Silicon Valley Women in Human Resources

LEGAL UPDATES FOR HR PROFESSIONALS

Wednesday, February 16, 2011

presented by

Lisa E. Aguiar
laguiar@rmkb.com

LAWYERS
RMKB
ROPERS MAJESKI KOHN BENTLEY
www.rmkb.com

GET READY FOR THE NEW YEAR: 2010 EMPLOYMENT LAW & REVIEW

What We Will Cover

- New Laws Enacted in 2010
- 2010 Significant Labor and Employment Cases
- Trends to Look Forward to in 2011

Lisa E. Aguiar, Esq.

New Laws Enacted in 2010

- SB1304 Organ and Bone Marrow Donation Leave
- SB1449 Decriminalization of Marijuana
- AB2724-Cal/OSHA "Serious Violations"
- Workers Compensation Notice Requirements
- GINA Regulations Finalized
- DOL Defines "Son or Daughter" for FMLA Leave

New Laws Enacted in 2010

- Organ and Bone Marrow Donation
  - 15 or more employees get PAID leave for
    - Organ donation: 30 work days in one year period
    - Bone marrow donation: 5 workdays in one year period

New Laws Enacted in 2010

- GINA Regulations Finalized
  - GINA applies to employees with 15 or more employees
  - Generally prohibits employers from acquiring genetic information
  - Regulations clarify
    - Inadvertent receipt is not a violation
    - Genetic information can include family medical history of employee

New Laws Enacted in 2010

- DOL Defines "Son or Daughter"
  - Children of unmarried partners
  - Same sex partners
  - Relatives who assume ongoing responsibilities for care

2010 Significant Labor and Employment Cases

- *Reid v. Google*
- *Lu v. Hawaiian Gardens*
- *Barbosa v. Impco Technologies*
- *EEOC v. Prospect Airport and Services*
- *Ontario v. Quon*
- *Rent a Center v. Jackson*
- *Lewis v. City of Chicago*

2010 Significant Labor and Employment Cases

- *Reid v. Google* – Stray Remarks
  - 52 year old employee called "obsolete", "old man" and "old fuddy duddy" by non-decision makers
  - Age based comments were admissible to prove discrimination
  - Remarks not merely stray remarks

2010 Significant L&E Cases

- ***Barbosa v. Impco Technologies***
  - Employee claimed overtime, after investigation it was determined the claim was false
  - Employer terminated employee for making a false claim
  - Court ruled in favor of employee
    - ★A "good faith but mistaken belief" is protected activity

2010 Significant L&E Cases

- ***Ontario v. Quon***
  - Police department audited text messages
  - Officer disciplined for sending sexually explicit messages
  - Officer sued for violation of privacy rights
  - Court ruled in employer's favor
    - ★Employer had legitimate, business reason for reviewing messages

2010 Significant L&E Cases

- ***Overhill Farms v. Lopez***
  - IRS sent "no match" letters to employers
  - Employer terminated all employees who did not respond or could not correct information
  - Employees sued for discrimination
  - Court ruled in employer's favor
    - ★Employees failure to correct erroneous information was valid grounds for termination

2010 Significant L&E Cases

- ***Bright v. 99 Cents Only Stores***
  - Wage order provides employees "shall be provided with suitable seats . . . ."
  - Employee cashier sued for employer's failure to provide seats
  - Court ruled in favor of employee
    - Claims can be based on violation of wage orders

2010 Significant L&E Cases

- ***EFEH v. Lyddan Law Group***
  - FEHC held employers could be liable for failure to take reasonable steps to prevent discrimination, even if no discrimination or harassment is fond to have occurred.

