Proskauer

California Employment Law Notes

September 2008

Customer Non-Solicitation Covenants Violate Public Policy Against Non-Competes

Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937 (2008)

CPA Raymond Edwards II was hired in 1997 as a tax manager for the Los Angeles office of the now defunct accounting firm Arthur Andersen LLP ("Andersen"). As a condition of his employment, Edwards was required to execute a noncompetition agreement that prohibited his (1) "perform[ing] professional services" for 18 months post-termination on behalf of any client whose account he had handled during the final 18 months of his employment with Andersen; (2) soliciting for 12 months any of the clients he had serviced during his final 18 months at Andersen; and (3) soliciting other Arthur Andersen employees to work for another employer for 18 months post-termination. Edwards signed the agreement and remained employed through May 2002 when, in the wake of its Enron indictment and pending dissolution, Andersen sold a portion of its Los Angeles tax practice to Wealth and Tax Advisory Services ("WTAS"), a newly formed subsidiary of HSBC Bank.

The closing of the HSBC transaction was conditioned in part on Andersen's requiring its employees to sign a "Termination of Non-Compete Agreement" ("TONC") drafted by Andersen, which in relevant part required that they voluntarily resign from Andersen and release the firm from "any and all" claims in exchange for Andersen's agreement to forgo enforcement of the original noncompetition agreement. In turn, HSBC conditioned its planned hiring of former Andersen employees, including Edwards, on their execution of the TONC. Edwards signed and returned HSBC's written employment offer, but he refused to sign the TONC (in large part because he was reluctant to sign a waiver that might affect his right to indemnification). As a result, Andersen terminated Edwards's employment and withheld severance benefits, while HSBC withdrew its offer of employment to Edwards.

In his lawsuit against Andersen, HSBC and WTAS, Edwards alleged, among other things, intentional interference with prospective economic advantage. On Andersen's motion, the lower court severed the trial on the issue of the enforceability of the noncompetition agreement and the TONC and ruled in favor of Andersen, finding the agreement to be enforceable under the so-called "narrow restraint" exception to Cal. Bus. & Prof. Code § 16600. The court of appeal reversed the judgment, holding that the non-solicitation covenant violated Section 16600. The Supreme Court affirmed that portion of the lower court's judgment, but held that the broad general release ("any and all claims") was not invalid just because it failed to carve-out non-waivable statutory claims for indemnity under Cal. Lab. Code § 2802.

Employer Need Only Provide, Not Ensure, Meal And Rest Periods

Brinker Restaurant Corp. v. Superior Court, 165 Cal. App. 4th 25 (2008)

In this case, the Court of Appeal decided a number important issues concerning employee class action claims for alleged rest break violations, meal period and "early lunching" violations and off-the-clock/"time shaving" violations. The Court of Appeal determined the claims were not amenable to class treatment because individual issues predominated and, accordingly, granted the employer's petition for a writ of mandate compelling the trial court to vacate its order certifying the class action. Among the Court's holdings were the following: (1) while employers cannot impede, discourage or dissuade employees from taking rest periods, employers need only provide, not ensure, rest periods are taken; (2) employers need only authorize and permit rest periods every four hours or major fraction thereof and such rest periods need not, where impracticable, be in the middle of each work period; (3) employers are not required to provide a meal period for every five consecutive hours worked; (4) while employers cannot impede, discourage or dissuade employees from taking meal periods, employers need only provide meal periods and need not ensure they are taken; and (5) while employers cannot coerce, require or compel employees to work off the clock, an employer can only be held liable for employees' working off the clock if it knew or should have known the employees were doing so. (The *Brinker* decision was quickly followed by a laudatory press release from the governor and a memorandum to the DLSE staff from the labor commissioner stating that the opinion is binding on the DLSE and should be applied in all pending matters. www.dir.ca.gov/DLSE/Brinker_memo_to_staff-7-25-08.pdf. *Cf. Mark v. Spencer*, 2008 WL 3877735 (Cal. Ct. App. Aug. 22, 2008) (plaintiffs' attorney's failure to disclose fee-splitting arrangement with another attorney in a class action barred his subsequent action against former co-counsel to enforce the agreement); *Hoffman v. Construction Protective Services, Inc.,* 2008 WL 4070195 (9th Cir. Sept. 4, 2008) (trial court properly excluded evidence of damages as a sanction for failure to disclose damage calculations under FRCP 26(a)).

