

WHAT'S NEWS!

Arbitrator, Not Court, Gets to Decide

Recently, in *Tiri v. Lucky Chances, Inc.*, a California Court of Appeal overturned a trial court decision denying an employer's petition to compel arbitration where the trial court found that the arbitration agreement was unconscionable. In overturning the trial court's ruling, the Court of Appeal held that the trial court erred in even reaching the issue of whether the agreement was unconscionable because the arbitration agreement included a provision expressly delegating to the arbitrator authority to determine issues of enforceability of the agreement.

The provision stated: *The arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including but not limited to, any claim that all or any part of the Agreement is void or voidable.*

Relying on *United States Supreme Court precedent in Rent-A-Center*, the court held that delegation clauses, like this one, are enforceable as long as the delegation language is "clear and unmistakable" and the provision is not revocable under state law principles such as fraud, duress or unconscionability (limited to the fairness of the delegation provision itself and not the fairness of the arbitration agreement as a whole).

The court held the language of the "delegation" provision was clear and unmistakable and that the provision itself was not unconscionable because there is nothing inherently unfair about authorizing an arbitrator, rather than a court, to decide issues relating to the enforceability of the arbitration agreement. As such, the court held that the delegation provision was enforceable and an arbitrator, not the court, should have

decided whether the parties' arbitration agreement as a whole was enforceable and applicable to the parties' dispute. For this reason, the Court of Appeal overturned the trial court's denial of the employer's petition to compel arbitration because the trial court lacked authority to rule on the petition.

Employers may wish to consider including provisions in their arbitration agreements that specifically delegate authority to the arbitrator to decide whether the agreement is enforceable. This is one tool for keeping unconscionability decisions out of the hands of trial courts that are sometimes inconsistent in ruling on these issues.

However, delegating authority to the arbitrator is not entirely without risk, as one recent case before the United States Supreme Court demonstrated. In *Oxford Health Plans v. Sutter*, the parties' arbitration agreement contained a delegation clause and, pursuant to that clause, an arbitrator interpreted the agreement as allowing class claims in arbitration (a ruling that almost certainly would not have been made in court).

Because of the very limited grounds for judicial review of an arbitrator's rulings, the arbitrator's interpretation of the agreement in that case was upheld.

Employers should think carefully about the provisions in their arbitration agreements, including deciding what issues to delegate to the arbitrator, and ensure that these provisions are very clearly drafted to best ensure that the agreement is enforced as intended. Employers must also periodically review their agreements to ensure that they are as beneficial as permissible in light of continually evolving case law. [PE]

Child Labor Law Flyer Enclosed!

President's Report ~Dave Miller~

EBAY SETTLES 'NO POACH' PROBE

EBay is the latest Silicon Valley company to settle with US authorities over allegations it struck illegal agreements with rivals to not hire their employees.



The ecommerce company will pay California \$3.75 million some of which will go to compensating employees affected by a so-called "no poach" agreement between eBay and financial software company Intuit between 2006 and 2009. The company also settled a suit filed by the Department of Justice, agreeing not to enter into any future arrangements limiting others from competing for its employees.

The settlement is the last in a string of cases brought against Silicon Valley titans – about 10 companies including Google, Apple and Intel – for suppressing wages by not allowing other companies to make offers to their employees, said Bill Baer, head of the DOJ's antitrust

division. Some civil suits by employees affected by the no poach agreements are continuing.

The investigation into hiring practices revealed the close relationships between leaders of the tech world, turning up emails linking executives such as Google's co-founders and Apple's former chief executive Steve Jobs.

In one email from 2007 that formed part of the DOJ's case against eBay, the company's then-chief executive Meg Whitman complained to Scott Cook, who served as chairman of Intuit's executive committee and an eBay director, about Intuit's continuing attempts to hire its employees despite the agreement.

