

NEW PREGNANCY AND DISABILITY REGULATIONS FOR CALIFORNIA EMPLOYERS

Effective December 30, 2012, California employers are subject to the new administrative regulations governing disabilities – including those related to pregnancy – that were issued by the Fair Employment and Housing Commission (now known as the Fair Employment and Housing Council as of January 2, 2013). These regulations were designed to strengthen the protections afforded to individuals suffering from disabilities, including those related to childbirth, pregnancy and related conditions.

Some of the significant provisions in the new pregnancy regulations include the following:

Calculation of PDL – The new regulations clarify that the 4 month unpaid pregnancy disability leave requirement refers to one-third of a year or 17 1/3 weeks, meaning a full-time employee who works 40 hours per week is entitled to 693 hours of PDL per pregnancy. Employees who work more or less than 40 hours per week are entitled to a pro rata amount of leave. This clarification makes it easier for employers to calculate intermittent and reduced schedule leave when appropriate.

Reinstatement obligations – Upon request, employers are required to provide a written guarantee of reinstatement to the same or comparable position following the leave (provided that the employer has no obligation to reinstate in the case of legitimate business reasons unrelated to the pregnancy, such as a layoff). If an employer denies an employee reinstatement to the same position following the leave, it must: (i) reinstate the employee to a comparable position; (ii) prove that it would not have offered a comparable

position to the employee even if she had not taken the leave; or (iii) prove that no comparable positions were available (in which case, the employer has an affirmative duty to reasonably notify the employee of all positions that are available within 60 calendar days following the employee's return date).

Notice obligations – Employers with at least 5 but less than 50 employees are required to post this notice [Notice A] or an equivalent either physically or electronically. Employers with at least 50 employees are required to post this notice [Notice B] or an equivalent. Employers with 5 or more employees must also make reasonable efforts to provide the required notice either verbally or in writing to those employees whose primary language is other than English, and if at least 10% of the workforce speaks a primary language other than English, the notice must be translated into that language.

Broader definition of "Health Care Provider" – The group of individuals who are qualified to certify disabilities has been expanded to include marriage and family therapists, licensed midwives, clinical psychologists, clinical social workers, chiropractors and physician assistants.

Limited protection for individuals "perceived to be pregnant" – Employers are prohibited from discriminating against, harassing or taking adverse action on account of a perceived pregnancy (e.g., refusing to hire a job applicant because the employer perceives the applicant to be pregnant). However, employers' reasonable accommodation obligations only extend to individuals that are in fact pregnant, and not to those that are merely perceived to be pregnant.

Continuation of health benefits – The new regulations clarify that the requirement to continue health benefits for the duration of the PDL is independent of and in addition to any obligation to maintain health benefits under CFRA. Thus, an employee may be eligible for more than 29 weeks of health benefits continuation for PDL (17 1/3 weeks of potential leave) and CFRA (12 weeks).

The new regulations clarify other obligations, including providing an expansive list of possible accommodations for workers affected by pregnancy or related conditions. Employers should review their current handbooks and policies to ensure compliance with the new regulations.

WASHINGTON FEDERAL COURT DECLINES TO UPHOLD BROAD NON-COMPETE RESTRICTIONS AGAINST CALIFORNIA EMPLOYEE

Employers are often faced with difficult issues when seeking to hire employees with non-competition restrictions, or seeking to enforce non-compete restrictions with respect to departing employees. The recent *Amazon.com, Inc. v. Powers* case — involving a former Washington-based Amazon and current California-based Google employee — illustrates how a federal court chose to resolve some of these problematic issues.

Daniel Powers worked at Amazon in Seattle, Washington from mid-2010 through July 1, 2012, during which time he was responsible for sales of Amazon's cloud computing services. At Amazon, Mr. Powers executed an agreement that, among other things, prohibited him from: (1) doing business with Amazon's actual or prospective customers for 18 months following his departure; and (2) working in any capacity that competes with Amazon. In September of 2012, Google hired Mr. Powers to work as its Director of Global Cloud Platform Sales in its Mountain View, California headquarters. Upon joining Google, Mr. Powers executed an offer letter that, for a period of 6

months, prohibited him from: (1) soliciting Amazon customers that he had material contact with during his former employment; and (2) perform certain work relating to cloud computing.

