



# California UPDATE

## EMPLOYMENT LAW

THIRD QUARTER 2009

### All “A-Twitter” Over Workplace Privacy

Workplace privacy issues are arising with greater frequency as more employees use employer-issued email devices and social networking sites such as Facebook and Twitter. Messages sent by employees from employer-owned network devices can expose the company and other employees to liability, spam, and inappropriate material, or may distract employees from work. Employers may also be obligated to preserve or archive these types of electronic communications in the event of litigation. As new technologies and electronic services emerge, employers should review their policies on electronic communications in the workplace.

Last year, we reported on a Ninth Circuit case in which the court determined that a text-message provider violated federal law by disclosing a police officer’s text-messages on a city-issued pager to the city’s police department without the police officer’s permission. The case, *Quon v. Arch Wireless Operating Co. Inc.*, concerned an officer in the City of Ontario Police Department who was issued a two-way pager by the City. Although the City’s policy stated that employees would have no expectation of privacy in electronic communications made with City property, the City also had

an informal policy allowing personal use. After the City monitored and requested personal text messages of the officer from the wireless company, the officer sued for violation of his right to privacy. The court found that there was a reasonable expectation of privacy in the content of the messages due to the informal policy that was in use by the employer. The Ninth Circuit recently denied a request for rehearing of this ruling.

With the rise of social networking for business and personal use, this case serves as a good reminder of the need for clear and consistently enforced computer, internet, and electronic device usage policies. Employers should communicate with employees regarding appropriate use of company owned equipment and networks, and explain why such policies are necessary. ♦

### Tough Times in California: Unemployment Approaches 12%, The UI Fund is Broke, and Jobs are Moving out of State

Unemployment in California continues to climb, and the unemployment insurance trust fund has run out of money. The state is currently relying on federal loans to pay benefits to unemployed Californians. Legislation has been introduced (SB 222) to triple the unemployment insurance tax on employers. California already has one of the highest such tax rates in the country, and this added burden would be one more disincentive to add jobs in the state. The California Chamber of Commerce is opposed to this bill, and the governor has not indicated whether he will sign it.

Additionally, a new study of long-term employment trends in California indicates that, since 1990, California has lost 30% of its middle class manufacturing and high tech jobs to other states. The Milken Institute reports that for over two decades jobs have been migrating to other states with lower costs and a less hostile regulatory and litigation climate. Many California legislators, who are dealing with a budget shortfall of billions of dollars, still don't seem to grasp the connection between jobs and tax revenues. ♦

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### Judge Gets Whiff of Discrimination, Denies Summary Judgment

A federal judge in San Francisco has ruled that an African American employee can proceed to trial on his claim that the company discriminated against him in favor of Hispanic employees. In *Harris v. Vance International*, N.D.Cal., 6/3/09, Judge Chen ruled that the employee had raised triable issues of fact as to whether his termination was motivated by bias as opposed to performance factors. Among other things, the company argued that the employee had poor personal hygiene habits and had to be counseled about his

offensive body odor. The employee countered with his own statement that he did not have a body odor problem and that a female coworker had actually complimented him on his choice of cologne. The judge ruled that “there is adequate evidence to raise a disputed issue of fact” on the question of the termination. The court did, however, dismiss the employee’s harassment claim, finding insufficient evidence of a “hostile environment.” ♦

# Layoffs Mean Lawsuits: What Employers Can Do to Reduce Exposure to Costly Litigation

Employers continue to face tough decisions about layoffs. Many employers have sought alternatives, such as hiring freezes, cancelling costly business trips, reducing hours, cutting salaries, and implementing voluntary retirement plans. Unfortunately, as the economy continues to struggle, many companies can no longer avoid reducing their workforce (or reducing it further). Those companies fear lawsuits, and their accompanying costs, disruption, and negative publicity.

These fears are legitimate. We reported in our last issue that, according to the Department of Fair Employment and Housing, employment discrimination filings in California last year rose more than 14 percent, to 18,750 – their highest level since 2002. Similarly, the Equal Employment Opportunity Commission reported that workplace discrimination charges increased by 15 percent from 2007. However, employers can minimize the risk of post-layoff employment lawsuits by proactively creating and implementing a self-audit checklist.

## 1. Identify and Document Objective Criteria for the Layoffs and Select Neutral, Unbiased Decision Makers.

Employers should create objective criteria for deciding which employees to let go. For example, an employer's decision may be based on years of service; experience in the field; documented job performance; documented disciplinary history; the status of the worker (e.g. temporary, part-time, or contract employees); or on any combination of these categories. The cost of developing an objective plan is only a fraction of the cost of defending a single lawsuit.

Similarly, direct managers or supervisors should not necessarily decide who gets laid off. An employer should select a neutral, objective final decision maker, such as someone in human resources. Having a neutral and detached decision maker will help guard against discrimination and retaliation claims, and can serve as an important internal check as well. Even smaller employers should involve more than one manager in the decision-making process to avoid the appearance of bias, and document the reasons each manager supports the decisions made.

