

EMPLOYMENT MATTERS

ROUNDUP OF DEVELOPMENTS FOR 2010 AFFECTING CALIFORNIA EMPLOYERS

- **COBRA Subsidy Extended:**

Our Spring 2009 Newsletter described in detail new obligations on employers to subsidize COBRA continuation coverage. Those obligations were amended by law on December 19, 2009.

First, eligibility for the 65% subsidy has broadened to include employees subject to involuntary termination through February 28, 2010 (the previous cutoff date was December 31, 2009).

Second, eligible employees are now entitled to fifteen months of subsidized payments, rather than the previous maximum of nine months.

But what about people whose nine months of eligibility under the previous law have already lapsed? For them, if they continued COBRA coverage and began paying

100% of the premium, employers must either reimburse them the 65% subsidy for each month's premium up to the fifteen-month maximum,



or apply the 65% to future premium payments. If they discontinued COBRA coverage upon the expiration of the nine-month period, they may retroactively renew COBRA coverage, but only if they pay the entire amount that would have been paid under the new law had they continued coverage, *i.e.*, 35% of their monthly premium for each month their coverage has lapsed up to the fifteen-month

maximum, and 100% of the premium thereafter.

The Department of Labor, on its website, has made available various forms required to notify former employees of the change in the law.

- **Expansion of FMLA for Military Families:** Two categories of protected leave for military families have expanded under recent legislation.

Military Caregiver Leave:

Family members are allowed leave to care for service members who have suffered a serious injury or illness in the line of duty. Previously, this category generally applied only to family members of *active* members of the Armed Forces (including members of the National Guard and Reserves). It now includes family members of *veterans* who were active service members at any time within five years of the date they underwent treatment. Also, covered injuries or illnesses now

include preexisting conditions when those conditions have been aggravated by service in the line of duty.

Qualifying Exigency Leave:

This category allows leaves for family members to attend to "qualifying exigencies," as defined in Department of Labor regulations. Previously, it generally only applied to members of the National Guard or Reserves if and when they were called to active duty. It now includes current members of the Armed Forces (*i.e.*, active, non-reservists) whenever they are deployed to a foreign country.

- **IRS Reduces Mileage Reimbursement Rate:**

The mileage reimbursement rate set by the IRS for 2010 has been reduced to 50 cents per mile. Under California law, this rate is presumed reasonable for the reimbursement of employees for miles driven in their own vehicles.

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NONCOMPETITION AGREEMENTS TAKE ANOTHER HIT

As we reported in our Autumn 2008 Newsletter, the California Supreme Court held in *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) that agreements restraining employees from competing with their former employers are invalid under section 16600 of the California Business and Professions Code unless they fall within a narrow statutory exception. Two recent cases have continued to limit the validity of post-employment restraints.

In *The Retirement Group v. Galante*, 176 Cal. App. 4th 1226 (2009), the appellate court vacated, as contrary to section 16600, the lower court's order prohibiting the defendants from soliciting any of The Retirement Group's current customers. The court did so despite The Retirement Group's argument that the prohibition was narrowly tailored to prevent the misuse of confidential information about its customers.

The *Galante* court decided that "protection of trade secrets" is not an exception to section 16600. However, the court acknowledged that unlawful forms of competition, such as trade secret misappropriation, could properly be restrained. Reconciling section 16600 with California's laws against unfair competition, the court held that competitive conduct

like customer solicitation may only be prohibited if "it is wrongful independent of any contractual undertaking." In

