FENWICK & WEST LLP

Fenwick Employment Brief

November 16, 2004

Saundra L. Riley	Contributor	650.335.7170
Raymond H. Hixson	Co-Editor	650.335.7938
Daniel L. McCoy	Co-Editor	650.335.7897

ALERT: Voters Curtail Plaintiffs' Lawyers' Ability to Launch Class Actions Against Businesses

For years, plaintiffs' lawyers in California have terrorized employers with class actions brought under a vague law that allowed class actions to be brought to challenge "unfair business practices." Plaintiffs' lawyers often exploited this law as a means to leverage settlements out of employers because the lawyers could bring claims even if they represented no person harmed by the purported unfair practice, and even if the lawyers were unable to satisfy the traditional requirements for bringing a class action. On Election Day, voters overwhelmingly approved Proposition 64, which called for sweeping changes to California's Unfair Business Practices Law. The revision became effective immediately, and will almost certainly lead to a decrease in unfair business practice claims. The passage of Prop. 64 represents a victory for employers and business groups which sought to scale back the vague and overbroad law.

Prop. 64 implemented two primary revisions to the law. First, private citizen plaintiffs must now have standing (*i.e.* they must have suffered injury in fact through loss of money or property) to bring a claim for unfair business practices. Previously, attorneys could file suits against businesses on behalf of a named "plaintiff" even if that person suffered no injury at the hands of the business (indeed, a plaintiff asserting employment law violations pursuant to the unfair business practices law did not even need to be employed or affiliated with the employer). Second, "representative" claims (on behalf of a group of purportedly injured employees or other persons) for unfair business practices are now viable only to the extent the claimant satisfies class certification standards for the class (for example, the claimant must establish that common questions of law and fact predominate amongst the class). Previously, private citizens could maintain such "representative" actions on behalf of a disparate group of individuals without having to establish traditional class certification elements (commonality, adequacy of representation, etc.).

It is unclear whether Prop. 64 applies retroactively to unfair business practice claims filed prior to the election. It will take some time for the state courts of appeal to address this issue and potentially other issues arising from the new law. In the meantime, Prop 64 has weakened substantially a previously effective tool used by the plaintiffs' bar to pursue employers for a broad category of business practices.

Employers Hit with $650,000 and $1.8 Million Verdicts for Wrongful Termination

Two recent jury verdicts illustrate the risks employers face under discrimination laws when terminating employees and the importance of training managers to avoid making comments that can be construed as discriminatory.

In *Chopra v. ADVO, Inc.*, the plaintiffs (5 East Indian employees) sued their former employer ADVO for terminating them after they complained about their supervisor's purported abuse, which allegedly included his statement that the plaintiffs were "slaves" as long as they worked at ADVO. At trial, the

plaintiffs established that ADVO's Human Resources Director, the decision-maker regarding termination, had previously made comments that "clearly reflected a concern that the workforce needed to have fewer East Indian employees." ADVO contended that it terminated the plaintiffs for leaving the workplace prior to the end of their shifts and that Williams' comments were unrelated and irrelevant stray remarks. However, the plaintiffs established that none of their replacements was East Indian and ADVO terminated its relationship with an East Indian-owned staffing agency (which supplied ADVO with several East Indian workers) following plaintiffs' terminations.

On these facts, the Alameda County jury rejected ADVO's reasons for termination and awarded the plaintiffs $130,000 each in emotional distress damages (for a total of $650,000). On appeal, the court affirmed the verdict, and relied in particular on the fact that the HR Director's remarks about East Indians in the workforce preceded the terminations by only four months and ADVO switched to a new staffing firm directly after the terminations.

In another case, an Alameda County jury awarded more than $1.8 million to an executive for racial discrimination she allegedly suffered. In *Harvey v. Sybase*, Marietta Harvey, a Filipina Human Resources Director for Sybase, contended that Sybase laid her off and refused to rehire her because of her race. After her layoff, Harvey applied for two lower-paying positions, but both went to white men. Harvey alleged, and Sybase admitted, that Sybase's president told Harvey's boss there was a perception that Harvey's department "looked like an airport" – purportedly meaning that it had too many Asians. The president claimed he intended his comment to be a "reminder" that "diversity was important." The jury rejected this explanation and awarded Harvey $500,000 in non-economic damages, $842,943 in past and future lost income and $500,000 in punitive damages.

Both verdicts serve as a reminder that "loose lips sink ships" and underscore the importance of educating managers to avoid making comments that can be misconstrued in the context of personnel decision making.

Third Quarter Layoffs in High-Tech Industry Up 14 Percent from 2003

High-tech companies announced 54,701 layoffs in Q3, up 14 percent from Q3 of a year ago, and 60 percent from the prior quarter, according to a prominent outplacement firm. The high-tech sector (which includes electronics, telecommunications and electronic commerce businesses) accounted for 56 percent of the layoffs.

ALERT: Bush Signs Bill that Ends Double Tax on Contingent Fees

On October 22, 2004, President Bush signed the American Jobs Creation Act of 2004. As reported in the October 26, 2004, Fenwick Employment Brief, the new law exempts from a plaintiff's income that portion of a settlement or award set aside for attorneys' fees in specific types of lawsuits, including those involving employment discrimination, harassment and retaliation or violation of other employment-related state and federal laws. Prior to this law, when an employer made a payment to the employee's attorney as part of a settlement, the employer arguably was required to report the payment as income to both the attorney and the employee. This potential "double taxation" of the payment to the attorney frequently created a substantial obstacle in settlement negotiations. Under the new law, the payment to the attorney needs to be reported as income only to the attorney, eliminating a significant potential obstacle to settling employment disputes.

ALERT: Proposition 72, Which Would Have Required Certain Employers to Pay Health Care Premiums, Defeated

On election day, Californian voters rejected Proposition 72. If enacted, Prop. 72 would have required employers with 50 or more workers to either

arrange for and pay workers' health care coverage directly with private health insurance providers, or pay a fee to a state program intended to fund private health insurance coverage. Employers and business groups viewed the Proposition as a step toward socialized health care and as a serious deterrent to business growth in the state.