Trends to Look Forward to in 2011

- **Increased EEOC Filings**
- **Increased DOL Investigations**
- **Increased I-9 Audits**
- **Increased EDD Audits**

GET READY FOR THE NEW YEAR: 2010 EMPLOYMENT LAW AND REVIEW

California's fiscal crisis deterred the Legislature from taking much substantive action in the employment area this year, but a number of important employment related laws and rulings emerged from the courts, administrative agencies and Congress that impose new obligations and responsibilities on California employers in 2011. The following is a brief summary of some of the changes.

New Laws Enacted in 2010

SB1304: Organ and Bone Marrow Donation Leave

California employers with 15 or more employees must now provide the following paid leave to employees who choose to donate organs or bone marrow:

1. Organ Donors: Must be provided a 30 day (work days) leave of absence in any one year period.

2. Bone Marrow Donors Must be provided a leave of absence of up to 5 work days in any one year period.

The statute says that such leave does not run concurrently with the Family Medical Leave Act (FMLA). However, because state law cannot override federal law, leave for the purpose of donating bone marrow or an organ may run concurrently with FMLA if the employer is a covered employer and the employee is eligible for FMLA.

Workers Compensation Notice Requirements

The posting of notice requirements were amended in 2010 to require additional information about Managed Professional Networks (MPNs). Employers with MPNs that provide treatment for workers compensation claims must display the required workers compensation poster (Notice to Employees—Injuries Caused By Work) as well as additional information about the MPNs the employer uses. The workers compensation pamphlet must also include information about MPNs.

GINA Regulations Finalized

The U.S. Equal Employment Opportunity Commission (EEOC) issued final regulations on November 9, that implement the employment provisions of the Genetic Information Non-Discrimination Act of 2008 (GINA). GINA prohibits the use of genetic information to make decisions about health insurance and employment, and restricts the acquisition and disclosure of genetic information. GINA applies to private employers of 15 or more employees and generally

prohibits employers from requesting an applicant's or employee's genetic information, even if the employer never uses that information. The regulations clarify that inadvertent receipt of genetic information from the employee in the workplace is not a violation of the law. Moreover, the same exception applies to information inadvertently obtained through Internet social networking, such as Facebook.

The regulations also expound upon the notice that genetic information can include the employee's family medical history, which is commonly included in medical reports. The EEOC notes that family medical history can often reveal inheritable genetic conditions.

The Department of Labor Defines: "Son Or Daughter" For Purposes of FMLA Leave

When employees need time off to care for a son or daughter with a serious medical condition, many employers do not realize that the FMLA provides a very broad definition of "son or daughter." A manager who has the traditional biological definition in mind may inadvertently deprive an employee of FMLA rights. A recent Department of Labor opinion letter highlights and perhaps expands this broad definition.

The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a step child, a legal ward, or a child of a person standing '*in loco parentis*,' who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self care because of a mental or physical disability."

In an opinion letter, the Department of Labor defined "*in loco parentis*' broadly, including unmarried partners, same sex partners, relatives who assume ongoing responsibility for care, and other people who may have no legal or biological relationship to the child. In fact, under this definition, a child may have more than two parents, as in the example of biological parents who divorce and remarry.

Employers should note the expanded definition of son or daughter propounded by the DOL and be prepared to offer FMLA leave to employees who may not fit the traditional definition of a parent.

2010 Significant Labor and Employment Cases

***Read v. Google*—"Stray Remarks" to Prove Discrimination**

Google hired a 52 year old Director of Engineering. He initially received a good performance review from his Manager, but was criticized by some coworkers and non-decisionmakers as "obsolete," and "old man" and an "old fuddy duddy," among other comments. After Google moved him to another position and eventually laid him off, he sued for age discrimination. The court ruled that these age biased comments were admissible evidence, which along with other evidence could defeat the employer's motion to dismiss the case.

