

Employment Group Newsletter

WHAT TO DO WHEN SOCIAL SECURITY NUMBERS DO NOT MATCH

By: **Barbara McCully**

Inside this issue:

<i>Policy on Refusing to Hire Smokers...</i>	4
<i>Medical Leaves of Absence</i>	5
<i>Observation from the Trenches...</i>	6
<i>HR Corner</i>	7
<i>Wage and Hour Update</i>	9
<i>Recent Cases of Note</i>	10
<i>Employment Group Victories</i>	15
<i>Upcoming Events</i>	17
<i>News and Trends</i>	18

We have received a number of inquiries about media reports that the Department of Homeland Security ("DHS") will crack down on employers to verify employees' authorization to work in the United States. The reports of stricter enforcement stem from proposed changes to rules and regulations governing the Immigration Reform and Control Act whereby if just one employee's social security number does not match the records of the Social Security Administration ("SSA"), the employer will receive a "no-match letter." If the employer fails to promptly take reasonable steps to verify the identity of and the employee's authorization to work in the United States, the employer may be found liable for civil penalties.

While there is significant opposition to the proposed regulations, we provide the following highlights of those regulations and practical guidance to assist you in the event they are applied.

Background

Under current law, it is unlawful to knowingly employ unauthorized aliens.

"Knowingly" includes constructive knowledge of a person's undocumented status.

"Constructive knowledge" is defined as facts and circumstances which would lead a person through the exercise of reasonable care to know of the alien's undocumented status.

The DHS's proposed changes (1) expand the types of situations that may amount to constructive knowledge and (2) describe "safe harbor" procedures employers can follow to protect themselves against a finding by the DHS that the employer had constructive knowledge that an employee was not authorized to work in the United States, which could subject the employer to penalties.

Constructive Knowledge

The current regulations give three examples of situations that could amount to a finding that an employer had constructive knowledge of an unauthorized alien:

1. Where an employee fails to complete or improperly completes the Employment Eligibility Verification form ("I-9");
2. Where an employer has information that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; and
3. Where an employer acts with reckless disregard for the legal consequences of permitting an unauthorized alien onto its work force.

The proposed regulations clarify that whether an employer had constructive knowledge of an alien's undocumented status is to be gauged by the "totality of the circumstances."

The proposed regulations add two examples of what constitutes constructive knowledge:

1. Where an employer fails to take reasonable steps after receiving a no-match letter from the SSA that the combination of name and social security numbers submitted by the employer for an employee do not match those on file with the SSA; and
2. Where an employer fails to take reasonable steps after receiving a no-match letter from the DHS that the immigration status or employment authorization document presented or referenced by an employee for the I-9 form was assigned to another person or was not assigned to anyone.

Safe Harbor Provision

The proposed regulations contain a "safe harbor" provision setting forth a procedure which employers may use when they receive a no-match letter. Because there may be other "reasonable" steps an employer may take to verify whether an employee is authorized to work, employers are not obligated to follow the safe harbor procedure upon receipt of a no-match letter. Of course, an employer runs the risk that the DHS will find the employer's steps were not "reasonable."

On the other hand, if the safe harbor procedure is followed, employers are protected against the DHS claiming that the employer had constructive knowledge that it was employing an unauthorized alien. The safe harbor provision will not, however, protect an employer that has actual knowledge it was employing an unauthorized alien, even if the employer follows the procedure.

The safe harbor procedure for an SSA no-match letter is:

1. Within 14 days, the employer takes reasonable steps to resolve the discrepancy between its records and the SSA's records by (a) checking to see whether the discrepancy is a clerical error and, if so, advising the SSA of the error, and (b) verifying with the SSA that the name or number as corrected matches the SSA's records;
2. If there was no clerical error, the employer asks the employee to confirm that his/her name and social security number on file with the employer are correct and (a) if they are not, to advise the SSA of the error and verify with the SSA that the employer's corrected records match the SSA's records, or (b) if there is no error, **If** there was no clerical error, the employer asks the employee to confirm that his/her name and social security number on file with the employer are correct and (a) if they are not, to advise the SSA of the error and verify with the SSA that the employer's corrected records match the SSA's records, or (b) if there is no error, to promptly request that the employee resolve the discrepancy with the SSA and verify that the matter has been resolved;
3. If within 60 days of receipt of the no-match letter, the employer does not verify with the SSA that its records and the SSA's records match, the employer takes reasonable steps within three days to verify the employee's identity and employment authorized by completing a new I-9 form i.e., within 63 days of receipt of the no-match letter.

Please note that no document containing the social security number or alien number that is the subject of the no-match letter, no receipt for an application for a replacement of such document, and no document without a photograph may be used to establish employment authorization or identity. Thereafter, the employer must retain the new I-9 form with the prior form(s) in the same manner as though the employee were newly hired.

A similar safe harbor procedure is applicable to a no-match letter received from the DHS.

As under the current regulations, the mere fact that an employer has received a “no match” letter from the SSA or the DHS does not mean that the employee is, in fact, not authorized to work in the United States. Similarly, the fact that an employer does not respond to a “no match” letter under the proposed regulations does not necessarily mean that the employer has constructive knowledge that the employee is not authorized to work in the United States.

Assistance in Verifying Social Security Numbers

The SSA has created an online program called the Social Security Number Verification System (SSNVS) so employers can verify that Social Security numbers and names they have been provided match and are correct for purposes of completing W-2 forms. An employer can (1) verify up to 10 names and Social Security numbers and receive immediate results and (2) upload up to 250,000 names and Social Security numbers into the SSA database and receive results the next business day.

The registration and use of the SSNVS is free and employers can register through the SSA's Business Services Online registration; completion of the registration process may take a few weeks. To use the SSNVS you need Internet access, a browser, and Adobe Acrobat Reader. Employers may sign up for the service at www.socialsecurity.gov/bsowelcome.htm. current employees.

