Fenwick Employment Brief

October 17, 2012
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IMPORTANT CALIFORNIA LEGISLATIVE DEVELOPMENTS

Governor Brown recently signed numerous bills into law, several of which impact private employer obligations to their California employees. Except as specifically noted, all of the new laws discussed below are effective as of January 1, 2013.

Social Media Protections – AB 1844: California law will expressly prohibit, with limited exceptions, employers from requiring or requesting that an employee or applicant (a) disclose a username or password for personal social media to, (b) access personal social media in the presence of, or (c) divulge any personal social media to the employer. Notwithstanding the prohibitions, an employer is specifically authorized to request such information if it is "reasonably believed" to be relevant to an investigation of employee misconduct or violation of applicable laws and regulations, and limited to that purpose or a related proceeding. Further, employers may not retaliate against an employee or applicant for not complying with a request in violation of the law.

Salaries to Non-Exempt Employees – AB 2103: Employers may no longer agree with non-exempt employees to pay a fixed salary covering regular and overtime hours. AB 2103 amends California Labor Code Section 515 to specifically provide that such a fixed salary "shall be deemed to provide compensation only for the employee's regular, nonovertime hours, notwithstanding any private agreement to the contrary." See our June 2012 FEB for additional background information on this new law.

Employee Personnel Files, Employee Inspection Rights – AB 2674: AB 2674 expands an employee's rights – and employer's obligations – relating to inspection and copying of an employee's personnel file, including the following:

- Expressly affords former employees the same rights of inspection and copying as current employees, although the amendment limits requests by former employees to one per year.
- Employees have a right to both inspect *and obtain a copy of* their personnel records.
- Subject to certain numerical limits, requests can be made by an employee's "representative" – a person authorized in writing by the employee.
- Requests must be in writing, and employers must provide a request form but employees are not required to use it.
- Employers have 30 calendar days following a request to provide a copy of personnel records or to make them available for inspection.
- Employers may redact the names of nonsupervisory employees.
- Employers must maintain copies of personnel records for a minimum of three years after termination.
- The pendency of a lawsuit related to a personnel matter suspends the right to inspect or copy personnel records.
- Additional requirements apply to the logistics for an inspection and certain employees covered by collective bargaining agreements are excluded from coverage.
- The amendment imposes a $750 penalty for non-compliance, which is recoverable by the employee or the Labor Commissioner.

Itemized Statements, Injury – SB 1255: Section 226 itemizes certain information, such as rate of pay, hours worked, and deductions, that employers must record on an employee's wage statement and outlines the penalty – not to exceed $4,000 plus costs and attorneys fees – for noncompliance where an employee suffers an injury. This new law specifies that an employee will be deemed to suffer an injury and trigger the penalty provision if an employer fails to provide a wage statement. The penalty will also apply if the statement lacks accurate and complete information, as specified, and the employee cannot "promptly and easily determine" from the statement alone certain information including the amount of gross or net wages paid during the pay period, the deductions made from gross wages to determined the net wages during the pay period, the name and address of the employer or the legal entity that secured the services of the employer, the name of the employee, and only that last 4 digits of the employee's social security number or employee identification number.

Temporary Services Employers – AB 1744: Effective July 1, 2013,California Labor Code Section 226 will impose additional requirements on temporary services employers. With an express exception for certain security services companies, such employers will be required to specify on an employee's wage statement the rate of pay and total hours worked for each temporary assignment and to disclose on a new hire notice the name, physical address for the main office, mailing address (if different), and telephone number for the legal entity for which the employee will perform work.

***Reminder*: Commissions Arrangements Must Be in Signed, Written Agreements – AB 1396**: Per legislation signed late last year, all agreements to pay employees commissions based on services to be rendered in California must be in a writing signed by the employer and employee, with a copy retained by the employer. See our October 2011 FEB for further information on these requirements.

NLRB UPHOLDS FACEBOOK FIRING, BUT STRIKES DOWN "COURTESY," SOCIAL MEDIA, AND OTHER WORKPLACE POLICIES

In September, the National Labor Relations Board issued its first Board-level decision on a Facebook-related termination. In *Karl Knauz Motors, Inc.*, the Board found that the employer did *not* violate the National Labor Relations Act ("Act") when it terminated an employee for his Facebook commentary on a car accident at an adjacent, employer-owned dealership. The Board affirmed the administrative law judge's decision (*see* October 2011 FEB) in which the ALJ observed that the posting was done "apparently as a lark, without any discussion with any other employee . . ., and had no connection to any of the employees' terms and conditions of employment."