***Barbosa v. Impco Technologies*—Employee Protected From Termination After Making False Overtime Claim.**

An employee claims that he worked overtime, but an investigation reveals that his claim is false. The employee claims he made a mistake, but the company concluded otherwise. The employee was fired and he sued. He alleged that even if he was wrong in making his overtime claim, his complaint about missing overtime was "protected activity" and that termination was retaliation. The court agreed with the employee. Reporting possible wage and hour law violation is a protected activity. The court ruled that a "good faith, but mistaken belief" is protected from retaliation. As this case illustrated, employers should carefully investigate any complaints about improper wage payments before taking adverse action.

***Ontario v. Quon*—Workplace Privacy**

The case involved the Ontario Police Department's review of text messages sent and received by Police Sergeant Jeff Quon. The audited text messages included personal communications, including sexually explicit comments. Quon was disciplined for sending the messages. Quon sued claiming violations of privacy rights.

The U.S. Supreme Court held that government employees do have workplace privacy rights under the Fourth Amendment of the Constitution. However, the government employer may have legitimate work related reasons for invading that privacy.

In this case, the search of taser text was motivated by legitimate work related purpose, and it was not excessive in scope. The City was conducting an audit to determine whether it had purchased sufficient texting services, and whether employees ought to be charged for personal texts. Moreover, the search of text messages was not excessively intrusive under the circumstances.

Although the case involved government employee rights under the Fourth Amendment, the basic concept of workplace privacy is a developing area of the law and employers need to carefully craft personnel policies to inform employees of their privacy rights, and to carefully implement practices that do not unreasonably intrude on an employee's expectations of privacy.

***Pineda v. Bank of America*—Late Payment Penalty Claim And Subject To Three Year Statute of Limitations**

Although plaintiff Pineda gave two weeks notice of his resignation from Bank of America, the bank did not pay him his final wages on his last day of employment as required by the Labor Code, but instead paid him four days late. The California Supreme Court held that the action for penalties associated with failure to timely pay a final paycheck is subject to a three year statute of limitations even though the plaintiff was seeking only penalties and not payment of any unpaid wages.

Lisa E. Aguiar
San Jose
408.918.4555
laguiar@rmkb.com

Elise R. Vasquez
Redwood City
650.780.1631
evasquez@rmkb.com

Todd A. Roberts
Redwood City
650.780.1601
troberts@rmkb.com

David M. McLaughlin
Redwood City
650.780.1717
dmclaughlin@rmkb.com

Andrew M. Wolfe
San Francisco
415.972.6352
awolfe@rmkb.com

JAN 2011

GET READY FOR THE NEW YEAR: 2010 EMPLOYMENT LAW IN REVIEW

California's fiscal crisis deterred the Legislature from taking much substantive action in the employment area this year, but a number of important employment related laws and rulings emerged from the courts, administrative agencies and Congress that impose new obligations and responsibilities on California employers in 2011. The following is a brief summary of some of the changes.

New Laws Enacted in 2010

SB1304: Organ and Bone Marrow Donation Leave
California employers with 15 or more employees must now provide the following paid leave to employees who choose to donate organs or bone marrow:

1. Organ Donors: Must be provided a 30 day (work days) leave of absence in any one year period.
2. Bone Marrow Donors Must be provided a leave of absence of up to 5 work days in any one year period.

Workers Compensation Notice Requirements
The posting of notice requirements were amended in 2010 to require additional information about Managed Professional Networks (MPNs). Employers with MPNs that provide treatment for workers compensation claims must display the required workers compensation poster (Notice to Employees—Injuries Caused By Work) as well as additional information about the MPNs the employer uses.

Genetic Information Regulations Finalized
The U.S. Equal Employment Opportunity Commission (EEOC) issued final regulations that implement the employment provisions of the Genetic Information Non-Discrimination Act of 2008 (GINA). GINA prohibits the use of genetic information to make decisions about health insurance and employment, and restricts the acquisition and disclosure of genetic information. GINA applies to private employers of 15 or more employees and generally prohibits employers from requesting an applicant's or employee's genetic information, even if the employer never uses that information. The regulations clarify that inadvertent receipt of genetic information from the employee in the workplace is not a violation of the law. Moreover, the same exception applies to information inadvertently obtained through Internet social networking, such as Facebook.