The SSA emphasizes that such verifications can only occur after an employee has been hired. Further, employers are advised (1) to use the service in a non-discriminatory manner and (2) to develop a policy that sets forth the classifications of employees that will be submitted to the SSNVS system.

Employers are cautioned not to use the SSNVS service to target a type of group of employees and to not take immediate adverse action against an employee whose name or social security number do not match with the SSA's records. Rather, employers are encouraged to immediately advise the employee of the problem and try to rectify the discrepancy.

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POLICY ON REFUSING TO HIRE SMOKERS

Why a California Employer Will Likely Be Able To Enforce Such a Policy

By: Eric A. Boyajian

Smoking-related diseases result in an annual cost of approximately \$157 billion to the U.S. health care system. These costs are inevitably borne by companies and firms which end up paying increasing costs for health care. Such costs have led many employers to adopt a policy of refusing to hire smokers. Employees and applicants have reacted by claiming that such policies are an Invasion of Privacy, violate California *Labor Code* section 96(k), constitute Disability Discrimination and Disparate Impact Racial Discrimination, and qualify as Wrongful Termination in Violation of Public Policy. Employers have responded that such policies do not violate any legal principles for reasons set forth below.

Invasion of Privacy

The right to privacy is essentially the right to be left alone. Employers could successfully argue that employees should have no expectation of privacy in light of the employer's interest in providing low cost health insurance to employees. Employers may also prevail by showing that any alleged invasion would be justified because it substantively furthers one or more countervailing interests, such as (1) keeping health care costs to a minimum, (2) maintaining the integrity and the effect of at-will employment (assuming at-will employment is established), and (3) the employer's inherent right to choose who works for it, absent illegalities, in response to which an employee will not likely be able to show any feasible and effective alternatives that would have a lesser impact on privacy interests.

California Labor Code Section 96(k)

This statute prohibits terminating employees for engaging in "lawful conduct" away from work, arguably including smoking during non-working hours. However, this statute only protects a recognized constitutional right and it does not create any new substantive rights, thereby eliminating any affect this statute may have on a policy of not hiring smokers.

Disability Discrimination - ADA & FEHA

An argument could be raised that an addiction to cigarettes is a disability requiring reasonable accommodations under the Americans With Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA"). However, it would be a far stretch to argue that an addiction to cigarettes prevents/restricts the performance of a "major life activity" pursuant to the ADA because not only do smokers partake in major life activities, they frequently partake in very challenging athletic events. Based on the FEHA, employees may argue that the addiction is (1) a condition which affects the respiratory system, or (2) a health impairment related to cancer, or (3) affecting the employee's basic life function, which includes the ability to work under the FEHA. However, employers could deflect such arguments by focusing on the fact that the addiction is

to nicotine, not cigarettes, for which there are alternative sources, such as “the gum” or “the patch,” that would not affect the respiratory system, would not be related to cancer, and would not affect the employee’s ability to work.

Disparate Impact Racial Discrimination

Disparate-impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Not hiring or terminating smokers may result in a policy impacting a large percentage of minorities or individuals in certain protected classes, which could lead to a disparate impact claim. Employers will defeat such a claim if they have evidence showing that the purpose of the policy is to minimize health costs, in response to which an employee will not be able to show a lower-impact alternative that the employer could have chosen.

Wrongful Termination in Violation of Public Policy (“*Tameny* Claim”)

As the statutory/constitutional predicates for a *Tameny* Claim, an employee will argue a Constitutional Invasion of Privacy, a violation of California *Labor Code* section 96(k), Disability Discrimination and Disparate Impact Racial Discrimination. As discussed above, none of these will provide for a foundation for a *Tameny* Claim since they have not been violated.

As a result, though intuition may lead one to believe a policy of terminating or not hiring smokers allows for legal recourse against employers or prospective employers, a careful consideration of the potential claims shows otherwise, in light of the absence of any legal precedence supporting such causes of action and employers’ interests in reducing health care costs.

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MEDICAL LEAVES OF ABSENCE

By: Barbara McCully

Deciding whether and when to fill the position of an employee on medical leave and what to do when the employee is certified to return to work is a constant conundrum for human resources professionals. Employers can now take solace in two recent California cases.

Employer Not Liable for Filling Employee’s Position During Medical Leave and Terminating Her Due to Lack of Position Upon Return from Leave

The employer’s policy provided six months of paid medical leave and stated that if the leave went beyond the 12 weeks provided by Family Medical Leave Act (“FMLA”) and California Family Rights Act (“CFRA”), the employee’s position could not be guaranteed and, if it was filled, the employee had 60 days upon return to work to locate a position for which the employee was qualified. A receptionist took a medical leave for stress and exacerbation of an existing condition. Because she had extended her leave more than once, when the 12 weeks of FMLA/CFRA leave expired and

the receptionist's doctor had determined she was unable to return to work, the employer advised the receptionist that her 12-week "position guarantee" had expired, and that a replacement was being hired. She was also reminded of the return to work policy.

Seven months after she started her leave, she was certified to return to work without restrictions. There were no vacant receptionist positions, and although she interviewed for two other positions, she was not qualified for either. At the end of the 60-day period, she was terminated, consistent with company policy.

The court found that the company's policy went beyond what the law required and the policy was consistently followed in a non-discriminatory manner. The court also found that the receptionist provided no evidence showing that she was able to work at the time her position was filled, that she was terminated because of a disability, or that the employer's non-discriminatory reason for not reinstating her - unavailability of positions for which she was qualified - was pretextual.

