven days of the date the employer obtains the information, whichever is earlier.

Because this new provision adds new twists to an already complex area of employment law, Fenwick and West plans to devote next week's **Weekly Employment Brief** to this new development. In the meantime, please seek the assistance of counsel if you have any questions about how this new provision affects your organization.

Court Finds Circuit City's Arbitration Agreement Too Lopsided To Enforce

A one-sided arbitration agreement may be no agreement at all. Last week, a Federal court in California found Circuit City's employment arbitration agreement too lopsided to be enforceable. In *Circuit City Stores v. Adams,* the employee, Saint Clair Adams, filed a lawsuit against the company alleging sexual harassment and retaliation. However, at the time she was hired Adams signed a contract agreeing to resolve any disputes through binding arbitration. The case eventually went to the U.S. Supreme Court which held that, in general, arbitration agreements are enforceable, but returned the matter to the lower court for a determination of whether this particular agreement was viable. This week, the Federal court found that the agreement was too lopsided in favor of the company because the company could choose whether to resolve disputes through court litigation or arbitration, but did not give the same choice to employees. The court also found that the agreement was unfair because it limited the damages employees could recover and forced them to pay half the costs of the arbitration unless they won. Employers should review their arbitration agreements to determine whether they are consistent with this new standard.

Federal Court Raises The Bar For Pregnancy Discrimination Claims

An employee must do more than show she was pregnant to prove pregnancy discrimination. In *Solomen v. Redwood Advisory Company,* a Federal court in Pennsylvania found that an employee must demonstrate that pregnancy, childbirth or a related medical condition was a motivating factor for her termination in order to establish a claim under the federal Pregnancy Discrimination Act. In this case, the employee, Cheryl Solomen, claimed she was terminated from her position because she had been pregnant but, in fact, was discharged eight months after childbirth. The court found that even though Solomen submitted evidence of derogatory comments about her pregnancy, those comments could not prove discrimination since they occurred nearly a year before she was fired.

No Snooping Allowed: Federal Employer Violates Employee's Privacy Right With Desk Search

Employers should think twice before snooping around their employees' desks. In *Stewart v. Evans,* the Federal court in Washington, D.C. recently allowed a federal employee to bring a claim against her manager alleging that he violated her Fourth Amendment rights by illegally searching her private documents. The employee, Sonya Stewart, filed a report against a manager at the Commerce Department alleging that he was sexually harassing her. She kept detailed notes of the harassment and retaliation, and while she was out of the office, several managers at the Department examined her personal files. While the Fourth Amendment does not cover private employees, a similar privacy right exists in California under the state Constitution. Accordingly, searches of employee desks and files should be done with extreme caution, and only after the employee is given sufficient notice to diminish any reasonable expectation of privacy the employee may have in company property.

Comment of "Depression Again" May Meet FMLA Notice Requirements

Employers should always listen closely to what employees say about their absences. In *Spangler v. Federal Home Loan Bank of Des Moines,* a Federal court in Iowa ruled that an employee may have satisfied the FMLA requirement to provide her employer with notice of her absence by telling her supervisor she would be absent due to "depression again." In this case, the employee, Theresa Spangler, had already taken several leaves of absence related to treatment for her depression. In 1998, Spangler called her supervisor and informed him

she would not be in that day because it was “depression again.” When she did not arrive at work her supervisor terminated her employment. The court ruled that this comment may be enough to put the Bank on notice that she would need time off that would qualify under the FMLA, especially since the Bank was aware of her history of depression. Employers should be aware that even if employees do not specifically request FMLA leave, they may still be on notice that the absence may qualify under the Act.