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Employers Should Consider Early EEOC Mediation

Employers are often well advised to aggressively work early on to resolve complaints by former employees. To that end, the Equal Employment Opportunity Commission (EEOC), which investigates and pursues workplace discrimination claims, offers mediation services that can be inexpensive and effective to resolve claims by employees against employers.

Consider a scenario in which an employee comes to work one day and has a seizure. Other workers and his supervisor see him having the seizure, but it passes. The supervisor talks to the employee, who says that he does in fact have a seizure disorder and that he is under his doctor's care. The employee also admits that his doctor has restricted him from driving and standing on ladders, among other things.

The supervisor consults the human resource director to determine what to do. Although upset over the situation, they decide to make reasonable accommodations (per the requirements of the Americans with Disabilities Act) and modify his warehouse job. The supervisor calls a meeting of the warehouse workers and says that the employee will no longer be driving and working on ladders, but will be doing all other work.

A few months later, the employee quits, sends an email thanking the company for everything, and takes a new job. The employer, however, soon receives notice that the employee has filed a charge with the EEOC alleging, among other things, that the employee was discriminated against because of his disability in violation of the ADA.

The employee claims that the supervisor disclosed his medical condition at the meeting with co-workers and that the terms and conditions of his employment were unlawfully affected. The EEOC complaint also includes violation of privacy claims based on the alleged disclosure of the employee's medical condition to the new employer.

The employer contacts its attorney, who investigates and finds that there was no mention of the employee's medical condition at the meeting at issue, only the reassignment of job duties. Also, the supervisor vehemently denies disclosing the employee's medical condition to the new employer.

Incensed, the employer wants to fight this frivolous claim. While the employer's position is understandable, and indeed the employer would have strong defenses to litigate the claim, the reality is such litigation is costly and time-consuming. As a potential alternative, the attorney can advise the employer to first try the EEOC mediation process. The process is free, voluntary, and can include all claims the employee has (not just the EEOC issues), meaning it is a cost-effective way to resolve issues like this quickly.

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LGC Victorious Again In Copper Sands Litigation

In yet another victory in Copper Sands HOA, the Nevada Eighth Judicial District Court reconfirmed that Chapter 40, which is Nevada's comprehensive statutory scheme for residential construction defect cases, is inapplicable to the subject property, a condominium conversion project. As a result, Plaintiff will not be permitted to recover any remedies provided by Chapter 40.

By way of background, the subject property, known as Copper Sands, was originally built in 1997 as a 360-unit apartment complex. The original general contractor was Plaster Development Company, who in turn hired various subcontractors. The owner was Flamingo 94, LLC.

Upon completion of construction, the property was sold several times, ultimately being purchased by Claremont Sands, LLC. Claremont Sands then operated the property as apartments for seven years, from 1997 to 2004.

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Considerations With Beneficiaries Of Retirement Accounts

Have you checked your beneficiary designations for your retirement accounts lately? If not, you may find that your designated beneficiary is not who or what you think it should be, especially if you have had significant life changes, such as a divorce, marriage, or children since your retirement plan was established.

Because retirement accounts pass by way of contract (the named beneficiary), the probate process and attorneys needed for estate settlement are avoided for the inheritance of these particular accounts. Moreover, your retirement accounts are not part of your estate and generally not governed by the provisions of your will, so it is important to keep these retirement documents updated in conjunction with updating or preparing your estate plan.

Outdated Beneficiary Designations

Failing to properly designate the beneficiaries on these accounts can land your executor or trustee in court for a legal determination of the true beneficiary. The court's decision, however, may not necessarily be what you would have wanted.

By way of just a couple examples, what if your beneficiary has passed away, or you named a charity that no longer exists, or you since have had a child, or more children? To prevent these situations, you should update your beneficiary designation after you experience a change in family status. If you fail to document your beneficiary designation, your beneficiary may be determined by federal law, state law, or by the plan document that governs your retirement accounts.

For qualified plans, such as profit-sharing plans, 401k, or money purchase pension plans, federal regulations automatically designate the spouse of the retirement account owner as the beneficiary. In fact, in California, the retirement-account owner may not designate another as primary beneficiary without a signed, notarized document from the spouse approving such designation. If the retirement account owner is not married, then his or her estate may be the default beneficiary. If you have a trust (and are hoping to avoid probate) this could force probate to be opened depending on the value of the account.