Employer Not Required to Convert Temporary Light-Duty Position to Permanent If It Creates a New Job

An injured police patrol officer was temporarily assigned for years to a civilian, front-desk position. His doctor certified that his disability was permanent and he would never be able to perform the essential functions of a patrol officer. He was given the opportunity to stay at the front desk, but he would need to change his status from a police officer to a civilian, which he was unwilling to do. He was not qualified for any vacant positions so he retired and sued for disability discrimination under the Fair Employment and Housing Act ("FEHA"). The court found that an employer who reassigns an employee to a temporary light-duty position to accommodate an employee has no obligation

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OBSERVATION FROM THE TRENCHES: PUT YOUR BEST FOOT FORWARD

By: Sarah K. Goldstein

Clients' and attorneys' manners can have great affect on the outcome of a jury trial by pre-conditioning jurors to respect, admire or identify with them. During a recent trial, I was reminded of the importance of good manners in and around the courthouse. During depositions, I noticed that plaintiff had a habit of holding his hand high in the air to inspect his nails. He made a dramatic show of clearing his throat while pushing his hand out of his cuffed sleeve and raising his hand above his head, ostensibly so he could evaluate his nails in better lighting. He turned his nose up during his nail examination in an amazing display of snooty elitism. I secretly hoped he would perform his nail inspection during the jury trial.

Sure enough, right in the view of the jury, plaintiff conducted his arrogant nail examination. I was filled with glee as I saw a few jurors observe plaintiff with a look of disdain. Was plaintiff's snooty behavior the reason we won the trial in a virtual landslide verdict? Not likely. However, I have to think it helped. At the conclusion of the trial, attorneys were given an opportunity to speak with jurors to obtain their opinions about the case. We asked whether any of them had seen plaintiff examining his nails. A few confirmed that they had seen it and shook their heads as if to say, "shame on you." One juror added that she noticed during trial the plaintiff did not push his chair in to assist his own attorney to maneuver around him while cross-examining a witness. I thought to myself, "what an interesting thing for a juror to notice. She made a judgment about his manners."

On the other hand, during the same trial, my client made a positive impression on at least one juror by simply minding his manners. Jury selection had just begun and we had not yet empanelled the jury when we took a lunch break. We stepped into an elevator that happened to have a potential juror already in it. As the doors started to close another person approached. My client graciously reached out and re-opened the doors so the person could get in. It was a simple polite gesture that even the most well-mannered people sometimes forget or neglect to do. I noticed the potential juror give him a nod of approval. This individual on whom my client had made a positive impression sat as a juror in our case. I was pleased when I realized that this juror already had some thought that my client was “a good guy.”

My point is simple: at trial you want to make the best impression every way you can. You never know who is watching you, overhearing you, and pre-judging you. Everyone is familiar with the expression, “you never get a second chance to make a good first impression.”

Polite manners are non-verbal communication of respect, kindness, consideration, and honesty. They bolster your testimony by telling the jury about yourself. Trial can be a stressful, emotional time. It takes more than good manners to win at trial, but good first impressions go a long way. Give yourself an extra edge by remembering your manners and putting your best foot forward.

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DRUG TESTING IN THE WORKPLACE

HR CORNER

California law allows an employer to require a suspicionless drug test as a condition of employment after a job offer is tendered but **before** employment begins. In very limited circumstances, the pre-employment drug test can be deferred until after the employee has begun work, but the courts have said that an employer cannot require most current employees to submit to a drug test as a condition of promotion. However, suspicionless drug testing of employees whose work is in transportation or is safety-related may be permitted. Of course, if an employer has a reasonable suspicion that the employee is under the influence of a substance while at work, the employer may require the employee to undergo a drug test.

Limited Legality for Random Drug Testing

Cases upholding random drug testing are limited to those involving employees in specific, narrowly defined job classifications or professions that may be categorized as part of a pervasively regulated industry (where the employee has less expectation of privacy given the nature of employment) or where positions are critical to public safety or the protection of life, property, or national security. For example, random testing has been upheld for truck drivers under the Federal Highway Administration (FHWA) regulations, certain pipeline workers, aviation personnel, and correctional officers having contact with prisoners.

Except for these circumstances, random drug testing is not allowed in California. In a case involving the type of justification needed to test employees, the court held that any intrusion into an individual's privacy “must be justified by a compelling interest.” The court found that the employer's concern in that case about deterrence, efficiency, competency, a drug-free environment, rule enforcement, and ensuring public confidence in the railway system were not compelling interests.

Moreover, the court held that safety was not a compelling reason for testing the employee involved (a computer operator for a railroad in a non-safety sensitive position) and that her discharge for refusing to consent to the test was a breach of the covenant of good faith and fair dealing.

Pre-Employment Drug Screening

Most employers can require an applicant, as a condition of hiring, to successfully pass a pre-employment drug screen. The federal Americans with Disabilities Act (“ADA”) and California’s Fair Employment and Housing Act (“FEHA”) place restrictions on the timing of any pre-employment medical examination. You can only require a medical examination after you make an offer of employment and before the beginning of the applicant’s duties.

Screening of Employees Seeking Promotion Not Allowed

The California Supreme Court has addressed the issue of drug testing current employees seeking promotions. In that case, applicants for employment as well as current employees seeking promotions were required to undergo urinalysis testing for drugs and alcohol. The court upheld the portion of the drug testing program requiring applicants to undergo testing, but found the requirement that current employees be tested was unconstitutional.

Suspicionless Drug Test Immediately After Employment

While suspicionless drug testing must take place before the beginning of employment, a California Court of Appeal recently held that post-hire suspicionless testing may be permitted only in limited circumstances, such as where the job applicant requests and receives a delay in submitting to the pre-employment drug test until after the start of employment.

