Pacific Employers
MANAGEMENT ADVISOR
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September 2014

WHAT'S NEWS!

"At-Will" Policy Passes NLRB's Scrutiny

As the National Labor Relations Board ("NLRB") continues to scrutinize employee handbook provisions, finding that many of them interfere with employees' right to engage in union or protected concerted activity, a determination upholding an at-will employment clause that had been challenged by a union is worth noting.

The NLRB's Division of Advice ("Advice"), an arm of the Agency's General Counsel's Office charged with helping to determine whether novel unfair labor practice charges filed in NLRB Regional offices are meritorious, decided an employer's employment-at-will policy was lawful as it did not inhibit employees from exercising their statutory rights to organize under Section 7 of the National Labor Relations Act (NLRA). *Lionbridge Technologies,*

The Employer's Policy Stated:

> Employment at the Employer is on an at-will basis unless otherwise stated in a written individual employment agreement signed by the Senior Vice President of Human Resources. This means that employment may be terminated by the employee or the Employer at any time, for any reason or for no reason, and with or without prior notice.
>
> No one has the authority to make any express or implied representations in connection with, or in any way limit, an employee's right to resign or the Employer's right to terminate an employee at any time, for any reason or for no reason, with or without prior notice. Nothing in this handbook creates an employment agreement, express or implied, or any other agreement between any employee and the Employer.
>
> No statement, act, series of events or pattern of conduct can change this at-will relationship.

Advice concluded that while the policy did not explicitly restrict Section 7 rights, was not promulgated in response to union activity, and was not applied unlawfully, there remained the question whether employees could reasonably construe the policy as prohibiting them from organizing a union. Advice found the policy could not reasonably be construed to prohibit Section 7 rights and therefore was lawful.

The Board's examination of employer rules and policies is increasing. Even a few, seemingly routine words may mean the difference between lawful expression and an NLRA violation. Decisions in this area are being issued by the NLRB and Advice almost weekly. Therefore it is important that employer handbooks and policies be reviewed carefully and regularly with the NLRA firmly in mind. [PE]

Guest Speaker Seminar Flyer Enclosed!

President's Report
~Dave Miller~

UNIVERSITY EMPLOYEE FIRED!

In a welcome common sense decision, the California Court of Appeal in *Serri v. Santa Clara University* affirmed summary judgment granted to Santa Clara University against its former Director of Affirmative Action.

Why? Because as the University's Director of Affirmative Action, she failed to file the University's Affirmative Action Plan (AAP) for three years in a row!

Indeed, the undisputed record showed that Serri not only failed to file the University's AAP for three successive years, but also failed to inform her supervisors that she had not filed them and made other misrepresentations about the AAPs.

Since the University had legitimate, non-discriminatory reasons for discharging Serri, the case turned in large part on her ability to show that the University's reasons for firing her were a pretext for discrimination. Struggling to establish pretext, Serri did not literally argue that her "dog ate her AAP," but she came close by asserting a series of weak excuses such as:

- the AAPs weren't really that important;
- failure to file the AAPs would not likely result in actual sanctions against the University;
- the University failed to provide her with data and a consultant to process the data necessary for an AAP (ignoring the fact that she was responsible for overseeing this process); and
- when she once had actually prepared an AAP over a decade earlier, she "sensed" the University President was "reluctant" to sign the AAP, and he "never asked her" about the AAPs.

The Court exposed and rejected these arguments in a decision that affirms accountability still plays an important role in the workplace. PE]

"Occupants of public offices love power and are prone to abuse it."
-- George Washington - (1732-1799) --

Recent Developments

NLRB to Employer: Sexually Harassing Gestures On The Picket Line Are Protected Activity

Continuing to push the limits of reason, the Board recently upheld an Administrative Law Judge's (ALJ) decision finding that an employer unlawfully suspended a striking employee who made an obscene gesture and "grabbed his crotch" towards another employee while on the picket line. The employer concluded that the employee who engaged in the obscene gesture violated the company's sexual harassment and workplace violence policies. To discipline the employee for the conduct, the employer issued the employee a suspension. The Union subsequently filed an unfair labor practice charge challenging the suspension.

. . . ENGAGED IN ADMITTEDLY "VULGAR OR OBSCENE" CONDUCT, . . .

After a hearing on the issue, while the ALJ concluded that the striker did engage in "misconduct" by making the lewd gesture towards the other employee, he found it did not rise to a level sufficient to lose the protection of the National Labor Relations Act. In fact, the ALJ concluded "that for a striking employee to forfeit the protection of the Act, an implied threat of bodily harm must accompany a vulgar or obscene gesture." So, given that the striker only engaged in admittedly "vulgar or obscene" conduct, the employer could not suspend the employee for his activity on the picket line.