Spouse As The Primary Beneficiary

Typically, our clients are advised to name their spouses as the primary beneficiaries on accounts. The age of the oldest beneficiary is used to set the life expectancy on which the required minimum distributions from the inherited IRA will be based. If a spouse is going to be the first beneficiary of IRA money, it can be more advantageous to younger heirs if the IRA is initially passed on as a spousal rollover. After the surviving spouse dies, it can be left to younger heirs, using their dates of birth to set the amount of the distributions, which gives them a longer period over which distributions can be stretched, preserving the tax benefit for as long as possible.

Secondary/Contingent Beneficiaries

Naming a secondary or contingent beneficiary is where things can get complicated. Most IRA plan documents provide default beneficiary options. For instance, if you name two individuals as your designated beneficiaries and one predeceases you, the share that belongs to the deceased beneficiary automatically goes to the surviving beneficiary. If you want a different arrangement, you need to customize your contingent beneficiary designation.

For more information about beneficiary designations, contact Darcie Colihan in LGC's San Diego office.

LGC Prevails On MSA In Injury Case

Teresa Beck

Partner Teresa Beck and Associate Darcie Colihan recently won a Motion for Summary Adjudication on behalf of its client, an owner of a foreclosed property, against a realty company who signed a contract to manage the foreclosed single-family residence.

While the house was being shown by a realtor, a prospective purchaser stood on the base of a diving board adjacent to an empty swimming pool. The diving board broke off its base and the prospective purchaser fell into the empty pool and was injured.

LGC filed a Motion for Summary Adjudication arguing that, per the terms of the management contract, the realty company owed a duty to defend and indemnify LGC's client. The Court granted the motion, finding that the realty company owed a complete duty to defend and indemnify LGC's client. This was a significant victory for LGC's client.

Congratulations to Teresa and Darcie.

LGC Victorious Again In Copper Sands Litigation

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Claremont Sands then sold the subject property to Copper Sands Realty, LLC, which converted the apartments into condominiums and sold the units to individual purchasers.

In 2008, the Copper Sands HOA filed a Complaint against Plaster and Flamingo, alleging construction defects. Plaster, in turn, filed a Third-Party Complaint against the various subcontractors who worked on the subject property. In 2010, the various defendants filed a motion challenging the applicability of Chapter 40 to the subject property. The District Court ultimately ruled that the residences were no longer new at the time of sale, and thus Chapter 40 did not apply.

Following the 2010 ruling, the defense prevailed in a series of motions for summary judgment until all of the HOA's claims were dismissed. The defense then sought, and partially won, attorneys' fees and costs.

The HOA appealed the dismissal of all of its claims, including the issue of the applicability of Chapter 40. In 2015, the Nevada Supreme Court remanded two issues for consideration: (1) the applicability of the HOA's claims given the time-barring effect of the ten year statute of repose and whether such claims are saved by the two-year savings clause; and (2) the HOA's standing to bring claims related to fraud and misrepresentation.

After remand, in April of 2016, the HOA filed a motion for leave to request reconsideration of original order that found Chapter 40 inapplicable. The HOA argued that since the 2010 order, Nevada Supreme Court had issued its decision in Oxbow Construction, LLC v. Eighth Judicial District, which held that condominium conversions could qualify as the sale of "new residences."

The defendants opposed the HOA's motion. In addition to procedural arguments regarding the HOA's attempt to challenge a six-year-old order, the defendants argued that the Nevada Supreme Court did not remand the issue of whether Chapter 40 applied. The HOA had raised the issue with the Nevada Supreme Court and the Court rejected the argument. Thus, the law of the case doctrine was applicable and the District Court had already decided that Chapter 40 was inapplicable.

The defendants also argued that Oxbow was distinguishable because in that case, the developer had attempted to circumvent Chapter 40 by classifying the project as apartments and converting the project to condominiums upon completion of construction. Here, on the other hand, the subject project was originally built as apartments, the apartments were sold multiple times to entities unrelated to Plaster and Flamingo, and the subject property was operated as apartments for approximately seven years.

