

# COHEN & GOLDFRIED

ATTORNEYS AT LAW  
A PROFESSIONAL CORPORATION  
9595 WILSHIRE BOULEVARD, SUITE 200  
BEVERLY HILLS, CA 90212  
www.cogolaw.com

DAVID L. COHEN  
ROBERT M. GOLDFRIED

TELEPHONE: (323) 930-0933  
FACSIMILE: (323) 395-5518

May 28, 2009

NEWSLETTER

## Re: Recent Developments in Employment Law

Dear Clients and Friends:

We are pleased to provide the following information to our clients and friends regarding recent legal developments affecting employers.

### I. Legislation.

**A. If You Use a Third Party to Conduct a Background Investigation-Beware! You are Probably Violating the Law and Exposing Yourself to Substantial Liability.** Many employers hire third-party consumer reporting agencies to conduct background investigations, credit checks, and other routine searches for information, such as criminal records, driving records, and social security number verification. Those consumer reporting agencies ask employers to have their applicants or employees fill out a form authorizing the investigation. All too often, the form protects the investigation company, but not the employer. In fact, use of these forms by an employer can lead to substantial liability, because the forms do not comply with the Federal Fair Credit Reporting Act, the California Consumer Reporting Agencies Act, and the California Investigative Consumer Reporting Agencies Act. While the main focus of those laws is on consumer transactions, and what we traditionally think of as a credit report, all of those laws also have provisions which apply to applicant and employee background investigations. The laws are **complicated, convoluted, not always clear, sometimes contradictory, and frustrating to rationalize.** They use similar, but not identical definitions, and they have similar, but not identical, rules regarding the disclosures that must be made, and the authorizations that must be obtained, in order to request and obtain such information. Thus, it is very hard for employers to understand the confusing requirements, let alone comply with them. A violation of these laws can result in an award of actual damages suffered (this would include any loss of wages and damages for emotional distress), or \$10,000, whichever is greater, plus the plaintiff's court costs, attorneys' fees, and punitive damages. Additionally, an employee can sue for invasion of privacy. To avoid liability, employers should have their background investigation procedures reviewed by experienced employment counsel, and should make sure they are using the appropriate disclosure and authorization forms (we believe that four separate forms are necessary) - ones that will protect the employer.

**B. Sexual Harassment Training Reminder.** First required in 2005, California employers with 50 or more employees nationwide must provide two hours of interactive training regarding sexual harassment to all supervisors and managers working in the State of California within six months of hire or promotion, and at intervals of no less than every two years. If you started the training in 2005, and updated it in 2007, then this year is time for another training session. One of the services we provide for clients is this training.

**C. Cobra Premium Subsidies for Laid Off Workers.** The federal government's recent spending package provides for health insurance premium reductions in the form of a subsidy for eligible employees whose employment ends involuntarily between September 1, 2008 and December 31, 2009. Under the new law, the employees must also be eligible for COBRA continuation coverage, and must elect COBRA coverage. Eligible individuals pay only 35% of their COBRA premium. The remaining 65% of the premium must be paid by the employer, which then receives reimbursement from the federal government in the form of a tax credit. The premium reduction covers health insurance coverage starting on February 17, 2009 (the date the law became effective), and can last for up to nine months. Certain other eligibility factors apply, *e.g.*, income limitations, and the subsidy isn't available to individuals who are eligible for coverage under a spouse's plan, or Medicare. Employers have new notification obligations under this new law, and must ensure they understand and comply with the rules.