When Amazon learned that Mr. Powers joined Google, it first engaged in discussions with Google about Mr. Powers' employment. Following those discussions, Amazon sought injunctive relief through a Washington state court. After Mr. Powers successfully removed the case to a Federal District Court in Washington, Amazon moved for a preliminary injunction against Mr. Powers to enforce the non-compete restrictions.

The court denied most of Amazon's requests, and upheld the non-compete restriction only to the extent that it prohibited Mr. Powers, for a period of 9 months from the date he last had access to Amazon confidential information, from servicing any customer as to which he had obtained confidential information during his employment at Amazon (this restriction was essentially the same restriction as the one Mr. Power voluntarily agreed to upon joining Google). In making this ruling, the court made several noteworthy determinations.

The court first decided that the contractually-agreed upon choice of Washington law was the proper law to govern the dispute, even though the employee now worked and resided in California. (This choice of law determination was significant because had California law applied, the restrictions would have been unenforceable pursuant to California Bus. & Prof. Code § 16600.) The court determined that California did not have a "materially greater interest" in determining whether the restrictions should be enforceable, and therefore the contractually agreed upon choice of Washington law should govern.

With respect to the validity of the non-compete restrictions, the court next determined that the restrictions were enforceable only to the extent that they sought to prevent Mr. Powers from working with his former Amazon customers. The court also

determined, however, that Amazon’s attempt to uphold the more general “worldwide” ban against competition — i.e., not tied to specific customers — was unenforceable because it was unreasonable and Amazon failed to show how such a restriction was necessary to protect its business. The court further limited the length of the customer restriction to 9 months following Mr. Powers’ last receipt of confidential information (and in fact criticized Amazon’s attempt to impose a “one size fits all” 18 month restriction as not individually tailored to the circumstances). Coincidentally, the 9 month restriction the court imposed ended at approximately the same time the 6 month voluntary customer ban Google imposed upon hiring Mr. Powers.

There are several important takeaways from the Powers case. First, non-compete restrictions are generally disfavored, even in jurisdictions like Washington that permit such restrictions. In order to improve the chances that a restriction will be enforced, it should be as narrow and specific as practicable, and tailored to fit the employee and position in question (rather than a “one size fits all” approach). Specific customer restrictions — tied to actual relationships created during the employment relationship — are more likely to be enforced than broad, general prohibitions against competition. Second, employers who desire to hire individuals who are subject to contractual non-compete restrictions should carefully weigh the risks involved, and if they decide to move forward with bringing the employee on, take reasonable precautions to prevent even the appearance of impropriety (like Google did in this case with the specific non-compete restrictions it imposed on Mr. Powers). This complex area of the law continues to present pitfalls and challenges; early involvement of employment counsel in such situations is highly recommended.

UNIONS HAVE STATUTORY RIGHT TO PEACEFULLY PICKET ON PRIVATE PROPERTY IN CALIFORNIA

In *Ralphs Grocery Co. v. UFCW Union Local 8*, the California Supreme Court held that a labor union had the right to picket in front of a grocery store owner’s sole entrance on private property pursuant to two California labor laws.

The plaintiff in *Ralphs* owned and operated a warehouse grocery store in Sacramento, located in a retail development that contained restaurants and other stores. Agents of the defendant union picketed the entrance of plaintiff’s grocery store to encourage people not to shop at the store because the store’s employees were not represented by a union. After the union refused to comply with plaintiff’s requests to regulate the picketing — including requests to not picket within 20 feet of the store entrance and not distribute literature — plaintiff asked the Sacramento police to stop the picketing, but the police declined to do so without a court order. Plaintiff then filed suit to enjoin the union’s activities. The matter worked its way through the California court system before finally reaching the California Supreme Court.

The California Supreme Court first determined that the activity in question did not take place in a “public forum” (i.e., public areas that are traditionally accorded a high degree of protection under the free speech provisions of the state Constitution). While the activity was not entitled to constitutional protection, however, the Court held that the activity was entitled to statutory protection pursuant to two labor laws: The Moscone Act and Labor Code § 1138.1. Both of these labor laws generally prohibit courts from enjoining certain activities (such as picketing) during labor disputes unless it is established that the activities are unlawful (e.g., involve disorderly conduct, unlawful blocking of ingress or egress, breach of the peace, etc.) or that unlawful acts have been threatened and will be committed unless restrained.