Routine Testing in Annual or Periodic Physical Examination

Although the issue is not yet determined in California, federal courts and some state courts have approved testing as part of annual or periodic physical examinations. However, under the ADA and FEHA, the physical examination must either be part of a voluntary employee health program or job-related and consistent with business necessity.

If you choose this type of testing program you should notify employees that drug and alcohol tests will be administered as part of the physical examination. Advise employees that you may take disciplinary action if they refuse to consent to a test. However, an employee’s refusal to consent to the release of purely medical information obtained from the test cannot be the basis for discipline under the California Confidentiality of Medical Information Act.

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WAGE & HOUR UPDATE

California Minimum Wage Will Increase in 2007 and 2008

By: Jeff Ranen

The California state legislature and Governor Arnold Schwarzenegger reached a compromise in August 2006 whereby the state minimum wage, currently set at \$6.75 per hour, will increase to \$7.50 on January 1, 2007 and \$8.00 on January 1, 2008.

This state legislation will not affect the federal minimum wage, which is currently \$5.15 per hour. For states which have a higher set minimum wage than the federal minimum wage, the state wage governs.

This increase in minimum wage triggers two obvious consequences for employers. First, payroll and human resource professionals must confirm with their payroll providers that all employees are being paid above this minimum hourly rate. Employers may also want to audit the current compensation levels of their non-exempt employees and make raises and adjustments where appropriate.

Second, employers must ensure that modestly-paid exempt salaried employees still satisfy the "salary test" of the exemption. After January 1, 2008, the minimum monthly salary for exempt employees under the executive, administrative, and professional exemptions will be \$2,773.33, which equates to an annual minimum salary of \$33,280. This means that all employees classified as exempt under these three overtime exemptions must earn at least \$33,280 per year in order to qualify for the exemptions.

The Employment Group of LBBS will be closely following this legislative development.

Jeff Ranen is a senior associate in the Employment Group, Los Angeles.

RECENT CASES OF NOTE

FEDERAL

Northern California Federal District Court Rules that the Americans with Disabilities Act Applies to the Internet

- *National Federation of the Blind v. Target* (N.D. Cal. 2006)

As predicted by Los Angeles associate Jeff Ranen in the last quarterly newsletter, a federal district court in Northern California ruled on September 6, 2006, that Internet websites fall under the purview of the Americans with Disabilities Act and must be made accessible to the visually-disabled. In *NFB v. Target*, the nation's leading advocacy group for the visually-disabled sued the retailer Target as a class action lawsuit under the theory that its website, for which it conducts business and advertises products, is not compatible with software that visually-disabled people use to access the Internet.

Upon the filing of the lawsuit in February 2006, Target filed a motion to dismiss, arguing that the ADA does not apply to the Internet because the Internet is not a physical space. The court disagreed, interpreted the ADA broadly, and held that the Internet websites can be a "public accommodation" for which equal access must be granted to people with disabilities.

The implications of this lawsuit on California's businesses may be severe. We predict that plaintiffs' attorneys will closely follow this case and will file thousands of lawsuits against companies who do business on the Internet if the NFB prevails against Target.

Reassignment of Duties and Suspension Can Be Retaliatory Discrimination

- *Burlington Northern & Santa Fe Railway Co. v. White* 126 S.Ct. 2405 (2006)

An employee of a railroad carrier brought a Title VII action against her employer, alleging sex discrimination and retaliation. The issue was whether Title VII allows for employees to recover damages after being subjected to "materially adverse" retaliation during workplace disputes. The U.S. Supreme Court ruled unanimously that federal civil rights laws allow employees subject to "materially adverse" retaliation during workplace disputes to recover financial damages from their employers. Writing for the majority, Justice Stephen Breyer opined: "[t]he antiretaliation provision protects an individual not from all retaliation but from retaliation that produces an injury or harm."

The decision upholds a Sixth Circuit Court of Appeals decision in a dispute between Burlington Northern Santa Fe Corp. and Sheila White, a forklift driver based in Memphis who had sued Burlington Northern after the company took a series of actions against her after she complained of harassment by a supervisor. Following her complaint, the company suspended her supervisor but also turned the forklift duties, considered to be less demanding than other railyard work,

over to someone else with greater seniority. This reassignment caused White to file a complaint with the EEOC. She then filed other charges after she was suspended for 37 days without pay following a dispute with a coworker. She was awarded \$43,000 in actual damages against the company; the Sixth Circuit later upheld the decision.

The opinion is an attempt to clarify and reconcile how federal appeals courts decide workplace retaliation cases, which can include financial damages against businesses, under Title VII. This decision is being viewed as shifting the balance of power in employment settings toward employees by establishing a broader legal standard for retaliation claims, an area of litigation that has exploded in recent years. Under the Supreme Court's standard, employers are liable for unlawful retaliation if their actions "interfere with an employee's efforts" to ensure that he or she is not discriminated against in the workplace. The anti-retaliation provision of Title VII "seeks to prevent harm to individuals based on what they do, i.e., their conduct," such as filing a discrimination complaint. According to Breyer's opinion, "the jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one."

The court also found that a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. The jury had considerable evidence that the track laborer duties were more arduous and dirtier than the forklift operator position, and that the latter position was considered a better job by male employees who resented White for occupying it. Based on this record, the court believed that a jury could reasonably conclude that the reassignment would have been materially adverse to a reasonable employee.

First Amendment Does Not Protect a Government Employee

- *Garcetti v. Ceballos* 126 S.Ct. 1951 (2006)

A deputy district attorney filed a complaint against Los Angeles County and his supervisors at the district attorney's office, alleging that he was subjected to adverse employment actions in retaliation for engaging in protected speech, that is, for writing a disposition memorandum in which he recommended dismissal of a case on the basis of purported governmental misconduct.