Mr Cook wrote in response: "#@!%\$#^&!!! Meg my apologies. I'll find out how this slip up occurred." [PE]

"We cannot solve our problems with the same thinking we used when we created them." - Albert Einstein

Recent Developments

Teleworking As An Accommodation

The U.S. Court of Appeals for the Sixth Circuit has decided that the U.S. Equal Employment Opportunity Commission (EEOC) has created issues sufficient for trial in its disability discrimination lawsuit against the Ford Motor Company.

"...HAD REQUESTED TO WORK FROM HOME UP TO FOUR DAYS A WEEK..."

The EEOC has charged that Ford violated the Americans with Disabilities Act (ADA) by allegedly denying a former employee the opportunity to telework and by allegedly firing her after she filed an EEOC charge. Harris had requested to work from home up to four days a week as an accommodation for her irritable bowel syndrome. Harris was a resale steel buyer whose job primarily required telephone and computer contact with coworkers and suppliers.

The Sixth Circuit majority noted that "the law must respond to the advance of technology in the employment context . . . and recognize that the 'workplace' is anywhere that an employee can perform her job duties." The court also held that the "highly fact-specific" question was thus whether presence at the Ford facilities was truly essential, and that a jury should decide that issue. [PE]

CA Law Protects Political Activity

Employees are increasingly using social media, such as Twitter and Facebook, to oppose or influence employers' personnel and business decisions.

Employers planning to take action against employees for engaging in political activity outside of work once again may find themselves between the proverbial rock and hard place. California law protects employees' right to engage in political activity outside of work, even political activity that offends the employer or its constituents.

California Labor Code sections 1101 and 1102 prevent private sector employers from controlling an employee's political activities outside of work. Section 1101 prohibits employers from making, adopting, or enforcing any rule, regulation, or policy that forbids or restricts employees from participating in politics or becoming candidates for public office. Under Section 1102, employers cannot coerce or influence an employee's political activity by threatening discharge or loss of employment. [PE]

COBRA Notice Requirements

The Department of Labor recently revised important COBRA notices. The following forms are updated:

- COBRA Continuation Coverage Election Notice - California Employees
- COBRA Continuation Coverage Election Notice - Outside California
- General Notice of COBRA Continuation Coverage Rights - California Employees
- General Notice of COBRA Continuation Coverage Rights - Outside California

Federal law requires you to notify an employee of COBRA rights both at the time he/she becomes covered by a plan covered by COBRA and at the time of a qualifying event. These rules affect the content and delivery of all of the following:

- The General Notice of COBRA Continuation Coverage Rights
- An employer's notice of qualifying event
- Notices for employees and qualified beneficiaries
- The COBRA Continuation of Coverage Election Notice
- Plan administrator's notices, including the Termination Notice and Unavailability Notice.

The General Notice must be provided to the employee and spouse:

If mailed, it must be mailed separately to each unless, at the time it is provided, the plan has records indicating the employee and spouse live at the same address. In that case, the notice must be addressed to both the employee and spouse. If spousal coverage begins after the employee's coverage, a separate notice must be given. For example, if the employee divorces and then remarries, the new spouse must be given separate notice upon commencing coverage.

If the employee is given the General Notice personally, a separate copy must be mailed to the spouse. Separate notice need not be given to dependent children.

You may be liable to people other than the employee if you fail to properly notify them of their rights under COBRA.

COBRA Notice to Plan Administrator

A group health plan must offer continuation coverage when a qualifying event occurs. The group health plan is not required to act until it receives appropriate notice of the qualifying event.

You must notify the plan administrator within 30 days of an employee's loss of coverage due to termination, reduction in hours, death, Medicare entitlement or your bankruptcy event.

COBRA does not require any special format for the notification, but does specify that the contents of the notice must enable the plan administrator to clearly identify the plan, the covered employee, the qualifying event and the date of the qualifying event.

Do Not Overlook COBRA Notice

Notice to employees, dependents and the plan administrator are of the utmost importance when a Qualifying Event makes them eligible for COBRA continuation coverage.