In reaching this conclusion, the ALJ summarily dismissed the employer's obligations to prohibit sexual harassment under Title VII of the Civil Rights Act by concluding that this obscene conduct did not constitute sexual harassment. In doing so, the ALJ boldly claimed that the misconduct "cannot be legitimately characterized as `sexual harassment'" and that, under Title VII, "a plaintiff generally cannot prevail on the basis on a single incident not involving physical contact." The ALJ cited one federal appeals court case from 2006 in support of his conclusion. The Board then adopted the ALJ's decision on the issue with no additional discussion. [PE]

Ninth Circuit Rules That Home Delivery Drivers Are Not Independent Contractors

A Georgia choice-of-law provision in a contract entitled, "Independent Truckman's Agreement," between California truck drivers and a Georgia company was unenforceable based on California public policy, the federal appeals court in San Francisco has held. *Ruiz v. Affinity Logistics Corp.* The Court also ruled that California law applied in determining whether the drivers were employees or independent contractors. Vacating the lower court's judgment in favor of a Georgia transportation company in a wage-hour class action suit, the Court remanded the case to the lower court for further proceedings to determine whether the drivers were employees or independent contractors.

Background

Affinity Logistics Corporation provides home delivery and logistics services to various home furnishing retailers. To work as an Affinity driver, individuals must enter into an "Independent Truckman's Agreement and Equipment Lease Agreement" with the company. The agreement provided that drivers were independent contractors and that Georgia law applied to the agreement and any disputes arising from it.

Truck driver Fernando Ruiz entered into such an agreement with Affinity to work as a driver for the company in California. He subsequently filed a class action suit against Affinity for, among other things, unpaid wages and overtime in violation of the Fair Labor Standards Act and the California Labor Code.

The district court held that, under California's choice-of-law rules, Georgia law applied to determine whether the drivers were employees of Affinity. Georgia law recognized a presumption of independent contractor status, which Ruiz did not rebut. Thus, the court determined that Ruiz properly was classified as an independent contractor. Ruiz appealed, arguing that the district court erred in concluding that Georgia law applied.

California's Choice-of-Law Rules

When analyzing contract choice-of-law provisions in California, a court first must determine "whether the chosen state has a substantial relationship to the parties or their transaction, or … whether there is any other reasonable basis for the parties' choice of law." Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1152 (Cal. 1992). Next, the court must consider whether applying another jurisdiction's law is contrary to a fundamental policy of California and whether California had a materially greater interest in resolution of the issue.

California Law vs. Georgia Law

Although Georgia had a substantial relationship to the parties because Affinity was incorporated in Georgia and had its principal office there, the appeals court pointed out that Georgia law was contrary to California's fundamental policy of protecting its workers. In this case, under Georgia law, unless rebutted by the drivers, the drivers were presumed to be independent contractors. Under California law, however, once the employees show that they have provided services, they have established an employment relationship. The burden then shifts to the employer to prove that the employees are independent contractors. According to the Court, the conflict between Georgia and California law created vastly different "starting points" for the drivers and they are at a disadvantage under Georgia law.

The California Supreme Court has instructed that when determining employment status, courts must defer to "the remedial statutory purpose" behind the statute the plaintiff seeks to enforce. S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel., 769 P.2d 399, 404-05 (Cal. 1989).

Under California law, a court must consider (and give deference to) the protective legislation designed to aid employees in determining employment status. No such consideration was required under Georgia law. Thus, the Court concluded that applying Georgia law would contravene California's public policy of protecting its workers.

In addition, California had a materially greater interest than Georgia in the outcome of the case, the Court ruled. The drivers contracted with Affinity in California, made deliveries for Affinity in California, and resided in California. The company did not produce any evidence suggesting Georgia had a material interest in the case's resolution. The Court concluded the Georgia choice-of-law provision was unenforceable and that, under California's choice-of-law rules, California law applied. Accordingly, it vacated the district court judgment, remanded the case, and ordered the court to apply California law to determine whether the drivers were employees or independent contractors.

Implications

Choice-of-law agreements are difficult to enforce in California, particularly in cases involving workers' rights under the state Labor Code and where the connection to the other state is limited. Businesses should weigh the risks and costs of non-compliance with California's labor and employment laws against other factors, such as the need for uniform treatment of workers across state lines, industry-wide practices, and potential litigation in other jurisdictions, before using a non-California choice-of-law provision. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Interactive Dialogue

Q: ***"I have an employee who has asked for time off before and after the upcoming holiday weekend. When I explained that I needed her help in the office, she was upset. Three days later she came to me with a doctor's note explaining that she needs to take 2 hours off work each week. She said she wanted to take two hours on the day before and after the holiday weekend. This seems suspicious. What are my options here and do I need to honor this request?"***

A: **The quick answer would be simply to say "no," you need not honor the request.** However, you need to understand all of the implications of the situation before you actually reach that determination. Based on what you've told me, the note itself is pretty vague. Since it only says the employee needs 2 hours per week, and does not say when those 2 hours must occur, it is typically left to the discretion of the employer to decide when those 2 hours per week will be taken off by the employee.

Before making that decision, you should have a discussion with the employee about this possible "accommodation." Now that you've received this doctor's note you are on notice that the employee might have a disability and be entitled to the protection of state and federal laws. Those laws require, at a minimum, that the employer engage in the "interactive process" (a dialogue between employee and employer to discuss what, if any accommodation can be made for the disability) with the employee.

