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Weekly Employment Brief

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California Supreme Court: Arbitration Protections Apply to Non-Statutory Claims

Last Thursday, in a ruling that both helped and hurt employers, the California Supreme Court extended the reach of Armendariz arbitration protections to apply to non-statutory as well as statutory claims. In the landmark 2000 Armendariz opinion, the California Supreme Court held that employers may not compel arbitration of statutory claims unless the agreement satisfies such "conscionability" standards as mutuality and employer payment of arbitration costs. In *Little v. Auto Stiegler, Inc.,* Alexander Little, a service manager at a car dealership, was terminated. He sued, claiming he was a "whistleblower" who had been terminated for investigating and reporting warranty fraud. Since Little had signed an employment agreement containing an arbitration provision, the dealership moved to compel arbitration of his claim. The agreement provided that the dealership could appeal any arbitration award over $50,000 to a second arbitrator. Little challenged the enforceability of the agreement under Armendariz, which prohibits caps on damages. Holding that Armendariz protections do not apply solely to claims arising under the Fair Employment and Housing Act and that whistleblower protections are not waivable by private agreements, the court held the appeal provision unenforceable. However, the court also found that the overall arbitration agreement was valid once the offending appeal provision was removed. This is an encouraging decision for proponents of mandatory arbitration, as it suggests courts are free to "blue pencil" arbitration agreements to remove unenforceable provisions and enforce the remaining, lawful provisions.

Employer Liable for Conduct Reasonably Likely To Deter Protected Speech

The Ninth Circuit Court of Appeals (which covers California) recently held that any state-employer conduct that is reasonably likely to deter an employee's protected speech can constitute an "adverse employment action." In *Coszalter v. City of Salem,* current and former employees of the City of Salem alleged the City violated their First Amendment rights by retaliating against them for disclosing various safety and health violations. Such allegedly retaliatory conduct included, among other things, transfers to new duties, unwarranted disciplinary investigations, unwarranted assignments of blame, ongoing verbal harassment and humiliation, threats of disciplinary action, withholding of customary public recognition and unpleasant work assignments. The City argued these actions did not constitute "adverse employment actions." Although the magistrate judge agreed, finding that the employer actions did not constitute the loss of a "valuable governmental benefit or privilege," the Ninth Circuit held that such actions nonetheless constitute adverse employment actions if they are reasonably likely to deter the plaintiff from engaging in protected speech. Thus, the plaintiffs were permitted to proceed with their action against the City. The Ninth Circuit also rejected any bright-line rule regarding the timing between the protected activity and the retaliation, finding that a reasonable inference of retaliation could be created despite an eight-month gap between the protected activity and the retaliation. Although the statute under which plaintiffs sued in this case applies only to state employers, private employers should be aware of this broad definition of adverse employment action as other statutes similarly prohibit private employers from retaliating against employees for exercising their First Amendment rights.

Former Employees Liable for Hiring Away At-Will Employees

A California appellate court recently held two former employees and their new law firm were liable to their former law firm when the new firm hired away the former law firm's at-will employees. In *Reeves v. Hanlon,* plaintiff law firm Robert L. Reeves & Associations ("Reeves") sued its former employees Daniel Hanlon and Colin Greene and their new law firm Hanlon & Greene ("H&G") for interfering with the contractual relationships between Reeves and its at-will employees. Hanlon and Greene, once attorneys at Reeves, left Reeves' employ to start their own law firm, H&G, and allegedly "improperly persuaded [Reeves'] employees to join [H&G.]" The trial court found for Reeves on the interference claim, and H&G appealed. H&G argued that Reeves' interference claim failed to the extent that it relied on inducement of at-will employees to breach their employment contracts. The appellate court rejected H&G's argument, holding that California law permits an employer to "recover for interference with the employment contracts of its at-will employees by a third party when the third party does not show that its conduct in hiring the employees was justifiable or legitimate." Affirming the trial court's judgment for Reeves, the appellate court emphasized that H&G "engaged in unfair and unjustifiable conduct in the course of hiring employees from the Reeves firm" including "mount[ing] a campaign against the Reeves firm involving destruction of computer records, misuse of confidential information, and unethical conduct . . ." When hiring, employers should keep in mind that although an applicant employed at-will by another company may terminate employment for any or no reason, the hiring employer is protected from an interference claim only if it recruits the employee using justifiable means.

DID YOU KNOW???

In the U.S., approximately 130 million workers generate 2.8 billion emails a day…and approximately 14 million workers have their email or internet usage under "continuous" surveillance by their employer.