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Weekly Employment Brief

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California Law Allows Consideration Of Age In Determination Of Benefits

In a surprising move, a California state appellate court held that an oil company did not violate FEHA when it refused to pay for an older employee's master's degree because he was "too old to invest in." The court dismissed the employee's FEHA and "public policy" age claims observing that FEHA's section prohibiting discrimination in benefits does not include age. Significantly, however, the court upheld a jury verdict that awarded the employee the cost of his master's degree, because the company education assistance policy did not have an age limit. Importantly, the decision is only applicable to California employers with less than 15 employees, as the federal Age Discrimination in Employment Act, which covers employers with 15 or more employees, explicitly restricts age discrimination in benefits.

Courts To Employees: Complain Before Filing Court Complaint

Courts are giving credit to employers who react quickly to complaints of harassment. In two recent cases, employees who failed to complain internally found their harassment cases dismissed before they ever went to a jury:

- After fellow employees placed hangman's nooses around the office of an African-American employee, the employee sued for racial harassment. A federal appeals court in Salt Lake City agreed with him that such conduct, if proven, would constitute harassment. However, the court upheld summary judgment against the employee because he did not report the noose incidents to management. Moreover, when the employee reported other incidents of harassment the company had acted swiftly. *Hollins v. Delta Airlines*.

- A federal appeals court in New York rejected a common employee excuse for failing to comply with internal complaint procedures. The employee in *Leopold v. Baccarat Inc.* argued that the company did not guarantee confidentiality, and that she was therefore "scared" to turn in her supervisor to management. The court held that a lack of guaranteed confidentiality did not excuse the employee's failure to report the harassment, finding that she provided no specific reasons for her fear of reporting harassment.

Employees Don't Get To Dictate Employer Harassment Remedy

In *Star v. West*, decided by the Ninth Circuit Court of Appeals (San Francisco), an employee reported a co-worker who made threatening comments and showed up to work drunk. A supervisor immediately warned the alleged harasser to stay away from the complaining employee and assigned him to a different shift, to minimize contact with the alleged victim. The court held that this response was adequate to prevent future harassment, even though the victim wanted the employer to impose formal "discipline."

Back To Basics On Paying Employees

High-technology companies with financial problems should think twice before asking employees to share their pain. Employers short on cash have been

searching for creative ways to reduce labor costs, such as substituting stock options for wages. However, such solutions can quickly run afoul of federal and state labor laws. Specifically, California's Department of Labor does not interpret stock options as wages for purposes of minimum wage, and its requirement that employees receive at least $26,000 a year to be classified as exempt. Thus, if substituted stock options bring wages below minimum wage or exemption requirements, liability will result. Employers must be careful when crafting creative compensation plans to ensure that the new plans comply with minimum wage requirements and rules governing classification of exemption employees.

California Courts Scrutinize Mandatory Arbitration

It takes two to tango . . . and to arbitrate. In last year's decision in *Armendariz v. Foundation Health Psychare Services*, the California Supreme Court invalidated a compulsory arbitration agreement that allowed an employer to pursue legal action against its employee in court, while requiring employees to arbitrate their claims. A new decision from the California Court of Appeals emphasizes the dangers of not making absolutely clear that an arbitration agreement is bilateral. *McCoy v. Superior Court*. Considering an employment agreement worded in the first person (which, in essence stated: "I agree that any dispute arising from my employment will be subject to mandatory arbitration"), the court held that the agreement was unilateral. (The court also noted that the agreement was only signed by the employee.) The court discounted a separate clause that stated that both the employer and the employee waived their right to a jury trial. The court held that this language did not create an enforceable mutual obligation to arbitrate. Employers who have not yet reviewed their employment arbitration agreements since last year's decision in Armendarizshould do so immediately.