Fenwick Employment Brief

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NEW LAWS AFFECTING CALIFORNIA EMPLOYERS

The 2014 legislative session is in the books, and it produced several new laws affecting employers in California, including:

- **Private arbitration companies must provide arbitration data on their websites, in a searchable, cumulative report.** Beginning January 1, 2015, large private arbitration companies (such as AAA and JAMS) must, on at least a quarterly basis, publish detailed information concerning most employment arbitrations conspicuously on their website in a searchable cumulative report. Among other disclosures, private arbitration companies must, for arbitrations within the past five years, reveal the names of the parties, who initiated the arbitration, the date of disposition, how the dispute was resolved, the amount of the award and attorneys' fees granted, whether any other relief was granted, the amount of the arbitrator's fees and how the fees were split among the parties. This new law significantly dilutes one of the advantages of arbitration over court proceedings: confidentiality.
- **Mandatory sexual harassment training must include training on "bullying."** California requires that employers with 50 or more employees provide all supervisory employees with at least two hours of sexual harassment training and education every two years. Effective January 1, 2015, such training must now include prevention of abusive conduct (*i.e.*, "bullying") as a component of the training. Notably, California requires supervisor training on bullying despite having no law that specifically prohibits bullying in the workplace of private employers.
- **Unpaid interns are protected from discrimination and harassment.** California's Fair Employment and Housing Act has been amended to include unpaid interns within its scope. This expands prior law, which contained protections only for employees (properly classified unpaid interns are not employees) and contractors.
- **Waiver of rights and remedies under hate crime laws not enforceable in contracts for goods and services.** Beginning January 1, 2015, California will prohibit waivers of rights afforded under certain hate crime laws (the Ralph Civil Rights Act and the Tom Bane Civil Rights Act), including the right to pursue a civil action and statutory remedies, in contracts for the provisions of goods and services. The scope of the new law is not entirely clear and may be subject to legal challenge on federal preemption grounds, including under the Federal Arbitration Act. However, on its face the law appears to apply to arbitration clauses in independent contractor agreements.
- **Companies are jointly liable for wage and safety violations of labor contractors.** Effective from January 1, 2015, certain employers will share with its labor contractor(s) all civil liability for nonpayment of wages and failure to secure workers' compensation coverage, and cannot shift workplace safety duties and responsibilities to the contractor. The law specifically allows employers to obtain indemnification from the contractor for liability created by acts of the contractor. Employee leasing arrangements that contractually obligate the employer to assume all responsibility and liability under the law are excluded from the definition of labor contractor. This law does not apply to employers who have 25 or fewer workers, or who use 5 or fewer workers from a labor contractor at any given time.

ARE LINKEDIN CONTACTS THE EMPLOYER'S TRADE SECRETS?

A federal district court in California held in *Cellular Accessories For Less, Inc. v. Trinitas LLC* that whether LinkedIn contact information can be an employer's

trade secret is a factual dispute that must be decided by a jury.

Cellular Accessories For Less employed David Oakes as a Sales Account Manager for six years, and Mr. Oakes signed employment agreements that affirmed that he would protect Cellular's proprietary information, including its "customer base." Shortly before Cellular terminated Mr. Oakes, Cellular alleges that Mr. Oakes e-mailed to himself a computer file that contained contact information for 900+ of Cellular's customers, maintained his LinkedIn contact information following his separation and e-mailed to himself additional information concerning customer billing and pricing preferences. Mr. Oakes subsequently started a mobile phone accessory company that competed directly with Cellular.

Cellular filed a lawsuit against Mr. Oakes and his new company for, among other things, breach of contract, trade secret misappropriation and unfair competition. Mr. Oakes moved to dismiss the trade secret misappropriation claim, claiming that the at-issue customer data was not a trade secret under California's Uniform Trade Secret Act.

The court first determined that a customer list can constitute a trade secret only if the information contained in the list is not easily and publicly available, and the creator of the list used significant and sophisticated efforts to compile it. In this case, Cellular presented evidence that it expended a significant amount of time and money to build the customer list, including by hiring employees to specifically cold call companies to get past "gatekeepers" and locate the right procurement officer. Mr. Oakes asserted that much of this work was performed by LinkedIn, whose algorithm suggested contacts automatically. But the court concluded that the jury would have to decide whether the efforts and methods to compile the list were sufficiently difficult and sophisticated to qualify the list as a trade secret. In addition, the court found that data regarding customer billing and pricing preferences could have sufficient independent economic value to constitute a trade secret.

With regard to the LinkedIn contact information, the court determined that whether Mr. Oakes' LinkedIn contacts, cultivated during his employment with Cellular, were Cellular's trade secret should also be decided by a jury. The primary dispute involved the extent to which Mr. Oakes' LinkedIn contacts were viewable to other LinkedIn members or users. The court chose not to independently review the functionality of LinkedIn profiles and how profile information was viewable, but instead acknowledged that the parties disputed how Mr. Oakes' LinkedIn contacts could be made public (with or without permission of Cellular) and held that a jury should decide the matter.

This case not only serves as a reminder for departing employees that they must exit cleanly from a former employer, but it also raises the interesting, and evolving, issue as to how much an employer can assert ownership of and otherwise control an employee's business-related social media conduct. We will continue to monitor the case.

NEWS BITES

Holding Company With No Employees May Be The Employer Of Its Subsidiary's Employees

In *Castaneda v. The Ensign Group, Inc.*, a California court of appeal held that a corporation that had no employees of its own, but owned and allegedly exercised control over a corporation with employees, may be the co-employer of the controlled corporation's employees.

John Castaneda filed a class action complaint for minimum wage and overtime violations against The Ensign Group, which he alleged was the alter ego of Cabrillo Rehabilitation and Care Center, the nursing facility in which he worked. Ensign owned Cabrillo, but Ensign asserted that Cabrillo was an independent company that was not controlled or managed by Ensign.

On appeal from the trial court's dismissal, the court of appeal held that sufficient facts existed to suggest that Ensign effectively controlled Cabrillo such that the issue should be decided by a jury, including that Ensign: (i) owned 100% of Cabrillo's stock, (ii) shared the same corporate officers and address, (iii) provided training for Cabrillo employees, as well as provided all administrative services (including human resources, accounting and payroll) for Cabrillo, (iv) issued all paychecks, and (v) set forth employment policies

and standards and was responsible for employee discipline.

Retaliation Claim Fails Where Employer Not Aware Of Whistleblowing Activity

In *United States of America ex rel. Darryn Kelly v. Serco, Inc.*, a California federal district court held that absent evidence that an employer knew of the alleged protected activity, an employee cannot assert a claim under California's whistleblower statute.

Plaintiff Darryn Kelly was employed as an analyst by Serco, a federal contractor engaged to upgrade wireless communications systems along the U.S./Mexico border. Mr. Kelly complained to the Department of Homeland Security that Serco employees kept track of their time manually rather than through the required automated system, which resulted in inaccurate and fraudulent reports to the government. Three weeks later, Serco terminated Kelly's employment, after which he filed a wrongful termination lawsuit against Serco, claiming that Serco terminated him in retaliation for engaging in protected activity.

The court dismissed the whistleblower claim, because there was no evidence that anyone at Serco was aware of Mr. Kelly's complaint to DHS prior to the termination of his employment. The court determined that without evidence that Serco knew of the alleged protected activity, a causal link could not be inferred solely from the proximity in time between the termination and the protected activity.

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