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ATTORNEYS AT LAW

California Update

EMPLOYMENT LAW

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Labor Union News

Plumbers Union Forced To Shut Down Resort

Konocti Harbor Resort and Spa is closing its doors. The 261-room resort in Lake County, just north of Napa, was owned by Plumbers and Pipefitters Local 38 of San Francisco. Pursuant to a consent decree with the Department of Labor, the union was required to sell the property in order to settle charges that $35 million in pension fund money had been illegally diverted to the operation of the resort. (*Chao v. Mazzola,* N.D. Cal. 2007). Some 700 employees, most of them members of UNITE-HERE Local 2850, will lose their jobs.

Vallejo Contract With Electrical Workers Voided by Bankruptcy Court

The City of Vallejo, north of San Francisco, went into Chapter 9 bankruptcy proceedings last year. It was widely acknowledged that overly rich union contracts had busted the city. The leverage of the bankruptcy proceedings allowed the city to negotiate new contracts with the police and fire unions. The IBEW, however, refused to budge. The city appealed to the bankruptcy judge, who threw out the union contract under the principles set forth by the Supreme Court in *NLRB v. Bildisco* (1984). This is the first time that *Bildisco* has been used in Chapter 9 proceedings to void a collective bargaining agreement for a municipality.

UNITE-HERE Strikes at San Francisco Hotels; Threatens To Strike in Los Angeles

The contract between UNITE-HERE Local 2 and 32 major hotels in San Francisco expired in August of last year. For the first time in decades, the hotel companies are all bargaining separately. There is no multiemployer bargaining group, and there is no strike-lockout pact among the companies. So Local 2 is conducting rolling strikes, hitting different hotels unannounced for a week at a time. Health insurance cost is the main issue. Mike Casey of Local 2 has called for a national boycott of San Francisco tourist facilities until the hotels capitulate. In Los Angeles, Local 11 is bargaining separately with 21 major hotels whose contracts have expired. Maintenance of cost-free health coverage and wage parity with San Francisco are issues for the union.

Meanwhile, UNITE and HERE are engaged in civil war. The much heralded marriage of the two powerful unions has ended in a messy divorce, leaving some employers unclear as to which union represents the employees. Also, the SEIU is in a bitter battle in California with a spin-off called the National Union of Healthcare Workers. The two rival unions are trading charges of voter fraud and theft of funds.

California Supreme Court To Review LA Grocery Workers Ordinance

In a gift to the United Food and Commercial Workers (UFCW), the Los Angeles City Council enacted an ordinance that required purchasers of large grocery stores to retain all of the seller's employees for at least 90 days. This, of course, effectively prevents a buyer from acquiring the assets of a business (without the employees and a union contract) and hiring its own workforce. Lower courts have ruled that the ordinance is void and preempted by state and federal law. *Cal. Grocers Ass'n v. Los Angeles* (2009). The California Supreme Court has granted review. The UFCW is obviously hoping for a reversal.

Orange County Bans Project Labor Agreements

The Orange County Board of Supervisors has voted to prohibit "prevailing" wage labor agreements on county projects. In a direct repudiation of construction trade unions, the board stated that project labor agreements were "anti-competitive" and "discriminatory" toward non-union contractors.

Workin' at the Carwash Blues

The California Labor Commissioner is cracking down on car wash operators for wage and hour violations and failure to provide workers' compensation insurance. During a week-long sweep, 40 investigators inspected car washes in 25 counties. The Labor Commissioner issued 140 citations against more than 100 businesses and levied fines of almost $1 million.

In This Issue:

Liability for Subcontractors

California businesses need to remember that they can be liable for the wage and hour violations of janitorial and security guard subcontractors. Labor Code § 2810 creates such liability where the business "knows or should know" that an arrangement with a janitorial or security guard contractor "does not include funds sufficient to allow the contractor to comply with all applicable…laws or regulations governing the labor involved." There is a safe harbor, rebuttable presumption where a written agreement with the contractor has detailed assurances of compliance. Contracts with janitorial and security firms should be reviewed to assure compliance with § 2810.

Unemployment Projected To Hit 12.7%

The UCLA Anderson School of Business has released a report forecasting that there will be little growth in the California economy until late 2010. Unemployment, which is currently at 12.3%, is expected to peak at 12.7% and not dip below double digits until 2012. The report predicts further job losses in both the private and public sectors.

Roby v. McKesson: Good News and Bad News for Employers

The California Supreme Court's recent opinion in *Roby v. McKesson Corp.* is a tale of two decisions – the best of worlds and the worst of worlds. On the one hand, the case dramatically limits the use of punitive damages in employment cases. On the other hand, it provides some sobering insights for California employers dealing with disability claims.

The Allegations

Plaintiff Roby had been a 25-year customer service employee at McKesson when she was terminated in 2000 for repeatedly violating the company's new attendance policy. That policy contained strict guidelines for escalating discipline after a specified number of "occurrences" in any 90-day period.

Roby allegedly suffered from panic attacks that caused her to miss work frequently without notice, and she was documented under the attendance policy. Her managers allegedly knew that her absences were caused by a psychological problem but did not consider whether her absences might be related to a covered disability or whether she might be entitled to protected time off under the FMLA or California's CFRA.

Additionally, the medication Roby took for her condition allegedly caused her to emit an unpleasant body odor, and her supposed nervous disorder caused her to "dig her fingernails into the skin of her arms, producing open sores."

Supervisors made negative comments about Roby's body odor and sores. She was allegedly excluded from meetings and was reprimanded and belittled in front of others. Roby said she complained about her supervisor's conduct, to no avail.

After Roby was terminated for repeated violations of the attendance policy, she sued for harassment and disability discrimination.