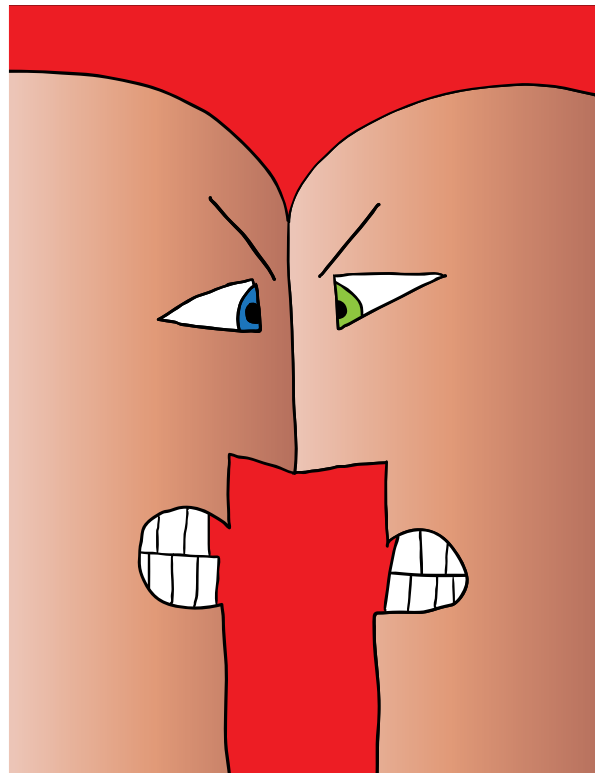
misused in the process, *i.e.* "independently wrongful" solicitation. In contrast, a separate portion of the lower

competing product "by application of" information the agreement defined as confidential.

The *Dowell* court said that it "doubt[ed]" the "continued viability" of any trade secret exception to section 16600 but refrained from deciding that issue. Instead, the court found, "Even assuming the exception exists...the non-compete and nonsolicitation clauses in the agreements are not narrowly tailored or carefully limited to the protection of trade secrets, but are so broadly worded as to restrain competition." As such, they were held void under section 16600. More worrisome, the court held that the company's use of such a broad noncompetition agreement was itself unlawful as a form of unfair competition.

What this Means for Employers

Employers that use employment agreements to safeguard confidential company information should closely examine those agreements. Promises by employees not to use or disclose company information post-employment should be narrowly tailored so that the restraint pertains to legitimate trade secrets, as defined by the California Uniform Trade Secrets Act. Agreements that overreach may not be enforced and their use could be judged to violate California laws against unfair competition.



other words, competition may not be contractually restrained just because the restraint is deemed important, useful, or even necessary to prevent the misappropriation of trade secrets. Rather, the restraint may only validly forbid the conduct that itself constitutes trade secret misappropriation.

The court therefore invalidated the lower court's bar on solicitation because it was not limited to solicitation in which The Retirement Group's trade secrets were

court's injunction, which barred solicitation by use of specifically identified trade secret information, was valid because the conduct proscribed was "independently wrongful."

In the second case, *Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564 (2009), the appellate court voided portions of an agreement that prohibited employees from soliciting company customers and further prohibited them from working for competitors if such work "could enhance the use or marketability" of a

CALIFORNIA SUPREME COURT HELPS AND HURTS EMPLOYERS IN RECENT HARASSMENT DECISION

The recent California Supreme Court decision in *Roby v. McKesson Corp.* (Case No. S149752) provides both good and bad news for employers.

First, the bad news. The court held that allegedly discriminatory personnel decisions, such as employee discipline and work assignments, could be used as evidence to prove claims of hostile work environment sexual harassment. McKesson had argued that, based on a prior California Supreme Court decision, personnel management

decisions supported only claims of discrimination (such as discriminatory hiring, firing, discipline, *etc.*) and did not support hostile work environment claims of harassment.

The court reasoned that personnel decisions *are* relevant to harassment because the actions themselves may further the manager's "hostile message," as well as help prove that a particular manager possesses discriminatory animus.

The good news is that the court determined that, under

the facts of the case, the punitive damage award against McKesson could not constitutionally exceed a one-to-one ratio. The court's decision came after a lengthy and factually specific analysis of multiple factors. The court concluded that a one-to-one ratio was justified primarily because of the relatively low degree of reprehensible conduct by McKesson, combined with the already large noneconomic damage award of \$1.3 million.

The court assessed McKesson's reprehensibility as low because

the only two wrongful acts attributable to the company were its decision to adopt an attendance policy that was averse to the disabled, and the failure of its upper-level managers to take action in response to the Plaintiff's complaint of harassment. The court's decision aids employers facing punitive damage awards by supporting arguments against double or triple damages in circumstances similar to those before the court in *Roby*.

FEDERAL ACT ADDS NEW PROTECTED CHARACTERISTIC TO TITLE VII

The Genetic Information Non-discrimination Act (GINA) recently became effective. It is designed to prohibit the use of genetic information in decisions affecting health insurance and employment.