The United States Supreme Court held that: (1) when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline, and (2) the deputy district attorney did not speak as a citizen when he wrote his memo and, thus, his speech was not protected by the First Amendment.

The court's ruling does not mean that public employees are entirely without protection for speech made in the course of their official duties. A powerful network of legislative enactments - such as whistle blower protection laws and labor laws - are available to those who seek to expose wrongdoing. The Court rejected the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.

Award of Benefits to African-American Players Not Unlawful Discrimination Against White Players

- *Colbern v. Selig* 447 F.3d 748 (9th Cir. 2006)

Retired professional baseball players, who were Caucasian or Latino, brought an action against Major League Baseball ("MLB") claiming violation of Title VII by excluding them from medical and supplemental income plans devised for the former Negro League players.

The Court of Appeals held that the MLB players were not subjected to an adverse employment action; the former Negro League players were not similarly situated with retired MLB players; and the MLB had a legitimate, non-discriminatory reason for awarding certain medical and pension benefits only to former Negro League players.

The fact that the appellants, retired white players who played in the Major Leagues, did not receive the same or substantially similar benefits as those provided under the Negro League Plans could not be considered an “adverse employment action” because the provision of the benefits by the MLB was not an “employment action” at all.

Public School Teacher who Failed to Apply for a Transfer Lacks Standing to Raise a Constitutional Challenge to a Race-Conscious Faculty Transfer Policy

- *Friery v. Los Angeles Unified School District* 2006 448 F.3d 1146 (9th Cir. 2006) (en banc)

A white teacher brought an action against school defendants, challenging a policy that forbids teachers from transferring between schools where such a transfer would push the ratio of white to nonwhite faculty at the destination school beyond a prescribed balance. The court noted that “. . . a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit.” The court also noted that “standing does not require exercises in futility.” Following the denial of a request for certification, the Court of Appeals held that it was not clear as to whether the school district's transfer policy would have affected the teacher, requiring remand to develop the factual record to determine whether it was futile for plaintiff to challenge the policy and regarding whether the teacher had standing to bring the claim.

Requiring Only Women to Wear Makeup Is Not Sex Discrimination

- *Jespersen v. Harrah's Operating Co.* 444 F.3d 1104 (9th Cir. 2006)

A female bartender at a casino terminated for refusing to wear makeup, sued her employer for sex discrimination under Title VII, alleging both disparate treatment and disparate impact, and asserted claims under state law. The court held that: (1) the requirement that only female employees wear makeup was insufficient to establish a prima facie case that Title VII sex discrimination was based on disparate impact; and (2) the grooming policy did not constitute impermissible sex stereotyping.

Plaintiff Jespersen failed to present evidence sufficient to survive summary judgment on her claim that the policy imposes an unequal burden on women. With respect to sex stereotyping, the court held that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping, but that on this record, Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping.

CALIFORNIA

Termination “At Any Time” Really Means “At Will”

- *Dore v. Arnold Worldwide* (2006) 46 Cal.Rptr.3d 668

A former employee sued his employer alleging breach of contract, breach of the covenant of good faith and fair dealing, and fraud in connection with his termination. The Supreme Court held that an employment contract providing for termination “at any time,” without more, does not create implied-in-fact agreement that termination will occur only for cause.

In this case, the court seemed convinced that an at-will contract can be cancelled by either side without cause. The trial court had granted the company summary judgment, ruling that the presumption of at-will employment codified in the state labor code and the express at-will provision described in a pre-employment letter to plaintiff precluded the finding of any implied good-cause agreement. The letter in question stated: “employment...is at will... This simply means that Arnold Communications, Inc. has the right to terminate your employment at any time just as you have the right to terminate your employment with Arnold Communications, Inc. at any time.” The Supreme Court found the language unambiguous. The letter plainly said employment would be “at will” and the letter used language similar to that used in Labor Code Section 2922. An employment contract providing for termination “at any time,” without more, is not reasonably susceptible to an interpretation allowing an implied-in-fact agreement that termination will occur only for cause; verbal formulation “at any time” is not per se ambiguous merely because it does not expressly speak to whether cause is required.

Supreme Court Holds “Discharge” Includes End of One-Day Assignment

- *Smith v. Superior Court (L’Oreal)* (2006) 39 Cal.4th 77

A hair model who served in a cosmetic company's one-day show filed a class action lawsuit against the company, alleging a violation of Labor Code statutes for the employer's failure to promptly pay modeling fee to her and other models. The Supreme Court held that the release of an employee upon completion of a job assignment constitutes “discharge” for purpose of statutes requiring immediate payment of wages.

The issue for the court was whether it is a “discharge” when the original agreement between the employer and employee was that the employee would work for only one day. After review of the relevant statutory language and the overall statutory scheme, the legislative history, and the intended purpose of the immediate wage payment legislation to address the economic vulnerability of discharged employees and potential harm to the public, the court concluded the discharge element of Labor Code sections 201 and 203 may be satisfied either when an employee is involuntarily terminated from an ongoing employment relationship or when an employee is released after completing the specific job assignment or time duration for which the employee was hired.

County Employee Is Not Entitled to Reinstatement or Back Wages/Benefits

- *Stephens v. County of Tulare* (2006) 38 Cal.4th 793

After a county employee left his job due to a work-related injury, his application for disability retirement was denied. When the employee returned to work with a different assignment, the county refused to pay him back salary and benefits under a statute requiring reinstatement after the retirement board decided that the employee was not qualified for disability retirement. The employee petitioned for a writ of mandate directing the county to reinstate him retroactively.