Physician's Discrimination Claim Was Improperly Dismissed

Johnson v. Riverside Healthcare Sys., 534 F.3d 1116 (9th Cir. 2008)

Christopher Lynn Johnson alleged he was discriminated against on the basis of his race and sexual orientation and asserted claims under 42 U.S.C. § 1981, the Unruh Civil Rights Act and the California Fair Employment and Housing Act. The district court granted defendants' motion to dismiss, but the Ninth Circuit reversed as to the dismissal of the Section 1981 claim, holding that Johnson had sufficiently pled a hostile work environment even though the two incidents he alleged (only one of which he witnessed) were isolated in time and occurred over a 28-month period. The Court affirmed dismissal of Johnson's Unruh Act claim on the ground that he was more like an employee than a customer and his FEHA claim on the ground that it was barred by the applicable statute of limitations.

Television Writers' Privacy Objections Overruled In Age Class Action Against Studios, Networks And Talent Agencies

Alch v. Superior Court, 2008 WL 3522099 (Cal. Ct. App. Aug. 14, 2008)

In this on-going putative class action filed by television writers alleging "industry-wide" age discrimination, the writers served subpoenas on the Writers Guild of America ("WGA") and other third parties, seeking demographic information, including dates of birth, employment data such as writers' employers, job titles, credits and dates of employment, and anecdotal evidence of age discrimination. The writers contended this information was the "bare minimum necessary to litigate their claims of systemic practices of age discrimination." In response to a privacy notice that went to 47,000 WGA members, 7,700 individuals filed objections to the production of this information. The trial court sustained the privacy objections, but the Court of Appeal reversed, holding in a two-to-one ruling that the trial court "gave short shrift to the public interest in pursuing the litigation," and granted the writers' petition for a writ of mandate. *Cf. Hurlic v. Southern Cal. Gas Co.*, 2008 WL 3852685 (9th Cir. Aug. 20, 2008) (cash balance pension plans do not violate the anti-age discrimination provision of ERISA, and ERISA preempts state law discrimination claim); *Whitman v. Mineta*, 2008 WL 4014446 (9th Cir. Sept. 2, 2008) (federal employee failed to show he was qualified or eligible for promotion to a position that was filled by a younger employee).

Employee Of Syrian National Origin May Proceed With Discrimination And Defamation Claims

Mamou v. Trendwest Resorts, Inc., 165 Cal. App. 4th 686 (2008)

Tamer Mamou was employed as a project director for Trendwest (a company that sells timeshares at various resort locations) when he was terminated after approximately 12 years of employment. Trendwest terminated Mamou after it became aware that he had filed documents with the California Secretary of State in which it appeared Mamou was seeking to establish a competing resale company. Mamou testified, however, that his attempts to explain the situation were rebuffed and that one of the supervisors who was in the termination meeting said to him, "I'm disappointed in you, my Arab friend." Another supervisor who was involved in the termination testified that although Mamou was not terminated for performance-related reasons, he had instructed HR to "take the lead on building a file relating to Tamer's performance over the last six months" – and that specific areas to be addressed included "disability claims" and other "HR related claims." Mamou also offered evidence of negative references and allusions to his Middle Eastern national origin and of various disparaging comments that were made about him after his termination. Mamou sued for national origin discrimination and retaliation for having opposed the company's adverse treatment of employees who exercised their right to take family medical leave, and he also asserted a defamation claim. Although the trial court granted summary judgment to Trendwest, the Court of Appeal reversed, holding that "there was ample evidence to support…an inference [that Trendwest's claimed reason for the firing] was false, beginning with the fact that Trendwest never rested on a single coherent explanation for its firing of Mamou, and that several if not all of its explanations were, to put it mildly, questionable." The Court also found a triable issue of material fact as to whether malice existed, thus vitiating the qualified privilege defense to the alleged defamation. *Cf. Parra v. Bashas', Inc*., 2008 WL 2891234 (9th Cir. July 29, 2008) (district court abused its discretion in failing to certify plaintiffs' class action alleging national origin discrimination in pay practices); *Lukovsky v. City and County of San Francisco*, 535 F.3d 1044 (9th Cir. 2008) (national origin and race discrimination claims based on failure to hire were barred by statute of limitations).