The Department of Labor Defines: "Son Or Daughter" For Purposes of FMLA Leave

When employees need time off to care for a son or daughter with a serious medical condition, many employers do not realize that the FMLA provides a very broad definition of "son or daughter." A manager who has the traditional biological definition in mind may inadvertently deprive an employee of FMLA rights. A recent Department of Labor opinion letter highlights and perhaps expands this broad definition.

In an opinion letter, the Department of Labor defined "*in loco parentis*' broadly, including unmarried partners, same sex partners, relatives who assume ongoing responsibility for care, and other people who may have no legal or biological relationship to the child. In fact, under this definition, a child may have more than two parents, as in the example of biological parents who divorce and remarry.

Employers should note the expanded definition of son or daughter propounded by the DOL and be prepared to offer FMLA leave to employees who may not fit the traditional definition of a parent.

2010 Significant Labor and Employment Cases

***Read v. Google*—"Stray Remarks" as Evidence of Bias**
Google hired a 52 year old Director of Engineering. He was criticized by some coworkers and non-decision makers as "obsolete," an "old man" and an "old fuddy duddy," among other comments. After Google moved him to another position and eventually laid him off, he sued for age discrimination. The court ruled that these age biased comments were admissible evidence, which along with other evidence could defeat the employer's motion to dismiss the case. Employers should note that even "stray remarks" made by nondecisionmaker co-workers could expose the company to liability.

***Barbosa v. Impco Technologies*—Employee Protected From Termination After Making False Overtime Claim.**
An employee claimed that he worked overtime, but an investigation revealed that his claim was false. The employee claimed he made a mistake, but the company concluded otherwise. The employee was fired and he sued. He alleged that even if he was wrong in making his overtime claim, his complaint about missing overtime was "protected activity" and that termination was retaliation. The court agreed. Reporting possible wage and hour law violation is a protected activity. The court ruled that a "good faith, but mistaken belief" is protected from retaliation. As this case illustrated, employers should carefully investigate any complaints about improper wage payments before taking adverse action.

***Ontario v. Quon*—Workplace Privacy**
The case involved the Ontario Police Dept's review of text messages sent and received by Police Sgt. Jeff Quon. The audited text messages included personal communications, including sexually explicit comments. Quon was disciplined for sending the messages. Quon sued claiming violations of privacy rights.

The U.S. Supreme Court held that government employees do have workplace privacy rights under the Fourth Amendment of the Constitution. However, the government employer may have legitimate work-related reasons for invading that privacy.

In this case, the search of the text messages was motivated by legitimate work-related reasons, and it was not excessive in scope. The City was conducting an audit to determine whether it had purchased sufficient texting services, and whether employees ought to be charged for personal texts.

Although the case involved government employee rights under the Fourth Amendment, the basic concept of workplace privacy is a developing area of

the law and employers need to carefully craft personnel policies to inform employees of their privacy rights, and to carefully implement practices that do not unreasonably intrude on an employee's expectations of privacy.

***Overhill Farms v. Lopez* – Employer could Terminate Employees Who Failed to Respond to Request to Correct Social Security Number Discrepancies**
After the IRS notified Overhill Farms that 231 of its then current employees had provided invalid social security numbers, Overhill contacted the employees identified by the IRS, and advised them that their social security numbers were invalid according the IRS, and provided them with the opportunity to correct the erroneous information to avoid termination. All but one of the employees either ignored Overhill's repeated requests for information or admitted they had submitted an invalid social security number. Overhill terminated the employees. The court held the employees' failure to respond to Overhills's requests for clarification was cause for termination.

This case informs employers about their obligations to employees when a social security "mismatch letter" is received from the IRS but clarifies that an employer is authorized to terminate employees for failure to correct the erroneous information.