Qualifying Events are certain events that would cause an individual to lose health coverage. The type of qualifying event will determine who the qualified beneficiaries are and the amount of time that a plan must offer the health coverage to them under COBRA. A plan, at its discretion, may provide longer periods of continuation coverage.

The qualifying events for employees are:

- Voluntary or involuntary termination of employment for reasons other than gross misconduct
- Reduction in the number of hours of employment

The qualifying events for spouses are:

- Voluntary or involuntary termination of the covered employee's employment for any reason other than gross misconduct
- Reduction in the hours worked by the covered employee
- Covered employee's becoming entitled to Medicare
- Divorce or legal separation of the covered employee
- Death of the covered employee

The qualifying events for dependent children are the same as for the spouse with one addition:

- Loss of dependent child status under the plan rules

[PE]



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Call 733-4256 or 1-800-331-2592.



Human Resources Question with Candice Weaver

THE MONTH'S BEST QUESTION

Must I Grant Teleworking?

Q: "We have had requests in the past by employees who wish to work from home. With the recent Ford Motor Company "teleworking" case, will we be able to say no?"

A: The recent *EEOC v. Ford Motor Co.* case is likely to increase the requests by employees to telecommute from home as an accommodation under the Americans with Disabilities Act, (ADA) the U.S. Court of Appeals for the Sixth Circuit, 2-1, has determined that "attendance" is no longer synonymous with physical presence in the workplace.

In the Ford case, a buyer, Jane Harris, requested that she be allowed to work from home when necessary to accommodate her severe irritable bowel syndrome (IBS), which sometimes made it difficult for her to stand without soiling herself. The employer, which had allowed other buyers to work from home on a more limited basis, refused her request, in part because of the expected frequent nature of the need to work from home. The employer determined that being in the office was an essential function of the job due to the emphasis placed on teamwork and in-person team problem-solving.

The Sixth Circuit, however, determined that there was an issue of fact as to whether the request to work from home was a reasonable accommodation under the circumstances. With advances in technology, the Court stated, the workplace can be anywhere that an employee can perform his or her job duties. In this case, because the Court found evidence in the record that much of the work could be done over the telephone or by video conference, and other buyers had worked from home, the Court allowed the plaintiff to proceed with her ADA failure-to-accommodate claim.

The dissenting judge pointed out that "the stated law of this circuit ... is that attending work on a regular, predictable schedule is an essential function of a job in all but the most unusual cases, namely, positions in which all job duties can be done remotely."

"Employers have long considered that 'being there' was a fundamental attendance requirement and important to effectively perform the job. The Court's decision plainly calls into question this time-honored view of work."

We recommend that employers examine in great depth on these requests during the ADA's interactive process, gathering all the relevant circumstances, to defend, if necessary, why the request to telecommute was not granted.

Employers also should update job descriptions to confirm the importance of presence in the workplace to perform certain jobs, as well as update telecommuting policies." [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on July 23rd, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members \$35 - Non-members \$50
Certificate - Forms - Guides - Full Breakfast
Future 2014 Training date: 10-22-14

No-Cost Employment Seminars

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

- Our Next 2014 Seminars -

◆ **Wage & Hour and Exempt Status** - Overtime, wage considerations and exemptions.
Thursday, June 19th, 2014, 10 - 11:30am

◆ **Hiring & Maintaining "At-Will"** - Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

Thursday, July 17th, 2014, 10 - 11:30am

These mid-morning seminars include refreshments and handouts.

◆ **Reminder -- There is No August Seminar!**

SEMINAR TOPIC TALK WITH DAWN

Wage, Hour & Exempt

Aware of the CA minimum wage increases? Have you also made plans for how that will impact your non-hourly employees and your company's bottom line?

It's not enough to just increase your hourly employees from \$8.00 per hour to \$9.00 per hour on July 1, 2014.