Of particular concern to employers, however, is the Board's agreement that the employer's "courtesy" rule – which required employees be courteous, polite and friendly to customers, vendors and suppliers [and] fellow employees" and disallowed "disrespectful . . . or any other language which injures the image or reputation of the [employer]" – violated the Act. A two-member majority of the Board concluded that an employee would reasonably understand the rule to prohibit communications about terms and conditions of employment that are otherwise protected by the Act. Dissenting, Member Hayes took issue with the majority's ruling, observing that read in context the rule was "nothing more than a common-sense behavioral guideline."

The *Karl Knauz, Inc.* decision falls in line with the Board's ongoing intense scrutiny on employer policies, as most recently summarized in its General Counsel's memorandum (*see* June 2012 FEB). Indeed, in the same month, the Board and an ALJ issued several other decisions invalidating employer policies as impermissibly broad due to their purported potential to chill Act-protected concerted activity:

- In *Costco Wholesale Corporation*, the Board issued its first decision on an employer social media policy. The policy prohibited employees from electronically posting "statements . . . (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation" on the pain of discipline and possible termination. The Board invalidated the policy, finding it "clearly encompasses concerted communications protecting [Costco's] treatment of its employees" and nothing in the rule "even arguably suggests that protected communications are excluded."

- In *Flex Frac Logistics, LLC*, the Board considered a confidentiality rule that prohibited employees from disclosing confidential "financial information, including costs" and "personnel information and documents" outside the company. A two-member majority found the policy to chill Act-protected conduct, specifically citing communications with union representatives who would be "outside the company." Dissenting, Member Hayes recognized the legitimate business purpose of the rule to ensure the company's ability to competitively bid for contracts by keeping its cost structure from being disclosed to third parties. He observed: "I fail to see anything in the record to indicate why [employees] would reasonably be inclined to so contort the context and stated purpose of the confidentiality rule as to preclude the discussion of wages."

- In *EchoStar Technologies, L.L.C.*, an ALJ invalidated several policies, including a social media rule that prohibited employees, in their personal social media activities, from (a) "disparaging" EchoStar, its employees and certain other individuals and entities affiliated with EchoStar or (b) engaging in such activities on "EchoStar resources and/or on company time" absent company authorization. It rejected EchoStar's attempt to invoke a savings clause, commenting that "a general clause or other language asserting that a document should be applied and interpreted in such a manner that it is legal[ly] proper does not save an otherwise invalid rule under the Act."

The final word on how broadly employer policies will ultimately be interpreted in assessing whether they chill conduct protected by the Act rests with the courts – guidance much awaited by employers. Until then, with the Board largely following the aggressive course set by its General Counsel, employers should partner with counsel in crafting policies that carefully balance legal compliance, risk, and business needs.

POLICY-BASED GENDER BIAS CLASS CLAIMS LIVE ON

In two separate rulings, federal district courts in the Northern District of California recognized the viability of class disparate impact claims as a vehicle to remedy widespread gender bias when attributed to a company policy. By way of background, in *Wal-Mart Stores, Inc. v. Dukes* (June 2011 FEB Special Bulletin), the U.S. Supreme Court slammed the door on the "most expansive class action ever" involving up to 1.5 million current and former female Wal-Mart employees. The Court found that the plaintiffs failed to provide evidence of a nationwide policy, commensurate with the scope of the class, of discrimination through Wal-Mart's vast operations.

Fast forward just over a year to late September, and, on remand, the district court in the *Dukes v. Wal-Mart Stores, Inc.* case rejected Wal-Mart's bid to dismiss the class claims in their entirety. Plaintiffs shrunk the proposed class considerably after the U.S. Supreme Court's decision – from 1.5 million members to several hundred thousand, and from 41 regions nationwide to 4 regions largely comprised of California workers. The district court recognized that the High Court's decision had neither considered nor foreclosed certification of a smaller, more targeted class, provided plaintiffs could provide evidence of a common discriminatory policy, an issue it reserved for another day.

Less than one week later, in *Ellis v. Costco Wholesale Corporation*, a different Northern District

judge certified for class treatment the claims of approximately 700 female employees alleging that Costco consistently discriminates against women in promotions to assistant and general manager positions. Plaintiffs allege that Costco identifies and prepares candidates for these positions in a way that disparately impacts female workers, and executives knew of but failed to address the issue on orders from the chief executive officer. The court recognized that "although this case bears some superficial resemblance to the national *Dukes* case, it is in reality a much different case" due to, among other things, the smaller class size, the limited scope of the challenged discriminatory actions, and the "significant proof of companywide policies and companywide gender disparities – essentially, purported common 'causes' and common 'effects[.]'"

