

News for California Employers

GWT proudly presents its inaugural issue of *News for California Employers*. The landscape for California employers is constantly shifting, and it is more important than ever to keep up-to-date on new developments. Because GWT's employment clients are quite varied in both size and sophistication, we address everything from the most basic (Employment Termination 101), to more cutting edge employment issues raised in recent, high-profile California cases. Our goal is to provide our readers with useful practical content, while touching on the cases and developments most likely to impact our employment clients. We hope you find this issue informative, and we welcome your questions and comments.

Employment Termination 101 – Best Practices on Termination

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The most common questions we receive as labor counsel are when, whether and how the employer can terminate an employee. Sometimes this arises in the context of layoffs, and other times in connection with a problem employee, or one who has been out on protracted leave.

Terminating an employee is never risk-free, particularly if the employee already has an attorney. Employees who have previously made claims, or who feel that they

have been mistreated during the firing process, are those most likely to sue their employer after they are terminated.

In our experience, the best time to call a lawyer is before you make the final decision to terminate. That way you can take prudent steps to identify and limit your risk, whether that means holding off on your decision and better documenting your file, offering reasonable severance in exchange for a release, or simply handling the termination in the way best-designed to limit your risk.

Special points of interest:

- *How to limit liability when firing employees*
- *Pitfalls of failing to consistently accommodate disabled workers*
- *Hope for employers facing punitive damages claims*
- *Renewed importance of protecting trade secrets after Edwards v. Arthur Andersen*

Inside this issue:

<i>Employment Termination 101</i>	1-3
<i>Recent Developments In California Employment Law</i>	4-6
<i>The Aftermath of <u>Edwards v. Arthur Andersen</u></i>	6-7
<i>About GWT</i>	8

10 Things You Should Consider before Terminating

1. Review your employee handbook and written policies. Does your employment handbook include an at-will policy, and have your employees acknowledged or initialed that policy? Does it also include a sexual harassment policy, with an appropriate procedure for making and responding to complaints? If not, it's time to revise those policies and have your current employees acknowledge the change, and confirm or re-confirm their at-will status.



2. Never make a snap decision to terminate an employee. Even if an employee is alleged to have stolen from the company, or sexually harassed a fellow employee, suspension is generally a better immediate response. It is always a good idea to fully investigate the facts before making a final decision.

3. Review the employee's personnel file before any termination. Although California is an at-will employment state, jurors are far more likely to be friendly to the employer if the file contains prior evaluations and warnings that support the decision to terminate.

4. On that same note, document performance issues as they happen. It is not unusual for a client to tell us that the employee

has historically been a problem, and yet the employee file contains good or even glowing evaluations, and no complaints. While it may be unpleasant, if you don't formally counsel or discipline employees when problems arise, it will be much more difficult to justify your decisions down the road. Not only will the employee feel that he was treated unfairly, but a jury will be much more likely to conclude that your stated reason for firing was a pretext.

5. Make sure the termination is consistent with your written policies. While we don't see them often, there are still companies out there that have progressive discipline requirements built into their employment manuals. If you have such a policy, you need to follow it (and consider revising it).

10 Things You Should Consider before Terminating (continued)

6. Take a hard look at the employee's status. Is he or she in a protected group, such as age, sex, race or disability? Have they recently been on leave, or made a claim for disability, workers' compensation, or sexual harassment? If so, it is important to talk to your attorney before firing the employee to best avoid any complaints for discrimination or retaliation. Disability claims, in particular, are extremely tricky to navigate without liability.

7. Consider how other employees in similar circumstances have been treated. If they were treated differently, is there an objective and defensible reason for terminating this employee for the same

reason? If you treat similarly situated employees differently, you substantially increase the chance of a discrimination claim.

8. When appropriate (and particularly if the employee is in a protected class, has recently been on leave, or has made a claim) consider a severance package in exchange for a release of all employment claims. The release should be drafted, or at least reviewed, by your counsel. Remember that if you are terminating an employee over the age of 40, there are special requirements for an enforceable release of claims.

9. Employees who feel that they have been treated unfairly are the most likely to sue. Treat even difficult employees as you would like to be treated yourself, and handle the firing process in a humane way. Do not become overly emotional, or argue with the employee. Be clear, respectful and professional. Be understanding, but reinforce that the firing decision is final.

10. Train your managers and supervisors on personnel issues. You don't want your company to be the victim of a hasty termination decision made by an employee who didn't understand the consequences of, for instance, failing to reasonably accommodate a disabled employee.

In conclusion, firing an employee is never easy or risk free, even in the best of circumstances. If you have any doubt at all about whether your decision is the right one, it makes good sense to seek the advice of a seasoned employment lawyer prior to making the decision to terminate. That lawyer can help you take an educated and objective look at the facts before you take action.