## 2. Audit Applicable Company Policies

Before an employer lays off employees, it should audit applicable company policies and procedures, and if necessary, revise written policies to provide maximum

flexibility in making decisions about layoffs. For example, employers should have a well written at-will employment policy stating that employees may be terminated at any time, with or without notice. Employers should also remove the word “permanent” from their employment applications, employment advertisements, confidentiality agreements, offer letters, and policies so as to avoid conflict with the employer's at-will employment policy.

Each reduction has its own peculiar circumstances and employers may need to handle each reduction differently. If the employer already has a company policy for reductions in force or layoffs, it should follow that policy. If the policy needs to be changed, the employer should make (and communicate) those changes as far in advance of the layoffs as possible. Layoff policies should be designed to preserve employer flexibility in handling workforce reductions.

## 3. Determine Whether the Company Has Obligations Under the WARN Act

Under the Federal Worker Adjustment and Retraining Notification Act (“WARN”) and the California WARN Act, employers may have statutory obligations when discharging a large number of employees.

The California WARN Act is applicable to business entities with 75 or more employees, while the Federal WARN Act applies to businesses with 100 or more employees. Both laws require employers to give employees at least sixty days' written notice of any mass layoff or plant closing. (California WARN also requires employers to provide advance notice of plant relocations). Employers who ignore these rules are liable to employees for back pay and benefits for each day of violation up to 60 days, plus penalties and attorneys' fees. Accordingly, employers should consult with employment counsel to determine whether they have state or federal WARN Act obligations.

## 4. Consider Offering a Severance Package in Exchange for a Release

If financial conditions permit, employers should seek to limit their liability by having employees sign a release of legal claims in exchange for a severance package or other benefit above and beyond the benefits that are received by the employees who do not sign a release. Remember: for a release to be valid, the employer must give the employee something of value to which he or she is not otherwise entitled.

And an employee's signature must be given knowingly and voluntarily. Employers should seek the advice of counsel to ensure that the release protects the employer to the maximum extent possible.

## 5. Risk Assessment: Review the Layoff List

After an employer determines whom to discharge, but before taking steps to implement the layoffs, the employer should review the selected employee list and the supporting documentation to evaluate the risk associated with each employee's termination. Employers should consider whether the data suggests that an employee was selected for termination on the basis of a protected category, such as age or race, or for some other unlawful reason, such as union participation. The employer should also be aware that employees on certain leaves of absence may be protected. And employees who recently engaged in protected activity, such as filing for workers' compensation or acting as a witness in a harassment investigation, have potential retaliation claims if they are included in layoffs on that basis.

Review of the “layoff list” will also help to ensure that the employer's actions do not disproportionately affect a protected group, such as older workers or minority groups. If there are significant disparities, it would be wise to review the process more closely to ensure that there are legitimate, verifiable reasons for the decisions. But unless the employer has a valid written affirmative action plan in effect, it is just as dangerous – and just as illegal – to favor minorities as it is to favor those in any other protected group. Reverse discrimination lawsuits are just as disruptive and just as costly.

## 6. There is No Obligation to Rehire Laid Off Employees, but Employers Must be Consistent

There is no obligation to rehire employees who were laid off. However, if the employer has implemented special procedures regarding the rehiring of laid off employees, it must comply with its own internal policies. Similarly, if the employer has made any promises to the former employees, it may be required to comply with such promises or potentially be liable for a claim of breach of contract. And if an employer hires someone new for a position soon after laying off their predecessor, it raises questions as to whether the layoff was legitimate. ♦

## CALIFORNIA SUPREME COURT UPHOLDS PROP. 8

Recently the California Supreme Court denied challenges to the constitutionality of Proposition 8, which amended the state constitution to define marriage solely as between a man and a woman. The California Domestic Partners Act, however, still provides that those in a registered domestic partnership “shall have the same rights, protections, and benefits” as those granted to spouses. Consequently, changes to the definition of marriage are unlikely to impact California employers.

## Anti-Slapp Law Does Not Protect Solicitation of Employees and Customers

A California Court of Appeal recently held that the California anti-SLAPP statute does not protect defendants accused of soliciting a competitor’s employees and customers. Generally, the anti-SLAPP statute (Strategic Lawsuit Against Public Participation) allows a defendant to move to strike a lawsuit that arises from conduct “in furtherance of the person’s rights of petition or free speech under the United States or California Constitution in connection with a public issue.”

World Financial Group (WFG), sued a competitor for allegedly using WFG’s confidential information and trade secrets to solicit WFG’s customers and recruit its employees. The competitor allegedly held a conference call with current WFG associates during which it asked the associates to come work for it. The competitor also allegedly sent a flyer to WFG associates comparing the two companies, and forwarded WFG associates a PowerPoint presentation containing information about WFG’s commission

structure and other information designed to persuade the associates to join the competitor. WFG also accused the former employees of disclosing confidential information and trade secrets in violation of company policy.

