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Employer's Notice by Email of Mandatory Arbitration Policy Deemed Inadequate

In a case of "first impression," a recent Massachusetts federal district court decision shed light on the risks associated with the use of email to give notice to employees of mandatory workplace policies. In *Campbell v. General Dynamics ("GD")*, the court examined whether GD gave sufficient notice to Campbell, one of its employees, of a policy whereby all employment claims were to be resolved by mandatory, binding arbitration. Campbell sued GD for disability discrimination following his termination. Several months prior to his termination, Campbell and all other GD employees had received a lengthy email from the company's President with the subject line "New Dispute Resolution Policy." The email contained five paragraphs and two links to Intranet files which more fully described the arbitration policy. GD sought to compel mandatory arbitration on the ground that its email notice, coupled with Campbell's continued employment with the company following his receipt of the email, constituted a valid agreement between the parties to arbitrate Campbell's discrimination claim.

The issue was whether Campbell received sufficient notice of the arbitration policy. Although GD established that Campbell opened the email, it could not prove he read it or the Intranet files associated with it. The court found that Campbell received insufficient notice, and it denied GD's motion. Three factors motivated the court's decision. First, GD offered no proof that Campbell read the terms of the mandatory arbitration policy. Indeed, the court chastised GD for not taking the very basic steps to require employees to signify (by a return email or otherwise) that they had read both the email and its attachments and understood their implications. Second, the court recognized that notice procedures for mandatory arbitration of civil rights claims must be scrutinized more strictly than claims brought in the commercial/business context (where courts have more liberally approved mass electronic arbitration notices). Third, the court acknowledged that, while email is an inexpensive and convenient method to communicate with a large workforce, "[i]t is often hard to distinguish the important [email] from the frivolous," and it would therefore be inappropriate "to presume that Campbell read the text of the email, clicked on its links, and read the linked documents."

This decision is not only a wake-up call for employers who have or intend to use email to distribute mandatory arbitration policies, but it has implications for notices related to other workplace policies as well (including, for example, a policy which requires employees to follow a specific grievance process when making internal complaints about harassment, discrimination or the like). If employers fail to ensure that their electronic notices to employees regarding mandatory arbitration and any other mandatory policies are actually received, read and acknowledged by each employee, they may be hard pressed to enforce such policies.

Court Clarifies Scope of Marital Status Discrimination Claims

A California Court of Appeal recently clarified the scope of marital status discrimination claims under the state's Fair Employment and Housing Act ("FEHA"). In *Hope Int'l Univ. v. Rouanzoin & Riggs*, the plaintiffs (husband and wife) were former professors at Hope International, a Christian university. They sued Hope for marital status discrimination under FEHA following Hope's termination of their employment. Hope's faculty handbooks, heavily influenced by the teachings of the Bible's New Testament, stated that faculty may be terminated for grievous moral failures, including adultery. The plaintiffs, who worked in the same graduate department, began their romance at

some point before the husband's divorce from his wife of 27 years.

Hope administrators gave conflicting reasons for the termination. First, Hope terminated the plaintiffs based on a suspicion that they had an affair prior to the completion of the husband's divorce, in contravention of the "morality" provisions in Hope's policies. Second, Hope terminated the plaintiffs because a husband and wife could not make up an entire graduate department—a violation of a de facto "anti-nepotism" rule.

The plaintiffs alleged marital status discrimination, among other claims. The court held that the first justification (suspicion of an adulterous affair) would not support a prima facie claim of marital status discrimination, stating the conduct in issue had nothing to do with their marital status; rather, it involved perceived immoral conduct and dishonesty about it. However, the court stated that the second justification could involve a marital status discrimination claim if Hope chose not to continue the plaintiffs' employment because it had a rule against a married couple making up the full-time faculty in one department. The court emphasized that FEHA and its accompanying regulations require employers to make reasonable efforts to transfer and/or assign job duties to married co-workers so as to minimize problems related to supervision and morale, thereby raising triable issues in this case.

This decision emphasizes several key points. One, employers should examine their policies and practices regarding anti-nepotism as it relates to married co-workers, to ensure that such policies do not impose an outright bar on employment of married workers. Two, where co-workers marry who work in the same department, reasonable efforts should be undertaken by an employer to transfer or reassign duties to allow continued employment of both spouses. Three, in order to be meritorious, discrimination claims must be based on a clear link between the adverse action and the plaintiff's membership in a protected class. In the Hope case, if the employer's decision to terminate was motivated by the plaintiffs' "immoral" behavior, and not their status as a married couple, there would be no unlawful discrimination.

Wage/Hour Class Action Complaints and Settlements Continue to Flourish

Aside from the massive publicity surrounding the *Duke v. Wal-Mart* case, which involves over 1.5 million class members, additional class action lawsuits against employers for alleged violations of overtime compensation and other wage/hour obligations continue to dominate the news. In early June, Longs Drug Stores reached a preliminary $11 million settlement with a class of store managers in 400 locations throughout California. The managers claimed that they were misclassified as exempt from overtime, based in part on the contention that they spent more than 50% of their time stocking shelves, running cash registers and performing other nonexempt duties.

Approximately one month prior to the Longs Drugs announcement, a purported class of employees for Adecco USA, Inc., a prominent nationwide staffing agency, filed a class action complaint in a California state court. They alleged that the company refused to permit employees to carry over accrued vacation time from one year to the next, in violation of California's "no forfeiture" rule. If certified, the class will include approximately 200 employees, and Adecco could face liability for forfeited vacation, attorneys' fees, penalties and interest.

Although neither the Longs Drugs settlement nor the Adecco lawsuit have yet resulted in a determination or admission of liability, these developments confirm that California employers continue to be prime targets for class action wage/hour lawsuits. In cases where unfair business practices are alleged, these suits enable plaintiffs to reach back four years to recover damages. Moreover, with the recent passage in California of the so-called "Bounty Hunter Law," which allows plaintiffs to recover a portion of employer wage violation penalties which previously could be recovered only by the State, the risks associated with both individual and class action wage/hour claims have grown. As such, California employers must continue to be vigilant with their wage/hour practices to ensure compliance with the stringent standards imposed by state law.