FENWICK & WEST LLP

# Weekly Employment Brief

*September 16, 2002*

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**URGENT UPDATE:**

**California Court of Appeal Rejects Inevitable Disclosure Doctrine**

Ending the uncertainty that has plagued California trade secrets law for years, the Court of Appeal last week issued a decision that clearly rejected the doctrine of inevitable disclosure as "contrary to California law and public policy. "In *Schlage Lock Company v. Whyte,* the Court of Appeal held unambiguously, "we reject the inevitable disclosure doctrine. We hold this doctrine is contrary to California law and public policy because it creates an after-the-fact covenant not to compete restricting employee mobility."

The inevitable disclosure doctrine permits a trade secret owner to prevent a former employee from working for a competitor despite the owner's failure to prove that the employee has taken or threatens to use trade secrets. It has been adopted in some states.

This case is a classic trade secrets controversy. Whyte was vice-president of sales for Schlage, where he was responsible for selling to national accounts. Schlage's "fierce competitor," Kwikset, hired Whyte away to be its vice president for national accounts. Whyte accepted the job but did not notify Schlage for two weeks, during which he continued to work for Schlage and to attend confidential meetings with Home Depot on behalf of Schlage. When Whyte finally left, Schlage accused him of disavowing a confidentiality agreement, stealing trade secret information and lying about returning company information. A "firestorm of litigation" ensued, with both sides filing lawsuits. While the trial court entered a temporary restraining order prohibiting Whyte from using Schlage trade secrets and confidential information, and requiring him to return any Schlage information in his possession, it refused to enter a preliminary injunction, finding that the information Schlage sought to protect was not a trade secret, and that Schlage had failed to prove that there was actual or threatened misappropriation. Schlage appealed.

While the Court of Appeal found that most of the information Schlage sought to enjoin Whyte from using were trade secrets, it also found that the evidence indicated that Whyte had not used any of the information, and Schlage had not proven otherwise. Analyzing Schlage's inevitable disclosure argument in the light of Business & Professions Code Section 16600 and California's long-standing public policy in favor of employee mobility, the court firmly rejected the doctrine because it would retroactively rewrite employment agreements and "distort the terms of the employment relationship" after the fact. Though the court noted that its opinion "does not change the law," it resolves a great deal of uncertainty, at least for now. It is not known yet whether Schlage will attempt to appeal this decision to the California Supreme Court, but we will report further developments in this and other cases in the **W.E.B.**

In the coming days, the Fenwick & West Trade Secrets Group and Employment and Labor Group will together continue to evaluate the implications of this important decision and will issue updates to explain what steps your company should take to evaluate policies and procedures. If you have any questions in the interim, please contact Patricia Nicely Kopf at 650.858.7219 or any other member of the Trade Secrets Group or Employment and Labor Group.

**Failure to Promote Female Who Lacked "Confrontation Skills" is not Gender Discrimination**

A federal appellate court upheld the dismissal of a sex discrimination claim of a female UPS dispatcher who was denied a promotion to a supervisory position because she was not "confrontational enough." In *Crone v. United Parcel Service, Inc.,* the female dispatcher's manager refused to recommend her for a supervisory job, stating that he believed she lacked the confrontational skills necessary to deal with truck drivers. The employee admitted, however, that confrontational skills were important in the supervisory position she sought because dispatcher supervisors had to supervise "feeder truck drivers," who were a unionized work force that tended to be "exceptionally confrontational." Ms. Crone also admitted she had difficulty dealing with confrontational encounters in the past, and had been close to tears during at least one encounter with a truck driver. Based on those facts, the Eighth Circuit Court of Appeal affirmed a trial court decision to dismiss her sex discrimination suit on summary judgment. The court concluded that while the dispatcher may have proven she was "a good employee," she could not show that UPS's reason for not promoting her was a pretext for sex discrimination.

**CEO of Struggling Company can be Personally Liable for Unpaid Wages**

In what should be a loud warning shot to all California companies - and their managers - the California Labor Commissioner held a company's CEO personally liable for over $40,000 in unpaid wages and penalties to an employee. In *Lyou v. Centrecom, Inc.,* a struggling company's CEO entered into an agreement with an employee to defer the employee's compensation until the company obtained additional financing. After the financing plan fell through, the employee successfully brought a Labor Commissioner claim for his unpaid wages plus waiting time penalties, against both the company and the CEO personally. When the CEO appealed the decision, the court requested the Labor Commissioner to clarify the basis for the decision. In response, Miles Locker, an attorney for the Commissioner's office, issued an Opinion Letter stating that the decision was founded upon general principles of California wage and hour law which provide that any person who, directly or indirectly, employs or exercises control over the wages, hours or working condition of any person is an employer and thus subject to liability for violations of the law. This Opinion Letter has potentially far-reaching and serious

consequences for company managers who exercise substantial control over their employees' wages and hours and whose companies violate California's wage and hour laws.

**Federal Court Overturns Million Dollar Jury Verdict because Sexual Harassment not Severe or Pervasive**

In a victory for employers, a divided panel of the Eighth Circuit Court of Appeal affirmed the concept that not all incidents of inappropriate workplace conduct rise to the level of unlawful sexual harassment. In *Duncan v. General Motors Corp.,* a clerk at a General Motors plant in Missouri claimed a male employee had subjected her to sexual harassment during her three year tenure at the company. The conduct included a single request for a relationship, sexist jokes and remarks, requiring her to use his computer that had a picture of a naked woman as the screensaver, and giving her inappropriate "job assignments," such as typing up a draft of the beliefs of the "He-Men Women Hater's Club." A jury found the conduct rose to the level of unlawful sexual harassment, and awarded the plaintiff over one million dollars in damages. A divided appellate court overturned the verdict, finding that, although the male employee's actions were "boorish, chauvinistic, and decidedly immature," and may have made the clerk "uncomfortable," they were not severe or pervasive enough to constitute unlawful harassment. While companies should never permit such conduct in the workplace, the case illustrates the "severe and pervasive" standard that must be met in sexual harassment cases under both Title VII and FEHA.