The Court of Appeal previously concluded that both of these labor laws violated the free speech and equal protection guarantees of the federal Constitution because they favored a particular type of speech (i.e., speech related to labor disputes) over other types. The California Supreme Court disagreed, finding that labor-related speech can be afforded particular protection without violating the federal Constitution. The Court ultimately concluded that under both the Moscone Act and Labor Code § 1138.1, peaceful picketing on a private sidewalk outside a retail store may not be enjoined on the ground that it constitutes a trespass.

This decision creates a significant obstacle for California employers who wish to enjoin or curtail labor activity—such as picketing or leafleting—on their private property. Injunctive relief may only be available if an employer can prove the occurrence of unlawful threats, breaches of the peace, disorderly conduct or interference with access.

News Bites

PRIVATE SOCIAL MEDIA POSTINGS DISCOVERABLE IN SEXUAL HARASSMENT LAWSUIT

Affirming that privacy rights often must give way during the discovery phase in employment lawsuits, a Federal District Court in New York required a plaintiff to produce non-public postings from her Facebook account during the discovery phase of a lawsuit. In *Reid v. Ingerman Smith LLP*, a legal secretary sued her former law firm employer, alleging that one of her former supervisors subjected her to same-sex harassment. Because the plaintiff sought emotional distress damages, the employer sought to discover private postings from plaintiff's Facebook account on the grounds that publicly available postings revealed information contradicting plaintiff's claims of mental anguish. The court held that certain private postings—including postings about plaintiff's social activities—were discoverable, as they may contain

relevant information regarding plaintiff's emotional state.

SPORADIC JOB DUTIES MAY STILL BE “ESSENTIAL” FOR PURPOSE OF DISABILITY ACCOMMODATION

In *Lui v. City of San Francisco*, a California Appeals Court determined that job duties performed only occasionally may nevertheless be “essential” for purposes of disability accommodation where the duties are critical to the operation of the employer. The *Lui* case involved unique circumstances, i.e., whether strenuous physical tasks such as making arrests, pursuing suspects and responding to emergencies are essential duties of all police department positions, even administrative office positions. The court seized upon a particular provision in FEHA (“[t]he function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed”) to find that even administrative employees within the police department needed to be able to perform strenuous tasks during the admittedly infrequent emergencies (e.g., mass celebrations, demonstrations, earthquakes, etc.) that required the involvement of the entire police department. *Lui* is a reminder to employers that a thorough, fact-based analysis of the particular position in question is necessary as part of the reasonable accommodation “interactive process.”

EMPLOYER MAY HAVE ACTED UNLAWFULLY IN FORCING RETIREMENT OF EMPLOYEE WHO WAS UNFIT FOR DUTY IN THE “NEAR TERM”

In another police department reasonable accommodation case, *Kesecker v. Marin Community College District*, a Federal District Court in California determined that a former police officer was entitled to a jury trial on his claims that his former employer unlawfully refused to reasonably accommodate his disability and engage in the interactive process. In *Kesecker*, the employer denied reinstatement to the officer—who suffered from generalized anxiety disorder—on account of the results of his

fitness for duty medical examination, in which the employer's physician opined that the officer was likely to experience "psychological distress for the foreseeable future and it is unlikely that he will be able to return to duty in the near term." After ten months of being denied any accommodation, the officer felt forced to retire. The court held that instead of forcing the officer to retire, a jury could determine that an extended leave of absence with a follow up fitness for duty examination was a reasonable alternative accommodation. The court also determined that the employer's failure to disclose the medical report to the officer created a triable issue as to whether the employer failed to properly engage in the interactive process. In this case, the employer should have at a minimum clarified the physician's opinion before forcing the employee to retire.

AGREEMENT TO TERMINATE ONLY FOR "GOOD CAUSE" IMPLIED WHERE THERE WAS NO WRITTEN "AT WILL" DISCLAIMER

Highlighting the importance of written at-will disclaimer language, in *Faigin v. Signature Group Holdings, Inc.*, a California jury awarded \$1,347,000 in damages for breach of an implied-in-fact agreement to terminate employment only for "good cause" where there was no written at-will language. The plaintiff in *Faigin* was an executive who simultaneously worked for two related entities, Fremont General and Fremont Reorganizing Corp. ("FRC"), but only had a written employment agreement with Fremont General. After his termination, the plaintiff sued FRC for breach of an implied agreement to terminate his employment only for "good cause." After the jury awarded judgment to the plaintiff on the claim, the court affirmed the judgment, noting that while an implied contract claim cannot exist where there is an express at-will disclaimer, there was none in this case. This case also serves as a cautionary tale for organizations with interrelated corporate entities, as the failure to maintain distinct boundaries in this case among the separate corporate entities blurred the

lines of the employment relationship and exposed the "secondary" employer to liability.

