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LEGISLATIVE/ADMINISTRATIVE UPDATE

California Legislation

The following important bills are currently pending in the California legislature.

AB 448 (Arambula): This bill would amend Labor Code Section 98 (which permits an employee to file an administrative complaint with the Labor Commissioner) and permit an employee to recover liquidated damages in the administrative forum for “a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission. . . .” The bill passed the full Assembly and has been referred to the Senate Committee on Labor and Industrial Relations.

SB 622 (Padilla): SB 622 would prohibit employers from willfully misclassifying employees as independent contractors. SB 622 would also prohibit willful payment of a non-exempt employee at a fixed salary where the employer knew or should have known that payment at that rate would result in the employee receiving less wages than had the employee been paid based on regular hours. The bill sets forth a scheme of civil penalties ranging from \$5,000 to \$25,000 and specifically authorizes civil actions (on an individual or representative basis) for violations.

SB 747 (Corbett): SB 747 would express the intent of the California legislature to enact legislation that would promote compliance with the Americans with Disabilities Act and similar state laws that govern access to public facilities through education and certification programs. The bill would have a complementary goal of reducing litigation that seeks attorney’s fees and damages without facilitating compliance with those laws. The bill passed the full Senate and is now before the Assembly.

SB 836 (Kuehl): This bill purports to add “familial status” as an additional basis upon which the right to seek, obtain and hold employment under the California Fair Employment and Housing Act cannot be denied. The bill defines “familial status” to include “being an individual who is or will be caring for or supporting a family member.” The bill defines “caring for or supporting” a family member as: providing supervision or transportation; providing psychological or emotional comfort and support; addressing medical, educational, nutritional, hygienic or safety needs; or attending to an illness, injury or mental or physical disability. The bill defines “family member” as a child, parent, spouse, domestic partner, parent-in-law, sibling, grandparent or grandchild. This bill passed the full

Senate and has been referred to the Assembly Committee on Labor and Employment.

II.

JUDICIAL UPDATE

California Court Holds that Maintaining a Workplace Safe From Violence is a Fundamental Public Policy

In *Franklin v. The Monadnock Co.*, Plaintiff Calvin Franklin (“Plaintiff”) filed a claim for wrongful termination in violation of public policy against The Monadnock Co. and Hi-Shear Corporation (“Defendants”). Plaintiff alleged that a coworker in the workplace had threatened to have Plaintiff and three other employees killed, that Defendants did nothing in response to Plaintiff’s complaint about the threats, that the coworker thereafter assaulted him with a screwdriver, that Plaintiff reported the assault to the police, and that Plaintiff was terminated from his employment as a result of his complaints to Defendants and the police.

The Supreme Court has noted that a historical survey of tortious discharge decisions has established four requirements that a policy must meet in order to support a wrongful discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be “public” in the sense that it “inures to the benefit of the public” rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be “fundamental” and “substantial.”

Labor Code section 6400 et seq. and Code of Civil Procedure section 527.8, read together, establish an explicit public policy requiring employers to provide a safe and secure workplace, including a requirement that an employer take reasonable steps to address credible threats of violence in the workplace.

Unconscionable Arbitration Agreement Stricken

In *Davis v. O’Melveny & Meyers*, O’Melveny & Meyers (“the Company”) adopted and distributed to its employees a new dispute resolution program (“DRP”) which culminated in final and binding arbitration of most employment-related claims by and against its employees. The Company distributed the DRP via interoffice mail and posted it on an office intranet site. An employee of the Company sued seeking in part a declaration that the DRP was unconscionable under California law.

The Ninth Circuit Court of Appeals stated that an arbitration agreement that is an essential part of a “take it or leave it” employment condition, without more, is procedurally unconscionable. Conversely, if an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then the agreement is not procedurally unconscionable. The Company conceded that its employees were not given an option to “opt out” and preserve a judicial forum.

The Ninth Circuit further held that: (1) the DRP’s one-year universal limitation period was substantively unconscionable; (2) the DRP’s confidentiality clause as written unconscionably favored the employer because while confidentiality by itself was not substantively unconscionable the DRP’s confidentiality clause was written too broadly; (3) the DRP’s non-mutual exception

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allowing it a judicial remedy to protect confidential information, was substantively unconscionable because it was one-sided; (4) the DRP was unenforceable as to at least two counts of the employee’s complaint that sought, among other things, public injunctive relief under California’s Labor Code and Unfair Business Practices Act; (5) Department of Labor and Fair Labor Standards Act (“FLSA”) complaints could not be waived with the DRP because the FLSA was premised on employees’ willingness to come forward, in support of the public good; and (6) the substantively unconscionable or void terms could not be stricken or excised without gutting the agreement.

Employment Law Symposium – Save the Date!

Tuesday, November 13, 2007

**San Diego Marriott Mission Valley
8757 Rio San Diego Drive, San Diego CA 92108**

Join our team of employment law attorneys as we address the changes in employment law over the past year.

We will be holding a morning session from 8:30 am – 12:30 pm where the following topics will be discussed in detail:

- Wage & Hour Issues
- Discrimination & Harassment
- Retaliation
- Leaves of Absence

Our afternoon session will feature Tom Ingrassia as he presents his highly acclaimed Sexual Harassment Prevention Training for supervisors and managers.

From 2:00 pm – 4:30 pm, you and your management team can learn important information regarding:

- Quid pro quo harassment
- Hostile work environment harassment
- Investigation of sexual harassment complaints
- Supervisor responsibilities once a complaint is received
- Retaliation and how to prevent it
- Other forms of discrimination
- How to create and maintain a culture of mutual respect

Who should attend: Business Owners, Executives, Human Resource Professionals, Managers and Supervisors.

Information on how to register for our Employment Law Symposium will be sent to you during the month of July.

This is Pettit Kohn Ingrassia & Lutz PC’s monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Hilary Vrem or Cara Patton at (858) 755-8500 or Eric DeWames at (310) 417-1136.