

EMPLOYMENT MATTERS

RIGHT OF FORMER EMPLOYEE TO COMPETE WITH EMPLOYER IS UPHELD



some agreements under a “narrow restraint” exemption.

Background:

In *Edwards*, the plaintiff signed a non-compete agreement with Arthur Andersen when he was hired. He agreed not to work for, or solicit, some of Arthur Andersen’s clients for certain periods after his employment

In a much-anticipated ruling in *Edwards v. Arthur Andersen*, No. S141790 (Aug. 7, 2008), the California Supreme Court held that non-compete agreements are invalid under California Business and Professions Code section 16600 (“Section 16600”), unless they fall within a narrow statutory exception. In so ruling, the Supreme Court rejected a line of Ninth Circuit Court of Appeals decisions that had upheld

ended. When the unit that employed Edwards was sold to HSBC, HSBC and Arthur Andersen asked Edwards to sign a Termination of Non-Compete Agreement (“TONC”) as a condition of employment with HSBC. The TONC required Edwards to release Arthur Andersen from “any and all claims,” in exchange for Arthur Andersen “releasing” him from the non-compete agreement. Edwards refused to sign

the TONC because he believed it waived his right to indemnification under the California Labor Code. When Arthur Andersen fired Edwards and HSBC withdrew its offer of employment, Edwards brought suit, alleging that Arthur Andersen violated public policy by forcing him to sign the TONC (thereby releasing Arthur Andersen) in exchange for being “released” from an illegal agreement.

The Court’s Decision:

Arthur Andersen argued that Section 16600 only prohibits non-compete agreements that effectively prevent an employee from engaging in his or her profession, but allows for agreements that operate as only a partial restriction. The Supreme Court disagreed, holding instead that Section 16600 clearly prohibits all non-compete agreements, unless the agreement is covered by a statutory exception to section 16600. The Court stated, “The agreement

restricted Edwards from performing work for Andersen’s Los Angeles clients and therefore restricted his ability to practice his accounting profession.” The agreement was therefore invalid because it restrained Edward’s ability to work as an accountant.

What This Means For Employers:

The *Edwards* decision finally puts to rest the notion that California employers can require employees to sign “narrow” non-compete agreements. *Edwards* once and for all declares that non-compete agreements are illegal in California except for those agreements that fall within one of the narrow statutory exceptions. If an employee signs a non-compete agreement, it will not be enforceable. In addition, an employer’s termination of an employee who refuses to sign an unenforceable non-compete agreement is a wrongful termination in violation of public policy.

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A PAIR OF DECISIONS PROVIDES GUIDANCE ON HANDLING CFRA CLAIMS

COURT CLARIFIES “SERIOUS HEALTH CONDITION”

In April, the California Supreme Court held that (1) an employee’s performance of a similar job for another employer, after she had requested CFRA leave from her first employer, was not conclusive evidence that the employee did not have a serious health condition under CFRA, and (2) an employer is not required to obtain the opinion of a health care provider jointly chosen by the employer and the employee in order to challenge an employee’s CFRA certification.

Background:

In *Lonicki v. Sutter Health Central*, 43 Cal. 4th 201 (2008), the plaintiff, who was employed by Sutter Health, provided the company with a medical certification attesting to her need for CFRA leave. She claimed to be suffering from job-related stress due to the increasing demands of her job and her supervisor. However, a Sutter Health physician concluded that Lonicki, a full-time employee, could return to work without any restrictions. Sutter Health did not require Lonicki to obtain a binding third opinion with regard to whether she had a serious health condition, and later terminated her for failing to return to work. Sutter Health also learned that during the time Lonicki claimed

to be unable to work due to a serious health condition, she was working a part-time job at a Kaiser hospital. The Kaiser job was substantially similar to her job at Sutter Health.

Lonicki sued for violation of CFRA. The trial court granted summary judgment for Sutter Health, holding that Lonicki’s work at Kaiser conclusively demonstrated that she was able to perform her job at Sutter Health, and thus was not suffering from a serious health condition. The Court of Appeal affirmed, and Lonicki appealed.

The Supreme Court’s Decision:

The California Supreme Court reversed, and held that the language of CFRA, which provides that an employee is entitled to a medical leave based on a “serious health condition that makes the employee unable to perform the *functions of the position of that employee*,” means that the employee is unable to perform the functions of “*the job assigned to the employee by his or her employer*.” The Court observed that while Lonicki’s ability to perform virtually identical tasks for Kaiser was “strong evidence” of her ability to work, it did not conclusively establish that she could perform her Sutter Health job. Accordingly, Lonicki

was entitled to a trial on the question of whether she had a “serious health condition.”