***Bright v. 99 Cents Only Stores*—Employer can be Held Liable for Violation of Wage Orders Unrelated to the Payment of Wages**
One of the requirements of the wage orders promulgated by the Industrial Welfare Commission is that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats…" Cashier Bright brought a lawsuit against her employer claiming it did not provide suitable seating to its cashiers and demanded penalties. The court held an employee's claims can be based on violations of the Wage Orders unrelated to wages. This ruling greatly expands potential employer liability under the Wage Orders.

Employers are wise to review the Wage Orders applicable to their employees to insure they are adhering to all parts of it, not just those related to the payment of wages.

***DFEH v. Lyddan Law Group*—Failure to Prevent Discrimination a Viable Legal Theory Even if No Discrimination Found**
The Fair Employment and Housing Commission (FEHC) held that employers could be liable for failure to take reasonable steps to prevent discrimination or harassment, even if no discrimination or harassment occurred.

This decision is limited to proceedings brought by the FEHC but they are a reminder to employers to review policies and practices to insure it is doing everything reasonable to prevent discrimination and harassment to avoid such a claim.

Trends to Look Forward to in 2011

Increased EEOC Filings: The EEOC reported a record number of discrimination, harassment and retaliation filings in 2010. An increase in discrimination filings is not unusual in a slumping economy. For the first time ever, retaliation complaints surpassed race discrimination claims as the most often filed charge. The increase signals a trend that is likely to continue and employers are encouraged to review their discrimination and harassment policies and practices to insure they do not run afoul of state or federal law.

Increased Department of Labor Investigations: The DOL has added

hundreds of additional investigators enabling it to investigate and prosecute alleged wage and hour violations. Employers should review their wage and hour practices, including the classification of employees, to insure compliance with federal and state wage and hour laws.

Increased I-9 Audits: The federal government has signaled its intent to increase I-9 audits in an attempt to insure that employers are complying with the I-9 requirements and to insure that employers are not hiring workers unauthorized to work in the United States. Employers should review their I-9 practices to insure they are in compliance with federal law.

San Francisco
201 Spear St
Suite 1000
San Francisco
CA 94105
ph (415) 543-4800
fax (415) 972-6301

Los Angeles
515 South Flower St
Suite 1100
Los Angeles
CA 90071
ph (213) 312-2000
fax (213) 312-2001

San Jose
50 W. San Fernando St
Suite 1400
San Jose
CA 95113
ph (408) 287-6262
fax (408) 918-4501

Redwood City
1001 Marshall St
Suite 300
Redwood City
CA 94063
ph (650) 364-8200
fax (650) 780-1701

New York
17 State St
Suite 2400
New York
NY 10004
ph (212) 668-5927
fax (212) 668-5929

Boston
60 State St
Suite 700
Boston
MA 02109
ph (617) 973-5720
fax (617) 973-5721

LAWYERS
RMKB
ROPERS MAJESKI KOHN BENTLEY

Lisa E. Aguiar

50 West San Fernando Street, Suite 1400
San Jose, CA 95113
Tel: (408) 918-4555 (direct)
(408) 287-6262 (main)
Fax: (408) 918-4501
E-mail: laguiar@rmkb.com
Internet: www.rmkb.com

Lisa E. Aguiar focuses her practices on labor and employment law issues. She advises and counsels businesses and governmental agencies on all aspects of their relationship with their employees from hiring, through compensation issues, management problems and termination of the relationship. She has negotiated and drafted severance agreements, employment contracts, proprietary and confidentiality agreements, and technology policies. She provides legally mandated and other employment training to her clients. When necessary she represents her clients in litigation brought by employees or former employees. She has wage and hour class action experience and has participated in all forms of alternative dispute including mediation, arbitration and early neutral evaluation.

Ms. Aguiar also represents her property management and real estate clients in all aspects of fair housing laws. She provides advice and counsel and litigation services to her clients related to requests for accommodation made by tenants and has successfully litigated and settled cases involving allegations of failure to accommodate disabilities.