You meet your legal requirement by having a conversation with the employee to discuss if the two hours per week is a sufficient accommodation for her condition. If she provides no information to indicate that her disability requires the two days to be before and after a holiday, then as the employer you have the right to set the time when the employee gets the reduced hours. You ultimately get to make the decision, so long as you do not act unreasonably and/or in an effort to discriminate against the employee for having a disability or other medical condition that might be protected by state or federal law. [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 October 22nd, 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

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 -

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 18th, 2014, 10 - 11:30am

♦ **Guest Speaker Seminar - Our Guest Speaker for the October Seminar will be Tyler M. Paetkau, of Hartnett, Smith & Paetkau,** the attorney responsible for representing *Tiri v. Lucky Chances, Inc.* winning the decision that permits an arbitration agreement which included a provision expressly delegating to the arbitrator, authority to determine issues of enforceability of the agreement.
Thursday, October 16th, 2014, 10 - Noon

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 20th, 2014, 10 - 11:30am

There is No Seminar in December

Seminar Topic Talk with Dawn

Forms & Posters
Contracts, Signs
Handouts, and Fliers

By now I hope you have posted a copy of the California Minimum Wages Poster that took effect July 1, 2014 and are complying with the increased rates. The new Minimum Wage Poster needs to be posted along with the All-in-One poster (that is filled out properly) and your Wage Order(s).

The laws and requirements do not stop there! Make sure you attend our FREE Seminar on September 18th to stay informed!

Guest Speaker Seminar

Each October we dedicate our monthly seminar to bring you a guest speaker for a timely discussion of issues of interest to the employer. This year is no exception! Our October Guest Speaker is ***Tyler M. Paetkau, of Hartnett, Smith & Paetkau,*** the attorney responsible for the representing *Tiri v. Lucky Chances, Inc.* Look for the Seminar Topic Talk in October to learn more about this seminar taking place on October 16. ***The Seminar will be held for extended time - 10:00am to Noon!***

Our FREE Seminars are held from 10-11:30am at the Tulare-Kings Builders Exchange, 1223 S. Lover's Lane in Visalia. **Please RSVP to Pacific Employers at 733-4256.** [PE]

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Guest Speaker Seminar Flyer Enclosed!

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Walgreens Pays $180,000 for Terminating Diabetic Employee Who Ate a Bag of Chips

Walgreens has agreed to pay $180,000 to a longtime employee with diabetes and to implement revised policies and training to settle a federal disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

The EEOC's lawsuit charged that former cashier Josefina Hernandez, who has Type II Diabetes, was terminated by a South San Francisco Walgreens because of her disability after she ate a $1.39 bag of chips, without paying for it at that time although she intended to pay later, during a hypoglycemic attack in order to stabilize her blood sugar level.

Hernandez had worked for Walgreen for almost 18 years with no disciplinary problems, and Walgreens knew of her diabetes. Yet the company security officer testified that he did not seek clarification when Hernandez wrote, "My sugar low. Not have time," in reply to his request for an explanation of why she took the chips before paying. According to EEOC San Francisco Regional Attorney William R. Tamayo, "Not only was this harsh and unfair, but it was illegal, and that's why the EEOC sued to correct this wrong." [PE]

Refusal to Sign Not Misconduct

The California Supreme Court has ruled that an employee's refusal to sign a disciplinary notice does not constitute misconduct for purposes of unemployment insurance benefits. The case involved Craig Medeiros (Claimant) who worked for Paratransit, Inc. (Employer) as a driver.

Upon hire, Claimant was required to join a union and sign a collective bargaining agreement (CBA) which specified that "all disciplinary notices must be signed by a Vehicle Operator when presented to him or her." Subsequently, a passenger filed a complaint alleging that Claimant had harassed her. Employer investigated and concluded the alleged misconduct had occurred.

The Employer then met with Claimant and asked him to sign a disciplinary notice; however, he refused to sign. Claimant filed for unemployment insurance benefits claim but his claim was denied by the Employment Development Department (EDD) and on appeal, the ALJ affirmed the decision. Claimant appealed and the case eventually came before the California Supreme Court, which held that "Employee's refusal to sign the disciplinary notice was not misconduct but was, at most, a good faith error in judgment that does not disqualify him from unemployment benefits."

The Court also noted, however, that "there is no dispute over whether the employer was within its rights to fire the employee for his insubordination. The only question is whether that single act of disobedience constituted misconduct within the meaning of California's Unemployment Insurance Code." [PE]

County Court Terminated 70-Year-Old

The Equal Employment Opportunity Commission (EEOC) has filed an age discrimination lawsuit against the Court of Common Pleas of Allegheny County, Fifth Judicial District of Pennsylvania. According to the EEOC, Carolyn J. Pittman, at age 70, was assigned to work at the Allegheny County Common Pleas Court by a staffing agency in February 2012.

While Pittman was still in training with Lisa Moore, who was in charge of training and supervising her, Moore allegedly complained that Pittman was too old to work in the department, and Pittman was subsequently terminated. The Age Discrimination in Employment Act (ADEA) prohibits discrimination against job applicants and employees who are age 40 or older. [PE]