Ultimately, the Court was persuaded by the defense's arguments. On June 14, 2016, the Court denied the HOA's motion, finding that the subject property operated as apartments from 1997 to 2004 and was converted in 2004, and therefore the units did not qualify as "new residences." As a result, the HOA is not entitled to receive Chapter 40 remedies.

This is a significant victory for LGC's client and the other defendants, given the increased exposure construction defendants can otherwise face under the Chapter 40 remedies.

For more information about the case or other Chapter 40 issues, please contact Jennifer DelCarmen in LGC's Las Vegas office.

Partner Loren Young Invited To Join CLM

LGC is pleased to announce that Partner Loren Young has been invited to join the Claims and Litigation Management Alliance. The CLM is a nonpartisan alliance comprised of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals, and attorneys. The organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows.

Loren is the managing partner of LGC's Nevada office. His practice includes personal injury and construction matters, with an emphasis on product liability and premises liability cases.

Click here for more about the Claims and Litigation Management Alliance.

Employers Should Consider Early EEOC Mediation

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Tom Lincoln

By choosing the EEOC mediation, all parties and their attorneys participate at the offices of the EEOC with an experienced mediator whose job is nothing other than mediating these types of disputes. The employer may well be able to resolve all of the claims for a few thousand dollars -- far less than the cost of litigation -- while also obtaining a release of any legal claims the former employee could pursue in state or federal court.

At LGC we strongly believe in fully advising our clients on all possible methods of resolution, including the benefits and detriments of each. When applicable, the EEOC mediation process can be one such effective and economical tool the client should be aware of in employment matters.

For more information about EEOC mediations or for question about any employment matters, please contact partners Tom Lincoln or Paul James

New Appellate Case Clarifies Standard For Sanctions Under CCP 128.5

In the case of *San Diegans for Open Government v. City of San Diego*, California's Fourth Appellate District clarified the standards and procedures for invoking newly enacted Code of Civil Procedure section 128.5, which permits a party to seek sanctions for costs incurred due to bad-faith conduct that is frivolous or solely intended to cause unnecessary delay.

The case arose out of a public records request submitted by self-described watchdog group San Diegans for Open Government (SDOG) to the City of San Diego (City) for all e-mail communications pertaining to the City's official business sent to or from the City Attorney's personal e-mail account. The City refused, saying the e-mails did not qualify as public records. SDOG filed an action against the City, claiming a violation of the California Public Records Act, and the City sought sanctions for filing a frivolous action. The request for sanctions was denied.

On appeal, one of the key issues was whether there was a "safe harbor" provision built into Section 128.5 Under a similar statute, Code of Civil Procedure section 128.7, a party may seek sanctions for any pleading that is brought for an improper purpose, unwarranted under existing law, or lacking evidentiary support. However, before bringing a motion under Section 128.7, a party must give 21 days' notice of an intent to seek sanctions, and an opportunity for the opposing party to withdraw the pleading at issue. If the pleading is withdrawn, sanctions are unavailable.

Section 128.5, on the other hand, contains no such safe harbor provision. However, it provides, "Any sanctions imposed pursuant to this section shall be imposed consistently with the standards, conditions, and procedures set forth in . . . Section 128.7."

Ultimately, the Court of Appeal concluded that no such safe harbor provision was incorporated into Section 128.5, reasoning that if the legislature had intended for Section 128.5 to include a safe habor provision, it would have been expressly included in the statute. Therefore, a party seeking sanctions under Section 128.5 need not provide 21 days' notice and an opportunity to withdraw the pleading.

In addition, the Court evaluated whether the question of "bad faith conduct" under Section 128.5 was analyzed under a subjective standard or objective standard. Based on the legislative history, the Court held that the legislature deliberately eliminated the previously used subjective standard and imposed an objective standard on Section 128.5 sanctions motions. As a result, the proper standard for sanctions under Section 128.5 is whether the conduct was objectively reasonable.

Under this interpretation by the Court of Appeal, Section 128.5 provides a potentially powerful tool for defendants to use to combat frivolous actions brought by plaintiffs, and to potentially recover attorneys' fees that would otherwise be unrecoverable upon prevailing in the action.

For more information about Code of Civil Procedure section 128.5 and the impact of this case, please contact partner Chris Schmitthenner in LGC's San Diego office.

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