The June seminar will help attendees understand the multifaceted regulations of wage, hour and exempt status. Employers need to understand and follow the rules and regulations for exempt salaried employees, commission employees, and independent contractors. Don't set yourself and your company up with unnecessary penalties by being uninformed on this topic! We hope to see you at the Seminar on Thursday, Jun 19th. [PE]

Prevailing Wage Seminar

Pacific Employers in conjunction with the SLO County Builders Exchange will be having a comprehensive review of the California Prevailing Wage statutes and regulations on July 16, 2014 from 10am to noon in San Luis Obispo.

Our very own Candice Weaver will be training and giving the following highlights:

- What the apprentice requirements are on public works projects;
- How the California prevailing wage statutes differ from the Federal Davis Bacon Act;
- How to determine if a "private" project requires the payment of prevailing wages;
- How to ensure that your subcontractors comply with the prevailing wage statutes and how to avoid penalties if they don't; and
- What to do if the Ca DLSE or DOL conducts an investigation or issues a wage assessment.

Cost \$30/person, lunch will be included (this seminar is open members and non-members of SLO Builder's Exchange or Pacific Employers). RSVP by July 14, 2014 to (805) 543-7330 or info@slocbe.com [PE]

Child Labor Law Flyer Enclosed!

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NURSING HOME TERMINATES EMPLOYEE WITH HIV

Christian Care Center of Johnson City, Inc., which operates as a nursing home facility, will pay \$90,000 to settle a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC). According to the EEOC charge, the nursing home fired an employee because the individual suffers from human immunodeficiency virus (HIV).

The EEOC charged that the employee worked for Christian Care Center as a licensed practical nurse for more than a month; however, allegedly when the nursing home learned that the employee was HIV positive, the employee was immediately terminated. HR Practice Pointer: Disability discrimination, including firing an employee because of HIV, violates California's Fair Employment and Housing Act (FEHA) and the Americans with Disabilities Act (ADA). [PE]

DENYING REQUEST FOR SERVICE DOG

Direct Optical, Inc., an optical store, agreed to pay \$53,000 to settle a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC). According to the EEOC's suit, Direct Optical denied an optician's request for the reasonable accommodation to bring her service dog to work because of her generalized anxiety disorder.

The employee advised that the dog alerted her to oncoming panic attacks, helped alleviate symptoms during a panic attack, and could also do other tasks, such as retrieve small objects, retrieve her medical bag and guide her to an exit. EEOC alleged Direct Optical denied the request and began disciplining and ultimately terminated the employee because of her disability and in retaliation for her request. [PE]

REINSTATE BEFORE SEEKING EVALUATION

When an employee takes leave under the Family and Medical Leave Act (FMLA) the employee is entitled to reinstatement as long as medical certification is received from the employee's health care provider indicating that the employee is able to resume work.

However, the employer is not permitted to seek a second opinion regarding the employee's fitness for work prior to restoring the employee to employment. According to a recent appellate court decision, if the employer is not satisfied with the employee's health care provider's certification, the employer may seek its own evaluation of the employee's fitness for duty at its own expense, but the employer must first restore the employee to work. [PE]

AutoZone, Inc. Sued over Point System

AutoZone, Inc. has been sued a fourth time by the Equal Employment Opportunity Commission (EEOC) for allegedly violating federal law when it implemented a nationwide attendance policy that failed to accommodate certain disability-related absences.

EEOC's complaint states that between 2009 and 2011, AutoZone assessed employees "points" for absences, without permitting exceptions for disability-related absences. Twelve points resulted in an employee's termination. As a result, qualified employees with disabilities who had even modest numbers of disability-related absences were allegedly fired.

Employers may need to make exceptions to workplace policies in order to accommodate a disabled employee. Further, in every case involving a disabled employee's need for an accommodation, the employer must do an individualized assessment to determine the appropriate course of action, such as granting disability related absences without adverse employment consequences to the disabled employee. [PE]