GINA amends Title VII of the Civil Rights Act to prohibit employment discrimination on the basis of "genetic information." Genetic information means information about employees' and their family members' genetic tests, as well as their request or receipt of genetic services, such as genetic counseling. Genetic information is also defined to include information about the existence of diseases or disorders in an employee's family members, *i.e.*, an employee's family medical history. The term does not

include the age or sex of any individual.

The Act also prohibits, with very limited exceptions, employers from requesting, requiring, or purchasing genetic information about employees or their family members.

Employers covered by Title VII (generally, employers with 15 or more employees) are covered by GINA's prohibition on employment discrimination. Employers should update their posters in the workplace, which are available from the EEOC, to account for the passage of GINA.

Similar to GINA, California's FEHA prohibits employment discrimination on the basis of real or perceived genetic characteristics. Cal. Gov't Code §§

12940(a), 12926(h), (m). Under FEHA, "genetic characteristics" means genes, chromosomes, or inherited traits known to be a cause of disease or disorder. FEHA also prohibits employers from testing individuals for genetic characteristics. Cal. Gov't Code §12940(o).

GINA also addresses the use of genetic information by health insurers. Both group and individual health plans, for example, may not impose higher premiums based on the genetic information of a participant.



ROUNDUP OF DEVELOPMENTS (CONTINUED FROM PAGE 1)

• Recognition of Same-Sex Marriages of other States:

Passage of Proposition 8 created uncertainty about the treatment in California of same-sex marriages entered into validly in states that recognize such marriages, like Massachusetts and Iowa. This amendment mandates that couples in such marriages have the same legal rights and obligations as married opposite-sex couples. The sole exception is that the union cannot be legally called a "marriage" if it was

entered into after the passage of Proposition 8 on November 5, 2008. Employers must therefore treat a same-sex marriage the same as an opposite-sex marriage if the same-sex marriage was validly entered into in another state. Employers are reminded that equal treatment also must be afforded to registered domestic partnerships, as well as same-sex marriages entered into in California from June 16, 2008 and November 4, 2008 (*i.e.*, California same-sex mar-

riages entered into between the day the California Supreme Court legalized same-sex marriage and the passage of Proposition 8).

- **California Civil Air Patrol Leave:** California law requires employers to grant unpaid leave for various reasons, such as for volunteer firefighters to perform emergency duty and for parents to attend a child's school conference. This new law requires up to ten days of leave per year for members of the California Wing

of the civilian auxiliary of the U.S. Air Force, commonly called the California Civil Air Patrol, to attend to emergency operational missions. Employers with 15 or more employees must grant such leave and restore the employee upon his or her return to the same or equivalent position. The employee's benefits must continue to accrue during the leave and the employee cannot be required to exhaust vacation or sick days while on leave.

ATTORNEYS ADVICE IS PRIVILEGED, INCLUDING OTHERWISE DISCOVERABLE FACTS CONTAINED IN COMMUNICATIONS

Confidential communications between attorneys and clients are privileged. But what about facts contained in those communications that are otherwise discoverable and relevant to a pending lawsuit? May courts order parties to produce communications with factual portions revealed, so long as attorney advice and analysis is redacted? No, says the California Supreme Court.

In *Costco Wholesale Corporation v. Superior Court*, Case No. S16335, the Supreme Court

considered privilege issues in the context of a legal memorandum requested by Costco to assess whether certain Costco managers were properly classified as exempt from California's wage and hour laws. The trial court had ordered Costco to produce a version of the letter which had the attorney's advice and analysis redacted, revealing only factual information being reported by the attorney. The factual information about the Costco managers' job duties, reasoned the lower

court, did not become privileged by mere transmission by an attorney.

The Supreme Court reversed. The key principle of the case is that even factual information is protected when it is contained in a privileged communication. In assessing privilege, the decisive question is not the contents of the communication (*i.e.*, factual information versus analysis and opinion), but whether the communication was made for the purpose of providing legal advice.

The court also held that, per California Evidence Code section 915, the trial court was not authorized to order an *in camera* review of the memorandum to assess whether it was protected by the attorney-client privilege. Such an *in camera* review may only be ordered with the consent of the party asserting the privilege, or after the court has determined that the privilege has been waived or a privilege exception applies.

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