Recent Developments in California Employment Law

2009 was a busy year for courts ruling on employment issues. Here are just a few of the highlights.

\$200,000 Judgment Affirmed for One-Time Failure to Accommodate Employee's Disability

A.M. v. Albertsons, LLC
178 Cal.App.4th 455 (2009)

The *Albertsons* case, is a cautionary tale which reminds us that to completely avoid liability, “reasonable accommodation” of a disabled employee may need to be executed perfectly every time.

A.M. was a cashier at an Albertsons in Marin County. After receiving cancer treatment, she needed to drink large volumes of water (and take more frequent bathroom breaks). Albertsons had granted her extra bathroom breaks as an accommodation, and had implemented a system for A.M. to obtain them by calling her supervisor to cover for her.

One night, A.M. was working with only two other employees in the store. She repeatedly notified her supervisor that she needed to be relieved at the checkstand to take a bathroom break. She said nothing about her disability, and A.M.’s supervisor, who was unloading a truck, refused to relieve her. A.M. proceeded to urinate on herself at the checkstand. A.M. was humiliated, and left the store after

cleaning herself up in the bathroom. Following the incident, she became depressed and withdrawn, and was briefly committed to a psychiatric hospital. She remained away from Albertsons for a number of months, but eventually returned, and was allowed to take (and was receiving) regular bathroom breaks at the time of trial.

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A.M. sued Albertsons for failure to accommodate her disability. The jury reached a verdict in favor of A.M., awarding her \$200,000 for lost wages, future medical expenses, and past emotional distress. The court of appeal affirmed, holding that *even a single failure to accommodate* was enough to constitute a denial of reasonable accommodation. A.M.’s case was certainly very sympathetic (and graphic), and it remains to be seen whether future courts will hold employers up to the same high standard. In the meanwhile, however, California employers should be quite cautious indeed when following through with their plans for reasonable accommodation.

Recent Developments in California Employment Law (continued)

Sexual Harassment Standards Clarified in Summary Judgment Case

Haberman v. Cengage Learning, Inc.
180 Cal.App.4th 365 (2009)

Haberman involved a sexual harassment claim alleging a hostile work environment. The plaintiff alleged upwards of twenty separate “incidents” of so-called harassment, such as comments like “you look really hot today” or “my customer says he really wants to date you,” or asking plaintiff whether she has any friends “who just want to have sex.” The court divided the comments into sexual and non-sexual communications. It then found that the eleven sexual comments, while possibly vulgar, were brief and isolated and insufficient to constitute a hostile work environment. The court of appeal affirmed the trial court’s grant of summary judgment on the ground that the acts of alleged harassment fell “far short” of establishing a pattern of severe, continuous, and pervasive harassment necessary to show a hostile work environment under FEHA.

With Haberman, California employers have a useful new tool when filing motions for summary judgment against employees alleging sexual harassment.

Prior to the *Haberman* case, employers had to rely on out-of-state and federal

cases to support their argument that even a large number of “boorish,” “brazen” or “suggestive” comments do not rise to the level necessary to make out a claim for hostile work environment. With *Haberman*, California employers have a useful new tool when filing motions for summary judgment against employees alleging sexual harassment.

Hope for Employers Facing Punitive Damages Claims

Roby v. McKesson Corp.
47 Cal.4th 686 (2009)

One of the biggest employment decisions to be issued by the California Supreme Court in 2009 was *Roby v. McKesson Corp.*, in which the Court addressed two important issues: (1) whether personnel management conduct can constitute “harassment,” and (2) the constitutional limits on awards of punitive damages. The Court’s holding was a mixed bag for California employers.

First, the Court held that personnel management conduct, such as reprimanding an employee in front of co-workers, belittling an employee’s job, and shunning an employee during staff meetings, *can* support a finding of not just discrimination, but also harassment. Thus, “official employment actions” that might have traditionally been used only to support a discrimination claim can now also be used to provide evidentiary support for harassment.

Recent Developments in California Employment Law (continued)

The decision will likely make it more difficult for employers (and individual supervisors) defending harassment claims to avoid liability.

Roby's punitive damages holding offers more hope to California employers. The jury awarded *Roby* more than \$19 million, including a whopping \$15 million in punitive damages. The court of appeal reduced the judgment to \$1.4 million in compensatory damages, and \$2 million in punitives. The Court held that given the relatively slight degree of reprehensibility that existed in the case, no more than a one-to-one ratio between punitive and compensatory damages was appropriate (particularly when the amount of compensatory damages was already substantial, and included a significant non-economic component).