## II. Administrative Developments.

**New FMLA Regulations Require Use of New Forms.** For employers with 50 or more employees, administering leaves of absence recently became more complicated. On January 16, 2009, new federal Family and Medical Leave Act ("FMLA") regulations became effective. These new regulations create substantial differences between the FMLA, and its California counterpart, the California Family Rights Act ("CFRA"). Indeed, the state recently issued a statement indicating that it plans to revise the CFRA regulations, and posted on its website a table that compares the revised FMLA regulations and the current CFRA regulations, illustrating many of the differences. See, [www.fehc.ca.gov](http://www.fehc.ca.gov). For example, the new regulations alter the timing and content of employer notifications, change the standards regarding the obligation of employees to provide notice of intent to return to work, modify the rules for employer designations of qualifying leaves, and give an employer the ability to directly contact an employee's physician to obtain additional medical information (something still prohibited by California law). Most important, the new regulations provide new sample forms for use, one to notify an employee whether the employee is eligible for the leave, and a second separate form to designate the leave as FMLA-leave. Also, a new medical certification form has been issued. California employers should not use these new forms. The new forms contain provisions which conflict with California law. Use of the new forms by California employers will expose them to substantial liability. California employers with 50 or more employees should contact experienced employment counsel to ensure that they use the proper forms, understand the new regulations, and do not inadvertently violate California law.

### III. Court Decisions.

**A. Be Careful How You Describe the Atmosphere at Work. Google's "Youthful Atmosphere" Contributes to Liability for Age Discrimination.** As a result of layoffs and terminations spawned by the bad economy, age discrimination claims are the new lawsuit *du jour*. A California court of appeal recently found that a former Google executive, terminated because he wasn't a "cultural fit," may sue Google for age discrimination under the California Fair Employment and Housing Act. The court held that there was sufficient evidence of age discrimination for the following reasons: Google promoted its general "youthful" atmosphere, suggesting a bias against older workers; when the executive was terminated, he was allegedly told he was not a "cultural fit" at Google; age-related comments were made by key decision makers and coworkers, such as telling the executive he was "slow," "fuzzy," "sluggish," "lethargic," and that his ideas were "obsolete," and "too old to matter"; coworkers referred to the executive as an "old man" and an "old fuddy-duddy." The executive also presented statistical evidence that older workers at Google received worse ratings on their performance evaluations, and lower bonus amounts than their younger counterparts. Employers must be careful to ensure that their atmosphere is conducive to young and old alike.

**B. Employers Can Fire Employees Who Use Legal Medicinal Marijuana.** Several years ago the California legislature passed the Compassionate Use Act, which provides, in general, that use of marijuana pursuant to a doctor's prescription is legal in California. This created quite a stir, since such use is illegal under federal law, and persons using marijuana under the California law have been prosecuted by the federal government. It also created a conundrum for California employers, who had to figure out whether they could discipline or fire an employee who was using marijuana legally under California law. The California Supreme Court recently gave us the answer. It held that firing a newly-hired employee whose marijuana use was discovered through a pre-employment drug test did not violate California's workplace anti-disability discrimination law, even though the employee's physician-recommended use for back pain was legal. The court found the Compassionate Use Act merely removed criminal penalties for the use of marijuana, and did not address employment law issues. The court further found that California's workplace disability discrimination law did not require employer accommodation of a substance that remains illegal under federal law. Even with this rare victory, employers must continue to ensure they understand and follow all of the very complicated rules for dealing with employees who are ill or injured, and who might have a disability that is protected by law.

**C. Non-Competition Agreements Remain Unenforceable in California.** If anyone needed a reminder that California law differs from the law of most other states, a recent decision of the California Supreme Court makes crystal clear that, except in very limited circumstances, noncompetition agreements with California employees will not be enforced in California courts. In most states, noncompetition agreements are valid, so long as the restrictions on competition are reasonable, and limited in time, place and scope. Not so in California, where they are

allowed only when necessary to protect the goodwill of a business being sold (by restricting the seller's ability to compete with the buyer in the geographic region where the seller's business had been conducted), upon dissolution of a partnership, or when necessary to protect a former employer's confidential information or trade secrets. The reason behind the restrictions on noncompetition agreements is California's strong public policy that employees should have the unfettered right to work for whomever they please.

