FENWICK & WEST LLP

Weekly Employment Brief

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Microsoft Settles Temp Class Action Suits

Microsoft agreed to pay over $96 million to settle two class action lawsuits brought by temporary workers alleging that the company employed them as "temps" or independent contractors in order to avoid paying benefits, including stock options. The cases, most notably *Vizcaino v. Microsoft*, were a wakeup call to employers about the risk of improperly classifying long-term temporary employees and independent contractors who work side-by-side with regular employees performing essentially the same job functions.

Continued Increase In Suits Over Stock Options

Even with the recent downturn in the stock market, stock options remain the most contentious issue in employee terminations, and these disputes are not necessarily limited to high-level executives. Frequently, the issue arises in the context of an employee discharge immediately before a key vesting date. In *Miga v. Jensen*, a Texas appellate court enforced a stock option agreement between an executive of Matrix Telecom and the company. The jury awarded in excess of $18 million in damages and $43 million in punitive damages before the amounts were reduced by the court. The employee had resigned and signed a "termination agreement" that contained a mutual release of all claims but did not expressly address the issue of options. The court ruled that the agreement did not release the options.

Dot-Com Employees Seek to Unionize

In a surprising but increasingly common development in the dot-com industry, unions have targeted dot-com employers, including Amazon.com for organizing. Unions have started organizing efforts directed towards Amazon's 5000 distribution employees and 400 customer service representatives. Citing concerns about low wages, job security, and the precipitous decline in the value of employee stock options, the unions claim employee response to the union organizing drives has been "extremely positive." Also, in San Francisco customer service representatives at Etown.com, a consumer electronics site, have petitioned for a union election. Recent layoffs were cited as a reason for interest in union representation.

Discharging Employee for Refusing to Sign Non-Competition Agreement Constitutes Wrongful Termination in California

In a landmark decision, a California court of appeal ruled that an employer may not, as a condition of continued employment, require an employee to sign an employment agreement containing an unenforceable covenant not to compete. The court further held that an employer' s termination of an employee who refuses to sign such an agreement constitutes a wrongful termination in violation of public policy. In *D'Sa v. Playhut, Inc.*, the employer required new employees to sign a confidential and proprietary information agreement as a condition of employment. The agreement included a covenant not to compete for one year after termination of employment. Such covenants are lawful in several states and are commonly used by multistate employers. Playhut terminated D'Sa after he refused

to sign the agreement. Concluding that such a covenant not to compete violated California Business and Professions Code section 16600, the court held that his termination for refusing to sign violated public policy.

U.S. Supreme Court Upholds Arbitration Agreement

In a case relevant to employment arbitration cases, the U.S. Supreme Court in *Green Tree Financial Corp.-Alabama v. Randolph* ruled that a consumer credit arbitration provision was enforceable, though it said nothing about arbitration costs, because the consumer failed to establish that she would have to bear such costs or that such costs would be prohibitively expensive. This case indicates the court's continued support for arbitration as a preferred remedy. The Court is scheduled to decide an employment arbitration case in the immediate future. Also, in California the state Supreme Court recently ruled in *Armendariz v. Foundation Health* that employment arbitration agreements are lawful under state law so long as certain criteria are met. Among these, the employer must bear the cost of arbitration except for an amount the employee would have had to pay in any event to bring suit in state court.