REMINDER: NEW CALIFORNIA EMPLOYMENT LAWS EFFECTIVE JANUARY 1, 2013

California employers should be aware of the various new employment laws that are effective January 1, 2013, including laws regarding the increased social media protections for employees and job applicants, the new religious accommodation obligations and the new obligations regarding written commission plans (see [September](#) and [October 2012 FEB](#)).

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(a) “Notice A”

YOUR RIGHTS AND OBLIGATIONS AS A PREGNANT EMPLOYEE

If you are pregnant, have a related medical condition, or are recovering from childbirth, PLEASE READ THIS NOTICE.

- California law protects employees against discrimination or harassment because of an employee’s pregnancy, childbirth or any related medical condition (referred to below as “because of pregnancy”). California also law prohibits employers from denying or interfering with an employee’s pregnancy-related employment rights.
- Your employer has an obligation to:
 - reasonably accommodate your medical needs related to pregnancy, childbirth or related conditions (such as temporarily modifying your work duties, providing you with a stool or chair, or allowing more frequent breaks);
 - transfer you to a less strenuous or hazardous position (where one is available) or duties if medically needed because of your pregnancy; and
 - provide you with pregnancy disability leave (PDL) of up to four months (the working days you normally would work in one-third of a year or 17 $\frac{1}{3}$ weeks) and return you to your same job when you are no longer disabled by your pregnancy or, in certain instances, to a comparable job. Taking PDL, however, does not protect you from non-leave related employment actions, such as a layoff.
 - provide a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in Labor Code section 1030, et seq.

For pregnancy disability leave:

- PDL is not for an automatic period of time, but for the period of time that you are disabled by pregnancy. Your health care provider determines how much time you will need.
- Once your employer has been informed that you need to take PDL, your employer must guarantee in writing that you can return to work in your same position if you request a written guarantee. Your employer may require you to submit written medical certification from your health care provider substantiating the need for your leave.
- PDL may include, but is not limited to, additional or more frequent breaks, time for prenatal or postnatal medical appointments, doctor-ordered bed rest, severe “morning sickness,” gestational diabetes, pregnancy-induced hypertension, preeclampsia, recovery from childbirth or loss or end of pregnancy, and/or post-partum depression.
- PDL does not need to be taken all at once but can be taken on an as-needed basis as required by your health care provider, including intermittent leave or a reduced work schedule, all of which counts against your four month entitlement to leave.

(b) “Notice B”

FAMILY CARE AND MEDICAL LEAVE AND PREGNANCY DISABILITY LEAVE

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with your employer and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to an unpaid family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse.

Even if you are not eligible for CFRA leave, if disabled by pregnancy, childbirth or related medical conditions, you are entitled to take pregnancy disability leave (PDL) of up to four months, or the working days in one-third of a year or 17½ weeks, depending on your period(s) of actual disability. Time off needed for prenatal or postnatal care; doctor-ordered bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; childbirth; postpartum depression; loss or end of pregnancy; or recovery from childbirth or loss or end of pregnancy would all be covered by your PDL.

Your employer also has an obligation to reasonably accommodate your medical needs (such as allowing more frequent breaks) and to transfer you to a less strenuous or hazardous position if it is medically advisable because of your pregnancy.

If you are CFRA-eligible, you have certain rights to take BOTH PDL and a separate CFRA leave for reason of the birth of your child. Both leaves guarantee reinstatement to the same or a comparable position at the end of the leave, subject to any defense allowed under the law.

If possible, you must provide at least 30 days advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or a family member). For events that are unforeseeable, you must to notify your employer, at least verbally, as soon as you learn of the need for the leave.

Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

Your employer may require medical certification from your health care provider before allowing you a leave for:

- your pregnancy;
- your own serious health condition; or
- to care for your child, parent, or spouse who has a serious health condition.

See your employer for a copy of a medical certification form to give to your health care provider to complete.

When medically necessary, leave may be taken on an intermittent or a reduced work schedule.