The Supreme Court held that the employee was not “dismissed for disability” and was therefore not entitled to reinstatement as of the day following his dismissal. Government Code section 31725 provides that “if (1) the county board of retirement rules an applicant/employee is not permanently disabled so as to be entitled to a disability retirement, (2) the board denies the employee’s disability retirement application on that **ground**, and (3) no appeal is filed or all appeals are final, then the applicant/employee is entitled to reinstatement to his or her prior position if (4) the employing county has previously ‘dismissed’ the employee ‘for disability.’”

In this case, the employee failed to satisfy the fourth element necessary to trigger an application of section 31725 by showing he was dismissed as a result of his disability. An employee who is neither sent away nor removed, but voluntarily absents himself or herself from the job, without more, cannot validly claim he or she was dismissed by the employer. Because the county never refused to reinstate Stephens, but simply told him to take sick leave until his medical condition allowed him to perform the modified light duty recommended by his physician, the court concluded that the county never dismissed Stephens within the meaning of section 31725.

Plaintiff Who Alleged Disability Discrimination in an Administrative Complaint May Raise a Failure to Accommodate Claim in Subsequent Lawsuit

- *Williams v. Genentech, Inc.* (2006) 139 Cal.App.4th 357

A terminated employee filed an action against his employer alleging causes of action based on disability discrimination under the Fair Employment and Housing Act (“FEHA”). The Court of Appeal held that the former employee failed to establish disability discrimination under the FEHA, where the employer's evidence created the reasonable inference that the employee was unable to perform the essential functions of her job at the time the decision was made to fill her position, the former employee presented no evidence rebutting that inference, and she presented no medical evidence establishing that at the time the decision was made to fill her position, she could have returned to her position with a reasonable accommodation.

In such cases, the scope of the Department of Fair Employment and Housing complaint defines the permissible scope of the subsequent civil complaint. However, the court stated that FEHA requires that its procedural requirements “be construed liberally for the accomplishment of [its statutory] purposes.” As a result, California courts have endorsed the “like or reasonably related standard.” Under that standard, the exhaustion of remedies bar does not arise where “an administrative investigation would likely have encompassed the claim alleged in the civil complaint”

Companies Must Engage in an Informal, Interactive Process Aimed at Identifying and Providing Necessary and Reasonable Accommodation

- *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34

An employee who was laid off as part of reduction in force while suffering from a workplace injury sued his employer, alleging disability discrimination in violation of the Fair Employment and Housing Act and wrongful termination in violation of public policy after the employer offered an alternative job and then rescinded the offer. The Court of Appeal held that an employer must engage in an informal interactive process aimed at effecting a reasonable accommodation, and provide a necessary and reasonable accommodation to an applicant or an employee whom it regards as physically disabled. A failure to engage in this process exposes a company to unnecessary liability for violations of state and federal laws.

Health Care Employees Working Beyond An Alternative Workweek Were Entitled to Receive Time-and-a-Half Only After Performing Forty Hours of Work

- *Singh v. Superior Court* (2006) 140 Cal.App.4th 387

A nurse sued operators of a hospital, alleging violations of labor laws, conversion, and theft of labor. The nurse sought to recover unpaid overtime compensation for all hours worked on days other than those scheduled by an alternative work week schedule of three 12-hour days. The Court of Appeal held that as a matter of first impression, health care employees working beyond an alternative work week schedule of three 12-hour days were entitled to receive time-and-a-half pay only after performing 40 hours of work, rather than for every hour worked beyond their regularly scheduled alternative work week schedule.

Attorney May Verify a DFEH Complaint for an Employee

- *Blum v. Superior Court* (2006) 141 Cal.App.4th 418

A former employee sued his employer for wrongful termination asserting violations of California Fair Employment and Housing Act ("FEHA") and other public policies. The Court of Appeal held that a verification of the DFEH complaint was a prerequisite for the action, but an attorney could verify the administrative complaint for the employee.

Case summaries were prepared by Joshua Mizrahi and Jeff Ranen, Associates in the Employment Group, Los Angeles.

Employment Group Victories

- Congratulations to Los Angeles Attorney **Rand Carstens** who, in association with Cynthia Vroom of the University of California's Office of the General Counsel, successfully moved and obtained summary judgment on behalf of The Regents of the University of California, Governor Arnold Schwarzenegger, and eight other individual defendants in an action brought under California's Information Practices Act ("IPA") as codified in California Civil Code section 1798. The IPA is a privacy statute whose goal is to minimize the collection and maintenance of personal information. The Plaintiff, a former UCLA student, sued The Regents and others claiming numerous violations of the IPA, including deliberate destruction of his graded exams without his permission; leaving student records unattended in public hallways; refusing to account for the whereabouts of numerous records; failure to safeguard his records, failure to implement IPA compliance policies or designate an IPA compliance agent; and failure to provide him copies of his records within statutory time limits – all in a conspiracy to deprive him of his rights under the IPA. The defense contended that the IPA simply does not prohibit the destruction of documents by an agency according to its own internal policy. The Regents' policies, which have the force of statute, do not require the retention of student graded exams once a grade has been entered. Both the University of California and the UCLA campus have published policies and procedures in place for the protection of student records. There is a designated Information Practices Coordinator on each campus, and several UCLA publications direct students to that office for information and assistance. UCLA's Information Practices Coordinator offered to assist the Plaintiff once she became aware of his requests; but he refused to cooperate and repeatedly challenged her authority. The Court agreed with the defendants and ordered judgment in favor of the defendants. This appears to be one of the first suits of its kind as there are no reported decisions involving alleged violations of the IPA.

