



Murphy Austin Adams Schoenfeld LLP

## Employment Law Newsletter

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### **Overbroad Confidentiality Clauses Can Be Costly**

An employer may incur liability when an employee reasonably believes that the employer's confidentiality policy deprives the employee of his or her rights granted under federal labor law. Similar liability may be incurred when the confidentiality clause conflicts with an employee's rights under California law—such as an employee's right to disclose his or her wages. In sum, employers must ensure that their confidentiality clauses are not overbroad or vague. For example, a policy that states that an employee could be disciplined for “violating a confidence or unauthorized release of confidential information” was overbroad because it conflicted with the employee's rights under the National Labor Relations Act. (See *Cintas Corp.*, 344 NLRB No. 118 (2005).)

### **Mileage Reimbursements--New Rates and Rules**

Effective January 1, 2006, the IRS will allow employers to deduct 44.5 cents per mile for employees who drive their own cars for business purposes. This is a decrease from the current 48.5 cents per mile that employers have been able to deduct since September of 2005.

Also, a California appellate court has just ruled that employers may pay an employee additional wages rather than reimbursing the employee on a per mile basis to cover the actual expenses an employee incurs when using his or her own car to perform the employer's business. However, employers must ensure that the additional wages cover the employee's actual expenses--taking into account such things as the increased taxes the employee will have to pay because of the increase in wages. (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2005) 133 Cal.App.4th 985.)

## **New Discrimination Rulings**

In recent months, numerous rulings have generally broadened an employee's ability to sue his or her employer for discriminatory conduct. Here are some tips for avoiding discrimination claims that can be gleaned from these lawsuits:

### **1. Avoid Americanizing Your Employees' Names and Be Sensitive to Ethnicity.**

An employer lost \$30,000 because one of its supervisors called an employee by a name that he thought would be more acceptable to its clients. Rather than using the employee's name, the supervisor referred to Mamdouh El-Hakem as Manny. (*El-Hakem v. BJY, Inc.* (9th Cir. 2005) 415 F.3d 1068.)

### **2. Carefully Consider Your Reaction to Employee Disobedience.**

If an employee disobeys or hesitantly complies with an order, carefully consider whether the employee has a good reason for doing so before taking action against the employee. An employer may incur liability if an employee suffers an adverse employment action for refusing to comply with an order and the employer knows that the employee is disobeying because the employee reasonably believes the order illegally discriminates—regardless of whether the order actually discriminates or not. For example, an employer could be found guilty of retaliation for giving negative reviews to an employee who refused to comply with a supervisor's orders to replace a female salesperson who was not "hot" enough. The employer could be liable even though the employee never stated that she believed the supervisor's orders were illegal. The employer should have known from the employee's act of disobedience that the employee reasonably believed the orders were illegal. (*Yanowitz v. L'Oreal* (2005) 36 Cal.4th 1028.)

### **3. Thoroughly Investigate and Document Why a Disabled Employee Is Unqualified to Perform all of the Essential Job Duties of His or Her Position.**

Previously, to prove disability discrimination in California, an employee was required to prove, among other things, that he or she was qualified to perform the essential functions of his or her position, with or without an accommodation. In *Green v. State of California* (2005) 33 Cal.Rptr.3d 254, a California appellate court transferred that burden of proof to the employer. Consequently, if an employee can prove that he or she has a qualified disability and that he or she experienced an adverse employment action, the employer then bears the burden of proving that the employee was not qualified to perform the essential job duties, with or without an accommodation. Recently the California Supreme Court took this matter under consideration, causing the previous rule (i.e. the employee retains the burden of proof) to be in effect until the Supreme Court decides whether or not it will affirm the *Green* decision. Regardless of how the Supreme Court will decide the matter, employers are well-advised to document thoroughly the facts surrounding every instance of an employee being unqualified to work in his or her position.

**Reminder: Legal Updates Seminar on January 12, 2006**

The labor and employment attorneys at Murphy Austin Adams Schoenfeld LLP are pleased to present the firm's clients with a summary of the legal changes with which employers must comply in 2006.

**January 12, 2006**  
**Double Tree Hotel, 2001 Point West Way, Sacramento, CA**  
**8:00 a.m. - Registration and Continental Breakfast**  
**8:30 a.m. to 11:00 a.m. - Presentation**

Reserve your spot by contacting Donna Kulczyk at [dkulczyk@murphyaustin.com](mailto:dkulczyk@murphyaustin.com) or (916) 446-2300, Ext. 3065.



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