In addition, the Supreme Court held that Sutter Health was not required by CFRA to obtain a binding third opinion before challenging the certification provided by Lonicki’s physician.

What This Means for Employers:

It is not uncommon for employees in certain industries to work more than one job, and as *Lonicki* confirms, the fact that an employee works one job while requesting CFRA leave from another employer does not necessarily mean that the employee does not suffer from a serious health condition within the meaning of CFRA. *Lonicki* echoes earlier cases interpreting the FMLA, and makes it clear that employers must *carefully* evaluate whether an employee who requests CFRA (or FMLA) medical leave has a “serious health condition” within the meaning of the law. And, while employers are not required to seek a tie-breaker third opinion to establish that an employee does not have a serious health condition, an employer who fails to take advantage of this procedure and denies the leave assumes a substantial risk that the employee will challenge the denial in court.

COURT CLARIFIES NOTICE REQUIREMENT

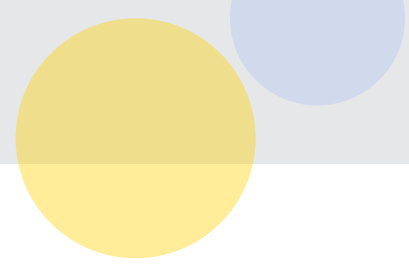
In *Avila v. Continental Airlines, Inc.*, No. B196603 (Aug. 11, 2008), a California Court of Appeal held that employees do not have to ask for leave specifically or invoke their CFRA rights in order to put their employer on notice of a CFRA-protected leave. Pre-printed medical forms documenting an employee’s hospitalization or condition, or oral notification of the need for leave, may be sufficient to put the employer on notice for purposes of CFRA.

Background:

Avila, a CFRA-eligible employee, called in sick for an emergency medical condition, but did not specifically ask for CFRA leave. Upon his return to work, Avila submitted forms from Kaiser reflecting that he had been hospitalized for four days. Avila was charged with two occurrences under the employer’s no fault attendance policy, and was later terminated after another occurrence. Avila sued, alleging that he had been terminated in retaliation for exercising his CFRA rights.

The Court’s Decision:

The employer argued that Avila did not properly request CFRA leave. The court disagreed, observing that an employee does not have to ask specifically for



NEW CALIFORNIA LAW ADDRESSES PAY FOR TEMPORARY SERVICE EMPLOYEES – EFFECTIVE JANUARY 1, 2009

California law governing pay for temporary employees will change on January 1, 2009. The new law will end the uncertainty regarding the potential application of the California Supreme Court decision in *Smith v. L’Oreal* to the temporary services industry. *Smith* held that the end of a temporary assignment or project constituted a “discharge,” requiring the immediate payment of all wages. Compliance with this requirement is difficult where the client company, and not the

temp agency, terminates a temporary assignment.

Under SB 940, signed into law by Governor Schwarzenegger on July 22, 2008, temporary service employers must pay their temporary workers on a weekly basis. Accordingly, the wages for the current week must be paid on the regular payday in the following calendar week. When an assignment is completed during Week 1, the worker may be paid the final wages for the assign-

ment on the regular payday in Week 2, rather than on the final day of the assignment. If, however, the temporary employee quits or is terminated by the temporary service agency (rather than by a client company), the regular rules regarding the final payment of wages apply. The new rules do not apply to employees who are assigned to a client for more than 90 days, unless the temp agency pays such employees on a weekly basis.

Under the new law, *daily* payment of wages is

required for strike replacement employees, as well as for those temporary workers who are assigned to work on a day-to-day basis from a centralized pool.

Employers who use temporary service agencies should ensure that both they and their vendors are aware of the new law, as employees can assert wage claims against both the temporary agency and its client company on a joint employer theory of liability.

MONITORING EMPLOYEE COMMUNICATIONS? IMPLEMENT A POLICY AND ENFORCE IT!

Recently, the Ninth Circuit Court of Appeals held that a text-message provider violated a federal statute by disclosing to the employer sexually explicit text messages sent by an employee using an employer-owned text message/pager. The court also held that the employer (a public entity) violated the constitutional rights of its employee and those with whom he communicated by reviewing the content of the messages.