- Congratulations to Orange County Associate **Bernadette Chala** for her recent article, “First Amendment Protection Limited by United States Supreme Court for Public Agency Employees” (*Cellabos v. Garvetti*) published in DRI’s Employment Law Summit Newsletter was selected to be the opening article for DRI’s weekly newsletter to all members.
- In the case of *Ballou v. County of Riverside*, the Fourth District Court of Appeal affirmed summary judgment by San Bernardino partner **Gail Montgomery** for the County of Riverside in a whistle-blowing case under Labor Code section 1102.5. Plaintiff contended he was discharged for reporting an unsafe working condition concerning asbestos in overhead pipes at transportation buildings. The Court of Appeal agreed with Ms. Montgomery that plaintiff failed to establish the causal length between his protective activity and discharge and that plaintiff failed to rebut the County’s evidence establishing a legitimate, non-retaliatory reason for the discharge.
- Vice-Chairman of the Employment Group, **Charles Thompson** (San Francisco) was featured in the *California Lawyer* August 2006 magazine Employment Roundtable. Mr. Thompson was part of a panel of experts discussing several employment cases and their impact on the law.
- Congratulations again to **Gail Montgomery**. In the case of *Jenkins v. County of Riverside*, the California Supreme Court denied plaintiff/appellant’s petition for review and request for depublication of the Court of Appeal decision. The Court of Appeal decision affirmed summary judgment in favor of the County for the discharge of a temporary employee who exceeded the authorized number of hours permitted under an ordinance. Plaintiff had worked year-round and in excess of the authorized number of hours for six years. Plaintiff claimed the County terminated her employment because she had a disability and that the County failed to accommodate her disability. The Court of Appeal held that the Ninth Circuit Court of Appeal interpreted California Law wrongly in a companion case filed in Federal District Court regarding plaintiff’s status. The Ninth Circuit concluded plaintiff became a de-facto regular employee despite her temporary classification and that she was denied due process at discharge. The California Supreme Court renders the Court of Appeal decision precedent in the State of California on issues relating to the status of temporary employees.
- Orange County partner **Nancy Zeltzer** was successful in having an action dismissed in Federal Court. The case involved claims of violation of the Civil Rights Act as well as Fair Employment Housing Act claims, all stemming from the order by the employer that plaintiff submit to a fitness-for-duty examination due to concerns regarding the employee’s mental status and fear of possible violence from the employee. The Court dismissed the federal claims and refused to exercise pendent jurisdiction over the state claims. Plaintiff’s motion for reconsideration was also denied.
- San Bernardino partner **Gail Montgomery** received a defense decision in a binding arbitration before the American Arbitration Association. The arbitrator agreed that the plaintiff was unable to establish an implied agreement of employment permitting discharge only for good cause, and that plaintiff was an at-will employee at all times who could be discharged for any reason. Plaintiff also failed to establish fraud and misrepresentation.
- A Canadian citizen came to work in California and her employment was soon terminated. As part of the subsequent litigation, partner **Gordon Fine** (San Francisco) moved to compel the plaintiff to post a bond for the amount of cost that the defendant company might reasonably recover should it prevail at trial. The governing statute, *Code of Civil Procedure* section 1030, was enacted decades ago, so Californians who prevailed in a lawsuit would easily be able to recover the costs associated with defending a lawsuit against non-Californians. The Court ordered the Canadian plaintiff to post the bond. The plaintiff refused to post the bond and **Mr. Fine** returned to court and had the case dismissed.

- Lewis Brisbois Bisgaard & Smith LLP is pleased to announce that partner **Timothy Watson**, has transferred to our San Diego office as part of the Labor and Employment team. The Firm's San Diego office now offers representation of clients and all phases and types of employment litigation, counseling, training, and collective bargaining. For more information, please contact Mr. Watson at watson@lbbslaw.com or visit our website at www.lbbslaw.com.
- **Karen L. Karr** has accepted a position as partner and will be working in the Phoenix and Tucson offices. Ms. Karr has extensive experience representing local and national companies with employees in Arizona. She will join the Firm in November 2006.
- In the month of August, the Los Angeles, Orange County, San Diego and San Francisco offices conducted mandatory supervisory harassment prevention training seminars. This new law, codified in California Government Code section 12950.1 (formerly AB 1825) requires that all California employers with 50 or more employees provide at least two hours of harassment prevention training to all supervisors by December 31, 2006 and every two years thereafter. The law also requires that new supervisors and newly-promoted supervisors be trained within six months of hire or promotion. The training took place at local Firm offices and was offered at a cost-effective way for Firm clients to train new employees, employees who were newly promoted and/or employees who had not been trained by the December 31, 2006 deadline. The Employment Group plans to offer these training sessions on a quarterly basis. The Firm also offers on-site training for employers in both English and Spanish. Attorneys who participated were **Melissa Omansky** (Los Angeles and San Diego), **Steve Gatley** (Los Angeles), **Gordon Fine** (San Francisco), and **Mercedes Cruz** (Costa Mesa).
- Lewis Brisbois Bisgaard & Smith LLP ("LBBS") was ranked by *California Lawyer Magazine* as the sixth largest law firm in California and second most active in litigation. The article also recognized LBBS for its diversity among attorneys.

Upcoming Events

Southern California Employment Law Seminar

October 27, 2006

8:00 a.m. - 1:30 p.m.

Marriott Hotel, 333 South Figueroa Street, Los Angeles, CA 90071

The Firm's Los Angeles office is offering a complementary seminar including breakfast and lunch on the following topics: Wage and hour, workers' compensation, hiring and firing, alternative dispute resolution, engaging in the interactive process, legislative updates and harassment training. The keynote speaker will be Carla Barboza, former EEOC litigation attorney and highly respected mediator. For information or to RSVP, please contact Mercedes Cruz by October 16, 2006 at (714) 668-5557 or seminar@lbbslaw.com. Please see the attached flyer for additional information.

