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Recent Developments

NEW CALIFORNIA AGE DISCRIMINATION LAW ENACTED

(August 4, 1999)

On August 2, 1999, a new California bill regarding age discrimination (SB26) was signed into law. Additionally, Governor Davis signed into law the sick leave bill reported on in our July 16, 1999 E-Update. Finally, the California Supreme Court issued a decision addressing an employee's free speech rights in the workplace, but failed to provide any substantial guidance for employers.

NEW AGE DISCRIMINATION LAW

Summary

The new California law provides that terminated employees are not required to show that they were intentionally discriminated against on the basis of age in order to prove unlawful age discrimination. Employers can be liable for unintentionally discriminating based on age. In fact, an employee over the age of 40 can show age discrimination simply by proving that the employer used salary as a criterion for termination (e.g. in a layoff decision) and demonstrating that that criterion adversely affected older employees.

Details

The new law, which goes into effect January 1, 2000, is the latest in a series of new laws from the California Legislature regulating the employment relationship. It dramatically restricts the freedom of employers to make termination decisions based on financial factors. Although federal anti-discrimination law is still unsettled on the issue of whether an employer can be liable for unintentional age discrimination, this new amendment to California's Fair Employment & Housing Act (FEHA) makes it clear that such liability exists under California law. The new law specifically targets termination decisions that use salary as a criterion if the use of this criterion results in a disproportionate number of older workers losing their jobs.

Two rules emerge from this new law. First, an employer can be liable for using any factor in an employment decision that results in a disparate negative impact on older workers unless the employer can show a business necessity for using that factor. For example, if an employer uses knowledge of computers as a criterion in making an employment decision, it could conceivably disproportionately exclude older employees or candidates. If so, use of that criterion constitutes unlawful age discrimination unless the employer shows that it was a legitimate business necessity (e.g. using a computer was an important requirement of the job).

Second, the part of the new law that has gotten most of the media attention is the prohibition on using salary as a termination criterion if it causes a disparate impact on older workers. For example, an employer who needs to cut its budget by a specific amount of money may want to lay off the fewest employees possible in order to maintain its operations and to cause the least disruption to the fewest people. However, if older workers are terminated at a disproportionate rate because the employer

considered salary as a factor in the decision, the employer has now committed unlawful age discrimination.

What this Means

This new law has the effect of preventing employers from considering salary when making termination decisions, even though the need to cut costs may be the motivation behind the termination in the first place. Thus, while employers were once asked not to consider age in making termination decisions, this new law now effectively requires employers to actually consider the age of affected employees because failing to do so could, inadvertently, lead to liability.

GOVERNOR DAVIS SIGNS AB109

Governor Davis has signed into law AB 109, which requires California employers to permit employees to use accrued sick leave, up to half of the amount accrued in one year, to attend to a sick child, parent, or spouse. Employers should note that the new law does not apply to any sick leave plan that is maintained as a funded ERISA plan.

CALIFORNIA SUPREME COURT REVIEWS AN EMPLOYEE'S RIGHT TO MAKE RACIAL EPITHETS IN THE WORKPLACE

Details

As everyone knows, the law prohibits employers from subjecting their employees to a racially harassing work environment. But what about the right of the bigoted employee to say what he believes? Doesn't s/he have the right under the First Amendment to speak freely? On August 2, 1999, a sharply divided California Supreme Court considered (but never really decided) this issue in Aguilar v. Avis Rental A Car Systems, Inc. In a very limited opinion, the Supreme Court upheld a court's ability to restrain any future racial epithets by an employee who was making offensive comments, such as referring to Hispanic employees as "wetbacks." However, the Court sidestepped the fundamental issue of whether the law can restrict speech, even racially derogatory and offensive speech, in the workplace.

What this Means

Although the decision has received substantial publicity, it has little impact at this point. An individual who is terminated or disciplined for harassing conduct could conceivably challenge the disciplinary action on free speech grounds. The Supreme Court's decision merely muddied the waters on this issue. If the issue is pressed, it seems unlikely that a court would find that an employee is free to create a hostile environment for those who are essentially compelled to be in his or her presence.

If you would like any further information about this development, please feel free to call or e-mail Mike Sullivan (msullivan@paulplevin.com,(619) 744-3655), Keither Rummer (krummer@paulplevin.com, (619) 744-3642) or any of our other attorneys at (619) 237-5200. Additional information about our firm and attorneys can be found on the world wide web at http://www.paulplevin.com/.

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