The defendants filed a motion to strike the complaint under California’s anti-SLAPP statute, arguing that their conduct constituted protected speech because it involved subjects of public interest and protected public policy—namely, “the pursuit of lawful employment” and “workforce mobility and free competition.” The court, however, determined that the defendants’ communication was unprotected speech because it was motivated solely by the competitor’s desire to increase its sales ranks, and simply part of a competitor’s pitch to plaintiff’s associates. The communications were neither “about” the public policies implicated, nor designed to inform the public of an issue of public interest. To hold otherwise, the court

noted, would make every case alleging breach of a non-competition agreement or misappropriation of trade secrets subject to the anti-SLAPP statute.

This decision cautions against use of an anti-SLAPP motion to defend against unfair competition claims. That the communications at issue may *implicate* a topic of public interest is not enough. Rather, to successfully defend a claim under the anti-SLAPP statute, a defendant’s speech must actually be about issues of public interest or designed to encourage participation in matters of public significance. The case is *World Financial Group, Inc. v. HBW Insurance & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561. ♦

## California Supreme Court Relaxes Proposition 64 Standing Requirements

In 2004, voters approved Proposition 64, a measure designed to limit frivolous claims under California’s Unfair Competition Law (UCL). Prop 64 limited UCL claims to those by individuals who were actually injured by, and suffered a loss because of, alleged unfair competition. Recently, the California Supreme Court weakened this injury requirement as related to class actions. The court held that only class representatives, and not all absent class members, need to comply with Prop 64 standing requirements.

The case, *In re Tobacco II Cases*, deals with allegations of misleading advertising and statements made about tobacco, the health implications of its use, and its addictive nature. While the subject matter of *In re Tobacco II* is not employment-related, its holding has significant implications for wage and hour class actions, which often include UCL claims to extend the damage period to four years. *In re Tobacco II* will make it easier for plaintiffs to achieve class certification and move forward with frivolous claims which have not resulted in any injury to the employee. ♦

## Cardiac Defibrillators in the Workplace: Save Lives While Avoiding Liability

Although health clubs are the only California employers expressly required to have automatic external defibrillators (AEDs) on their premises, an increasing number of employers are voluntarily choosing to provide AEDs as a part of their first-aid programs. Moreover, some employers may need to provide AEDs in order to comply with California General Safety Order 3400, which requires that employers in “isolated locations” make provisions for prompt medical attention in case of serious injuries or illnesses. Federal OSHA guidelines for workplace first-aid programs also recommend that employers consider the implementation of an AED program. These guidelines can be found online at:

<http://www.osha.gov/Publications/OSHA3317first-aid.pdf>.

Under California law, a “rescuer” who delivers emergency care, in good faith and not for compensation, cannot be held liable for personal injury or death resulting from acts or omissions in rendering the care unless there is gross negligence or willful or wanton misconduct in the use of the AED. The state immunity statute also applies to “acquirers” (entities providing AED devices) if they comply with all regulations governing placement of AEDs. These regulations generally address maintenance and testing of the AEDs, reporting requirements, implementation of written procedures, and training of at least one employee for every AED unit acquired. For a comprehensive list of the requirements governing provision of AEDs, see California Health and Safety Code § 1797.196 and <http://www.emsa.ca.gov/laws/files/regs18.pdf>. ♦

# \$86 Million Dollar Award to Starbucks Baristas Reversed on Appeal

Last year, a trial court in San Diego County awarded Starbucks baristas a whopping \$86 million in restitution for a Starbucks tip pooling policy that allowed shift supervisors to share in tips left by customers. A California Court of Appeal recently reversed this award, finding that an employer is not prohibited from allowing employees who provide service to the customer to keep a portion of the tip proceeds left in a collective tip box. The appellate court distinguished this situation from those where employers mandate tip sharing when the tip is given to an individual service employee. There were limits placed on the appellate court's

decision, and employers should not jump to conclusion that all managers can now share in employee tips. The opinion, however, provides another positive decision for businesses using tip-pooling policies. It is *Chau v. Starbucks Corp.*, Court of Appeal, Fourth Appellate District, Division One, Case No. D053491 (Cal.App. June 2, 2009).

The California Supreme Court will soon weigh in on the subject of tip-pooling. It recently granted review in *Grodensky v. Artichoke Joe's Casino*, Case Number S172237, which involves a class of casino card dealers who claim that the casino's tip pooling practice is unlawful. ♦

## Do You Know About E-Verify?

E-Verify is a program operated by the federal government which allows participating employers to electronically verify the employment eligibility of newly hired employees. Use of E-Verify is voluntary for private employers in California. The effective date of the final rule requiring certain federal contractors and subcontractors to use E-Verify has been delayed until September 8, 2009. Information about E-Verify can be found online at the website of U.S.

Citizenship and Immigration Services, [www.uscis.gov/e-verify](http://www.uscis.gov/e-verify).

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