Catering Employee Could Proceed With Family Leave Claim, But Not Disability Claim

Avila v. Continental Airlines, Inc., 2008 WL 3272183 (Cal. Ct. App. Aug. 11, 2008)

Henry Avila sued his employer, Chelsea Food Services (a division of Continental Airlines), following his termination for excessive absences from work. Avila sued for disability discrimination and for violation of his rights under the California Family Rights Act ("CFRA"). The trial court granted summary judgment to Continental, but the Court of Appeal reversed the summary adjudication of the CFRA claim. The Court affirmed dismissal of the disability discrimination claim on the ground that there was no evidence that Continental was aware of Avila's alleged disability because the forms he submitted to the company did not contain sufficient information to put Continental on notice of his alleged disability – although the forms referenced Avila's hospitalization they gave Continental no details about the reason for the hospitalization. Evidence that Avila told other employees (but not his supervisors) about his acute pancreatitis before his termination and that he informed the company after his termination of the nature of his illness did not save his claim. However, the Court reversed the dismissal of Avila's CFRA claim in light of the fact that Avila did submit forms from Kaiser regarding his absence, which was sufficient to put Continental on notice that he might have been suffering from a "serious health condition" sufficient to trigger family medical leave rights under CFRA. (In a dissenting opinion (as to the reversal of the summary adjudication), Justice Kriegler noted that there was no evidence that Avila ever requested family leave under the CFRA or that the individuals who made the decision to terminate had any knowledge of Avila's hospitalization.)

Operator Of Nursing Home Chain Was Properly Convicted For Failing To Pay Over Payroll Taxes

United States v. Easterday, 2008 WL 3876593 (9th Cir. Aug. 22, 2008)

Jack Easterday operated a chain of nursing homes. Between 1998 and 2005, the payroll taxes for his company and its subsidiaries were approximately $45 million of which only $26 million was paid to the IRS. In his criminal trial for failure to pay over payroll taxes, Easterday did not dispute that he failed to pay the taxes – his defense was that he lacked the financial ability to comply with his tax obligations. During the trial, the district court refused Easterday's request that the jury be instructed that in order to prove a willful failure to pay taxes, the government must prove that Easterday had the ability to pay the tax obligation. The jury convicted Easterday, and he was sentenced to 30 months of prison and three years of supervised release. In this appeal, the Ninth Circuit affirmed the judgment and sentence and held the district court had not erred in refusing the jury instruction that Easterday had sought. *Cf. Kadillak v. CIR*, 534 F.3d 1197 (9th Cir. 2008) (taxpayer's election to recognize AMT income on his unvested shares of company stock was proper, but he was not entitled to a claim of right deduction when unvested shares were later forfeited upon termination).

Injured Employee Limited To Workers' Compensation Remedy

Mora v. Hollywood Bed & Spring, 164 Cal. App. 4th 1061 (2008)

Salvador Mora sued his former employer and its president after his arm was crushed in a power press machine. Mora alleged the machine lacked an adequate guard to protect against injury and, therefore, pursuant to Cal. Lab. Code § 4558, he was not limited to a remedy provided under the Workers' Compensation Act. The trial court granted the employer's motion for summary judgment, and the Court of Appeal affirmed, holding there was no evidence that the employer specifically authorized the failure to install or removal of a point of operation guard on the machinery. *Cf. Ramirez v. Nelson*, 44 Cal. 4th 908 (2008) (homeowners breached no special duty of care to unlicensed contractor or his worker who was electrocuted); *Los Angeles County Professional Peace Officers' Ass'n v. County of Los Angeles*, 165 Cal. App. 4th 63 (2008) (county's policies concerning cash-out of vacation benefits discriminated against disabled public safety officers in violation of Cal. Lab. Code § 132a and equal protection guarantees).

Labor Commissioner Approves Use Of Payroll Debit Cards

In two opinion letters issued on July 7, 2008, the DLSE determined that an employer's use of payroll debit cards and "money network checks" to pay employees did not violate Cal. Lab. Code § 212, governing the payment of wages by non-cash methods. www.dir.ca.gov/dlse/OpinionLetters-byDate.htm.

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