Thus, despite the *Wal-Mart Stores, Inc. v. Dukes* ruling, courts are permitting gender bias class claims where employees show some corporate policy coupled with statistical evidence of a disparate impact on the at-issue employees. Proactive measures are the best way to guard against such claims: Having a policy of non-discrimination, enforcing it rigorously, and periodically reviewing promotion patterns for signs of adverse impact on a protected class.

NEWSBITES

CA Supreme Court Grants Review Of Iskanian Arbitration Decision

On September 12, 2012, the California Supreme Court granted review in *Iskanian v. CLS Transportation Los Angeles, LLC*, in which the trial court compelled arbitration of an employee's wage and hour claims and dismissed his class and representative claims, and the appellate court affirmed the ruling. The parties' agreement provided that "any and all claims" arising out of the employee's employment would be subject to mandatory, binding arbitration and expressly waived each party's right to bring representative and class claims. The appellate court's key holdings are summarized in our June 2012 FEB. Two of the issues identified for likely review focus on arbitration: Whether the U.S. Supreme Court's holding in *AT&T Mobility v. Concepcion* (Fenwick's April 28, 2011 Litigation Alert) impliedly overruled *Gentry v. Superior Court* (September 2007 FEB) regarding contractual class action waivers in the context of non-waivable labor law rights, and whether the *Concepcion* decision permits parties to waive, through an arbitration agreement, the right to bring representatives claims under the California Labor Code Private Attorneys General Act of 2004.

WA Minimum Wage Increases To $9.19 Per Hour

According to the Washington Department of Labor and Industries, starting January 1, 2013, Washington's minimum wage rate will increase by $0.15 to $9.19 per hour. The increase reflects a 1.67% increase in the applicable Consumer Price Index. Per Initiative 688, approved by Washington voters in 1998, the Department calculates the minimum wage each year based on inflation and the CPI.

CA Hospital To Pay $975,000, Allegedly Biased Enforcement Of English-Only Policy

According to the Equal Employment Opportunity Commission (the "EEOC"), a Central Valley hospital will pay $975,000 to settle claims that it discriminated against and harassed Filipino-American employees through selective enforcement of an English-only language policy. The hospital denies any wrongdoing, citing patients' rights laws and the goal of ensuring quality patient care as the sources for its policy requiring staff to use English or the patient's preferred language. However, the 69 plaintiff-employees alleged the hospital went further by singling out staff speaking Tagalog and other Filipino languages, forbidding use of such languages at any time, encouraging volunteers and colleagues to monitor compliance, and ridiculing their accents when speaking English. They further alleged that the hospital failed to investigate or remedy the situation

even after over 100 employees complained about the treatment. The $975K settlement represents the largest settlement ever for a workplace language discrimination case on the West Coast, according to the Asian Pacific American Legal Center. The hospital also reportedly agreed to injunctive relief requiring a new language policy that permits use of an employee's chosen language in appropriate circumstances, hiring an external equal employment opportunity monitor, and staff training on equal employment law and the new policy.

Fry's To Pay $2.3 Million To Settle "Sext" Harassment, Retaliation Claims

Fry's and the EEOC entered into a consent decree to settle claims of sexual harassment and retaliation. The EEOC alleged that a Fry's assistant manager at its Renton, WA store repeatedly sent inappropriate text messages to an employee regarding "how good she looked, offering her alcohol even though [the employee] was under age 21, inviting her to his home, and making reference to wanting to play with [the employee's] breasts." Her direct supervisor protested the assistant manager's harassment and was fired. The supervisor filed a retaliation claim with the EEOC, through which the EEOC learned of the underlying harassment, and the EEOC filed a lawsuit after conciliation efforts failed. Under the consent decree, Fry's will pay the supervisor $1.56 million in compensatory damages, attorneys' fees and lost wages and $736,000 to the employee; will implement certain injunctive relief including updated anti-harassment policies and training on such policies; and will be subject to compliance reporting and monitoring for three years.

ZipRealty Settles Wage Claims With CA Labor Commissioner For $4.8 Million

The California Labor Commissioner recently announced that it reached a $4.8 million settlement with ZipRealty over claims of allegedly unpaid wages from April 2007 through August 2010 for 2,670 of its agents throughout California. In 2010, four ZipRealty agents filed claims with a department of the Labor Commissioner for nonpayment of minimum wages and overtime. The department initially awarded $75,000 to the four agents, which award ZipRealty appealed. A trial court similarly ruled in favor of the agents and ZipRealty settled the claims for more than $595,000. The Labor Commissioner then pursued unpaid wage and overtime claims for all ZipRealty agents in California. The $4.8 million represents an average recovery of about $1,800 per agent, although actual awards will likely range between $500 and $4, 983 depending on the number of uncompensated weeks each worked during the relevant period.

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