Several years ago a federal court sitting in California had tried to create an exception, if the agreement still left a substantial portion of the market available to the employee, and was otherwise limited in time, place and scope. The California Supreme Court rejected this "narrow restraint" exception, and held that it constituted a misapplication of California law. In the Supreme Court's view, any agreement that restricts an employee's ability to pursue similar employment after leaving a job is prohibited, even if it is narrowly written, and leaves a substantial portion of the available employment market open to the employee. Moreover, an employer can be held liable for damages if it tries to enforce an invalid noncompetition agreement, even by nonlitigation conduct, such as notifying third parties of the existence of the agreement. Additionally, firing an employee for refusing to sign an employment agreement containing an unenforceable noncompetition covenant constitutes wrongful termination in violation of public policy. Last, an invalid noncompetition agreement contained within a comprehensive employment agreement could be held to void the entire employment agreement. Thus, California employers need to exercise extreme caution when requiring an employee to sign a noncompetition agreement, should be careful to ensure the agreement does not violate the law, and should think twice before trying to enforce an agreement that tries to do more than it should. Employers should also have all noncompetition language in agreements reviewed by counsel to ensure compliance with the law.

#### **IV. Miscellaneous.**

**A. Common Mistakes Made When Laying Off Employees.** The economic downturn has hit employers hard, requiring management to make tough decisions regarding reducing employee costs. Many employers have laid off employees, or selectively terminated employees who were not performing well. Unfortunately, it is all too easy to make mistakes reducing staff. Don't find yourself doing any of the following:

1. Failing to put a written, methodical, consistent and fair plan in place beforehand to outline criteria for selecting positions, groups, offices or departments that must be reduced.
2. Failing to perform an adverse impact analysis, a crucial step that ensures that no specific protected class is disproportionately affected by the layoff.
3. Failing to prepare and obtain release agreements, where severance is to be given.
4. Failing to follow special rules pertaining to older workers (those 40 and older).
5. For companies with 75 or more employees in California, failing to consider whether 60-day notices are required by the California and federal Worker Adjustment and Retraining Notification (WARN) Acts.

Employers should have experienced employment counsel review any layoff or termination plan before it is implemented. As the old saw goes, an ounce of prevention is worth a pound of cure.

**B. Layoffs of Employees Who Are High Earners May Be Age Discrimination.**

When laying off employees in order to cut costs, a temptation is to lay off those earning the most. Employers would do well to avoid that temptation. The California Labor Code provides that use of salary as a basis for differentiating between employees when terminating employment, may be found to constitute age discrimination, if the use of that criterion adversely impacts older workers as a group. Instead of using higher salary, employers should establish some other objective criteria, such as length of service with the company, or in the particular position, objective performance comparisons, or disciplinary records, when deciding whom to layoff. Employers should also have an objective third party, like employment counsel, review the demographic distribution of protected characteristics of the pool of employees being laid off, to ensure that a particular group (*e.g.*, women, those 40 or over, a particular race, etc.) is not affected more than any other group.

**C. Employers Can No Longer Get Under Their Employees' Skin, Literally.** Some employers look for innovative ways to track the whereabouts of their employees during the day, particularly those employees who work off-site, such as drivers and outside salespersons. One method of doing so is use of a GPS system which records location continuously. But there are limitations. A recent California law prohibits a person from requiring, coercing, or compelling any other individual to undergo the subcutaneous implanting of an identification device, such as a radio frequency identification device. Sounds like science fiction, or something out of the movies, but it isn't. So in case you were thinking of getting under your employees' skin in this manner, think again.


\*\*\*\*

We frequently speak to trade groups, professional organizations, and others, on labor and employment issues. If you would like to schedule a presentation for your organization, please call Kathy Pardi at (323) 930-0933. Also, please visit our website at [www.cogolaw.com](http://www.cogolaw.com). If you have any questions about any employment-related matters, please do not hesitate to contact us.

Sincerely,



Robert M. Goldfried



David L. Cohen

RMG/DLC:klp

2009MAY\NLR9132