Ms. Aguiar has served as a panelist and lecturer for employment law training programs and seminars on a variety of topics including wage and hour issues, preventing harassment and discrimination, leave issues, and hiring, firing and managing the employment relationship.

Recent Matters

- Successful defense of a City for a wrongful termination lawsuit brought by police officer;
- Settlement, to the clients' satisfaction, of multiple wage and hour class actions brought against construction contractors;
- Defense of multi million dollar overtime and bonus claim brought by four former employees of a multi national manufacturing company;
- Successful settlement of a million dollar lawsuit brought by a former tenant against the owner of the property and the property management company alleging failure to accommodate mental disabilities.
- Represented a service and retail company against claims of defamation, wrongful termination and unfair business practices brought by former manager.

LAWYERS
RMKB
ROPERS MAJESKI KOHN BENTLEY

Employment

RMKB offers a broad range of employment law services. As part of the high level expertise in employment-related legal services, RMKB offers the following litigation and counseling services in the area of employment and compensation:

Compliance with Federal and State Employment Law

RMKB performs comprehensive reviews of employment-related documents (job descriptions, employee classifications, offer letters, employee handbooks, etc.), employment policies and practices to ensure compliance with Federal and State law. Our goal is to minimize employee-related problems and avoid costly and time-consuming employment-related litigation.

Employee/Employer Relations

RMKB designs employee handbooks and individual policies and procedures. We advise on overtime issues, medical leaves of absence, particularly maternity leave and the Family and Medical Leave Act; and we handle many sexual harassment issues. We provide sexual harassment training and conduct investigation of harassment claims.

Termination Procedures

We frequently counsel in employment termination decisions made by our clients. We advise on any potential wrongful termination issues. We provide guidance to our clients for severance negotiations. RMKB has extensive experience in drafting separation agreements.

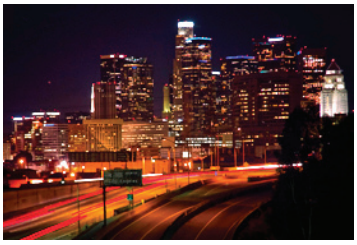
Litigation and Employment Dispute Resolution

RMKB has extensive experience in litigating claims for wrongful termination, discrimination (age, race, national origin, sex, religion, pregnancy), harassment, retaliation complaints, allegations of violations of FMLA and CFRA, wage hour claims in both Federal and State Court. In addition to our court experience, up to and including jury trials, RMKB provides advice and representation for pending disputes with current or former employees before governmental agencies, such as the Equal Employment Opportunity Commission, the Department of Fair Employment and Housing, the EDD, the Labor Commission and the Division of Labor Standards Enforcement.

LAWYERS
RMKB
ROPERS MAJESKI KOHN BENTLEY

Office Locations

West Coast



Los Angeles
515 South Flower St, Ste. 1100
Los Angeles, CA 90071
ph (213) 312-2000
fax (213) 312-2001

San Francisco
201 Spear St., Ste. 1000
San Francisco, CA 94105
ph (415) 543-4800
fax (415) 972-6301

San Jose
50 W. San Fernando St., Ste. 1400
San Jose, CA 95113
ph (408) 287-6262
fax (408) 918-4501

Redwood City
1001 Marshall St., Ste. 300
Redwood City, CA 94063
ph (650) 364-8200
fax (650) 780-1701

East Coast

New York
17 State St., Ste. 2400
New York, NY 10004
ph (212) 668-5927
fax (212) 668-5929

Boston
60 State St., Ste. 700
Boston, MA 02109
ph (617) 973-5720
fax (617) 973-5721

International

Hong Kong (Affiliated)
30/F, China Insurance Group Bldg.
141 Des Voeux Road Central
Hong Kong
011-852-2521-2486 Phone
011-852-2845-0758 Fax