Background:

In *Quon v. Arch Wireless Operating Co.*, No. CV-03-00199 (June 18, 2008), the employer, a California City, issued text-messaging pagers to its police officers. The City’s service contract with the provider allowed a

limited number of characters per month for each pager. After one of the plaintiffs, Sergeant Quon, exceeded the allotted number of characters several times, his supervisor told him that if he paid the extra charges, the City would not audit his messages. Eventually, the City became concerned about the extra charges, and conducted an investigation to determine whether it needed to increase the character number allotment in its contract to allow for work-related communications. When the City obtained transcripts of the messages from the service provider, it discovered that Sergeant Quon had been sending personal and sexually explicit messages to his wife and co-workers.

Sergeant Quon, his wife, and two other police department employees with whom he had exchanged text messages then brought suit against the service provider and the City. Although the plaintiffs brought several claims under federal and state law, the only claims considered by the Court of Appeals were a claim against the service provider under the federal Stored Communications Act and a claim against the City for violation of the plaintiffs’ privacy rights.

The Stored Communications Act prohibits the disclosure of stored e-mail or text messages without the consent of the sender or the recipient. The court held that the service provider violated the statute by disclosing the

content of text messages to Sergeant Quon’s employer, even though the employer was the subscriber on the service contract. As the subscriber, and not the user of the device or the recipient of the messages, the employer had no right to consent to the release of the employee’s text messages.

With respect to the privacy claims against the City, the Court’s analysis focused only on the Fourth Amendment of the United States Constitution. The Court concluded that Sergeant Quon and those with whom he exchanged text messages all had a reasonable expectation of privacy with respect to their text messages, and the City’s review of those messages was unreasonable.

A Pair of Decisions (continued from page 2)

a leave or invoke the law to provide sufficient notice of the need for CFRA leave. To the contrary, the court concluded that in a situation involving a medical emergency, notice on a hospital's preprinted form that an employee had been hospitalized could be viewed as a request for CFRA leave. At that point, the burden was on the employer to ask for further information from the employee to determine

whether the absence should be treated as CFRA-protected leave. The court explained that an employer should not be able to terminate an employee who is absent and known to be sick or injured without first determining if the employee qualifies for and wants leave. In so ruling, the court relied on regulations that allow for verbal notice of the need for CFRA leave.

What This Means For Employers:

Employers should be careful when disciplining employees for absences that might be CFRA-protected. If the available facts suggest that a serious health condition may be involved, the employer should ask for additional information, regardless of whether the employee has given written or oral notice of the need for

leave. *Avila* makes clear that a policy purporting to require written notice of the need for leave will not relieve the employer of its obligation to elicit the relevant information to determine if a serious health condition is involved, before taking adverse action against an employee.

Monitoring Employee Communications (continued from page 3)

What This Means For Employers:

The court's holding that the City violated the U.S. Constitution has no direct impact on private employers. However, the court's conclusion that Sergeant Quon and the other plaintiffs had a "reasonable expectation of privacy" with respect to the content of their text messages is significant for private and public employers in California. California's constitutional right of privacy applies to public and private entities alike, and a "reasonable expectation of privacy" is one of the elements of a California privacy claim.

To diminish employees' expectations of privacy with respect to employer-provided communication resources, employers should take the following steps:

- **Implement immediately, if you have not already done so, a policy that warns employees that their use of employer-provided electronic devices may be monitored.** A well-drafted policy can diminish employees' expectations of privacy by giving them notice that the employer may monitor the use of its electronic communication resources, including computers, network equipment and other electronic

devices. The policy should also advise employees that these devices are provided for business related use only, and that employees therefore have no expectation of privacy in their use of them. (Note, however, that such policies will not diminish any expectation of privacy that third parties who communicate with employees may have with respect to the content of their messages).

- **Follow the policy.** Part of the City's problem in Quon was that it had a policy that permitted monitoring, but Sergeant Quon's supervisor assured him that the City

would not read his messages so long as he paid for the extra charges resulting from his overuse of characters. Employers should take whatever steps are necessary to ensure that IT personnel and others involved with the monitoring of electronic devices do not undercut the policy.

- **Caution!** Even when employees' expectations of privacy are diminished, the Stored Communications Act mandates that an employer proceed with caution when attempting to review the content of communications that are stored by a third party service provider.

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