Professional Liability Underwriting Society Conference

November 8-10

Chicago, Illinois

Los Angeles Partner Sarah Goldstein will be co-chairing a session at the PLUS International Conference. The seminar topic is professional liability/general liability cross-over policies. The panelist will discuss the need, convenience, demand and pitfalls regarding combination policies; the forms, triggers and claim challenges presented by combined policies; and the classes and services best served by combined policies. Los Angeles Partner Gordon Calhoun will also be a speaker at this event. If you would like to attend or need more information, please contact Ms. Goldstein at goldstein@lbbslaw.com or (213) 680-5151. You can also find more information by visiting the following website: www.plusweb.org.

Orange County partner **Keri Bush** is scheduled to provide the following speeches:

DRI Annual Meeting

October 11th thru 15th, 2006

San Francisco Marriott

“Gender Matters-A Practical Examination

of How Jurors

Perceive Attorneys”

Lawyers’ Club of San Diego

October 19, 2006

Bristol Hotel San Diego and San Diego Inns of Court

“Women Who Try Cases-Problems and Solutions to the Gender Issue”

West Virginia Defense Counsel Women’s Conference

October 30, 2006

Marketing and Litigation Bias and How to Overcome it (Moderator and Speaker)

News & Trends

Text Message: C/YA

Blue Banana, a body-piercing and jewelry shop, thought it would be progressive and trendy when it decided to terminate one of its staff members. The company sent a text message to a sales assistant while she was off work with a migraine, stating, “[w]e will not require your services anymore...thank you for your time with us.” The store director added that the dismissal method was part of the “youth culture” and that text messaging was a major means of communications.

Employer Sued for Asking About “Pot” Use

Lawsuits have forced more than 100 companies in California in recent years to omit questions on

applications about arrests that did not result in a conviction as well as questions about marijuana convictions that are more than two (2) years old. California law forbids employers from inquiring about arrest records or information concerning a referral to a drug diversion program. Major companies that have been targets of these lawsuits include Starbucks, Arrowhead Pond of Anaheim, and Fry's Electronics.

Jury Awards for Discrimination Cases

Data collected on the median jury awards on U.S. discrimination lawsuits from 1998 to 2004 shows that the most common are based on sex and race. The number of claims by category were sex (39%), race (22%), disability (16%), age (14%) and other (9%). The highest share of awards were for age discrimination claims which fell between \$100,000 to \$249,000 (24%) and \$250,000 to \$499,999 (20%).

The median awards were:

•	Age	-	\$262,405
•	Disability	-	\$211,272
•	Sex	-	\$186,000
•	Other types of bias	-	\$101,563
•	All discrimination	-	\$187,583
•	All employment cases	-	\$175,000

The settlement awards were:

•	Age	-	\$72,150
•	Disability	-	\$71,000
•	Sex	-	\$75,000
•	Race	-	\$80,000
•	All discrimination	-	\$70,000

Firings Over E-Mail Use on the Rise

The moral of this story is, do not put anything in an email you would not want the whole world to see. According to a recent survey, an increasing number of workers are losing their jobs because of e-mail violations. A third of employers in the study, fired employees in the past year for violating workplace e-mail policies. Most companies now have staff whose job it is to read other staffers' e-mails. Almost half of the employers regularly check the contents of the e-mail their people sent. Workers do not seem to realize they are being watched and could get in trouble. Former Boeing CEO Harry Stonecipher, who had been married for 50 years, was forced to resign after his affair with a female colleague was discovered. The sexually explicit e-mails he sent her, on his company's e-mail system, became embarrassing evidence. Former Merrill Lynch analyst Henry Blodget praised stocks in public but derided them as dogs in e-mails. He was barred for life in the securities industry.

Most large companies archive their e-mails. Most firings occur because of sending messages with unacceptable content such as a racist or sexist joke or smutty stories or pictures.

Employers have good reason to worry about employees' e-mails. In the past year, a quarter of those in the survey were ordered by court or regulators to hand over e-mail records. Although more than 80% of companies have written policies outlining acceptable e-mail use, only half gave workers formal training on e-mail policies in the past years.

Compiled from various news sources.

Lewis Brisbois Bisgaard & Smith LLP

Employment Group Newsletter

The LBBS Employment Group Newsletter is a periodic online newsletter sent to our clients. We hope you find the foregoing informative and helpful.

- Editor in Chief** - John Barber - Mr. Barber is Co-Chair of the Employment Group. Mr. Barber can be reached at barber@lbbslaw.com or (213) 680-5107.
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- Associate Editor** - Jeff Ranen - Mr. Ranen is a senior associate based in Los Angeles. Mr. Ranen can be reached at ranen@lbbslaw.com or (213) 580-3921.

If you would like us to add or remove you from our mailing list, or if your email address has changed, please notify Steven G. Gatley at gatley@lbbslaw.com.

The information contained in this Newsletter is for informational purposes only and not for the purpose of offering legal advice or a legal opinion on any matter. The information contained is confidential and is intended only for the individual named.

Lewis Brisbois Bisgaard & Smith LLP's Employment Practices Department provides a full range of employment-related legal counsel and litigation services to clients ranging from Fortune 100 companies to individual proprietors. The Department's services include preparation of employment policies and handbooks, comprehensive employee training programs, wage and hour counseling, employer audits, workers' compensation representation, and all aspects of employment litigation. The Department has represented employers before the United States Equal Employment Opportunity Commission, California Fair Employment and Housing Commission, California Employment Development Department, California Division of Labor Standards Enforcement and numerous other regulatory agencies and government institutions. In addition, we have defended employers at every level of the State and Federal judicial system. Because **Lewis Brisbois Bisgaard & Smith LLP** has an office in every major California urban and business center, and in New York, Illinois, Arizona and Nevada, we are able to provide localized expertise and immediate response to each client, regardless of location, size or concern. We encourage you to contact us to discuss your employment-related needs.

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