While the *Roby* punitive damages holding is certainly very encouraging (and saved McKesson literally millions of dollars), it is presently unclear how the appellate courts will interpret that decision, and whether they will limit the *Roby* holding to the particular fact pattern of that case.

The Aftermath of *Edwards v. Arthur Andersen*: Impact on Non-Competes, Non-Solicitation Agreements and Trade Secrets

Two years ago, the California Supreme Court sounded the final death knell for employee non-compete agreements in *Edwards v. Arthur Andersen*, 44 Cal.4th 937 (2008). The primary issue in *Edwards*

was whether the Ninth Circuit's "narrow restraint" exception was a proper interpretation of California law relating to Business & Professions Code Section 16600. Section 16600 provides that, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Under the narrow restraint exception developed by the Ninth Circuit, employers could enforce non-compete agreements that did not "entirely preclude" an employee from practicing his or her trade, such as an agreement not to solicit specified customers for a specified period of time after employment. The agreement in *Edwards* was specifically drafted to fall under this judicially-created exception.

The *Edwards* Court flatly rejected the "narrow restraint" exception, expressed a stark disapproval for judicially-created exceptions to Section 16600, and held that any time an agreement restricts an employee's "ability to practice his [] profession" in any way not explicitly excepted by the statute, it is void.

While California employers have scrambled to draft around the *Edwards* decision, subsequent California cases have made clear that California courts of appeal will follow the California Supreme Court's lead.

In *Dowell v. Biosense Webster, Inc.*, 179 Cal.App.4th 564 (2009), three former employees of Biosense and their

Recent Developments in California Employment Law (continued)

subsequent employer sued Biosense to enjoin it from enforcing certain non-compete and customer non-solicitation clauses contained in an agreement the employees had signed while employed by Biosense. That agreement contained a very broad definition of the term “confidential information”.

The trial court voided the agreement. Biosense appealed, arguing that the court had erred in finding the agreement unenforceable. Concluding that the agreement’s broadly worded clauses “ultimately ...restrain[ed] the employee[s] from practicing their chosen profession,” the court of appeal found the non-competition and non-solicitation provisions facially void and unenforceable under Section 16600. It also reaffirmed that an employer’s use of an illegal non-compete agreement violates California’s unfair competition law, Section 17200 of the Business & Professions Code.

In *Retirement Group, Inc. v. Galante*, 176 Cal.App.4th 1226 (2009), the court of appeal once again broadly interpreted *Edwards*, holding that Section 16600 invalidated a provision in a preliminary injunction that prohibited former independent contractors from soliciting customers from the company they previously worked for, The Retirement Group (“TRG”). The court let stand that portion of the injunction which prohibited defendants from using TRG’s confidential information.

In addressing, the so-called “trade secret

exception” to Section 16600, the *Galante* court commented that misappropriation of trade secrets is “enjoinable *not* because it falls within a judicially created ‘exception’ to [S]ection 16600’s ban on contractual nonsolicitation clauses, but because it is wrongful independent of any contractual undertaking.” It then upheld the part of the preliminary injunction prohibiting the departing independent contractors from using TRG’s trade secrets.

In this age of increasingly mobile employees and information, it behooves all California employers to take immediate steps to protect their legitimate trade secrets.

While *Edwards*, *Galante*, and *Biosense* all make clear that California courts will not enforce non-compete or non-solicitation agreements, no matter how narrowly tailored, they also remind us that employers can still protect information that is truly trade secret. In this age of increasingly mobile employees *and information*, it behooves all California employers to take immediate steps to protect their legitimate trade secrets. Such steps should include a customized proprietary information agreement, limitations on access to confidential information, vigilance in preventing transfer of confidential information from secure company computers to unsecure personal storage devices, and restrictions on what is disclosed on company and employee websites and blogs (for instance, concerning the identity of company customers).

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ABOUT THE FIRM

Greenberg, Whitcombe & Takeuchi, LLP

has represented clients in employment disputes since 1981. GWT's employment practice includes both counseling and litigation. Our litigation practice focuses on defense of wrongful termination, discrimination and harassment claims, as well as assorted non-compete, trade secret, defamation and wage disputes. We also represent incoming and outgoing executives in negotiations concerning their existing or potential contracts, up to and including litigation.

GWT's clients tend to range from the very small to mid-size. Some have existing human resources managers or departments; others do not. As a result, our employment practice runs the gamut, from advising small businesses on best practices for documentation and termination, to handling sophisticated employment litigation concerning non-compete, non-solicitation, and trade secret issues.

GWT welcomes any questions you may have concerning problem terminations, non-compete agreements, or any of the other topics addressed in this Newsletter.

ABOUT THE AUTHOR

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