The Court of Appeal rendered three holdings:

(1) The award of noneconomic (or emotional distress) damages was "hopelessly ambiguous" (justifying a reduction in compensatory damages from $3.5 to $1.9 million);

(2) There was sufficient evidence to support a harassment verdict against the individual supervisor; and

(3) The punitive damage award of $15 million exceeded the constitutional limit and should be reduced to a one-to-one ratio with the compensatory damage award (i.e., $1.9 million).

Discrimination and Harassment – The Bad News

The first lesson from this case is that employers should not mindlessly apply an attendance policy to an allegedly disabled employee. Managers must be trained to alert human resources when continued absences are related to an ongoing medical issue. Then HR must consider whether the employee's absences are protected serious health conditions (under the FMLA/CFRA) or disabilities (under the ADA and/or California's FEHA) and must realize that the law often requires exceptions to an attendance or leave of absence policy in order to accommodate a disability.

The second lesson here is a sobering reminder that supervisors (and even co-workers) can be held personally liable for harassment under California law. The court upheld the verdicts and damage awards against Roby's supervisor, which included compensatory and punitive components. These awards stemmed mostly from the supervisor's conduct in belittling and demeaning Roby in front of others. Companies should take steps to train their managers to understand that harassment based on any category protected by law (including disability) can subject them to personal liability.

Punitive Damages – The Good News

The constitutionality of unlimited punitive damages, as applied under California's discrimination statute, has been debated for years. Finally, in a rather surprising result, the court limited the "exemplary (punitive) damages" in this case to no more than the amount of "actual damages" (economic and emotional). This one-to-one rule resulted from a fact-specific analysis that won't necessarily apply in all cases. But it should help reduce the potential catastrophic risk of employment litigation in California.

Fake Labor Inspector Caught!

An Oakland man is in jail for impersonating a "labor inspector" and extorting thousands of dollars in fake fines from small businesses for supposed violations of state laws.

Class Action Decertification Affirmed!

A class consisting of retail store managers who were classified as exempt from overtime wage laws was recently decertified by a California Court of Appeal. Class certification was granted in January 2004, but after extensive discovery, the defendant filed a motion to decertify the class in December 2006. The trial court granted the defendant's motion because individual issues predominated over common issues. The appellate court affirmed the trial court's ruling.

The appellate court used the "community of interest" analysis, stating that it "applies equally to an order decertifying a class as well as an order granting certification." In reviewing the evidence presented, the appellate court found that individualized inquiries into the classification of the store managers as exempt employees predominated over any common questions of law or fact. The defendant's evidence in support of its motion to decertify the class consisted of declarations of its expert, three managers, the vice president of store operations and five defense attorneys. In sum, the evidence demonstrated that there was a wide disparity in store location, size, configuration, management duties and styles, socioeconomic makeup and the number of employees at each location. The trial court also found that managers routinely exercise their independent judgment and that the amount of time that they spent performing managerial duties were matters of individual inquiry.

This ruling is helpful to employers facing misclassification claims, particularly retailers similar to the defendant, whose operations are numerous and who have diverse locations, stores of different sizes and positions with wide variances in job duties. The case is *Keller v. Tuesday Morning, Inc.*, ___ Cal.App.4th ___ (Nov. 4, 2009; pub. ord. Dec. 4, 2009) (Second Appellate District, Division Six).

REMINDER: On January 1, 2010, the IRS standard mileage reimbursement rate will drop to $0.50.

Employers Are Liable for Business Expenses When They Have Actual or Constructive Knowledge of the Expenditures

California Labor Code § 2802 provides that an employer must reimburse its employees for all necessary expenditures and losses incurred as a direct consequence of the employment. Unlike other sections of the Labor Code, § 2802 does not directly address when this duty is triggered.

In *Stuart v. RadioShack Corp.*, 2009 U.S. Dist. Lexis 41658 (N.D. Cal. 2009), the plaintiffs filed a lawsuit against RadioShack Corporation seeking reimbursement for expenses related to use of their own cars to perform inter-company store transfers. The issue before the court was whether an employee must first request reimbursement from his or her employer before the employer's duty to indemnify under Labor Code § 2802 is triggered.

Since Labor Code § 2802 is vague about when the duty to reimburse is triggered, the court looked to overtime cases where both federal and state courts have held that plaintiffs seeking unpaid overtime must prove that the employer "had actual or constructive knowledge of [the] alleged off the clock work." Drawing a parallel between overtime liability and expense reimbursement, the court held that, before an employer's duty to reimburse is triggered, it must either know or have reason to know that the employee has incurred an expense. Once the employer has actual or constructive knowledge of the employee's expense, it has the duty to exercise due diligence and ensure that the employee is reimbursed.

In this case, the plaintiffs failed to established that the employer knew or had reason to know that employees were incurring mileage expense just because they used (and the company expected them to use) their personal vehicles to perform inter-company store transfers. To prevail, plaintiffs would have had to show who logged such information or otherwise received it and whether those persons' knowledge could be imputed to the company. The court also held that employers may not assert equitable defenses such as waiver, laches and equitable estoppel to avoid payment of reimbursements to employees even if the employee knowingly fails to submit a request for reimbursement.

Employers may continue to enforce deadlines and procedural requirements that employees must follow in order to request and receive work-related expense reimbursements. But even if an employee fails to follow these procedures, employers must reimburse the employee where they know or should reasonably know that the employee incurred the expense.

Deadline for Sexual Harassment Training Is Fast Approaching

By January 1, 2010, California employers with 50 or more employees may be required to provide at least two hours of "interactive" sexual harassment training to all supervisory employees in California. This training must be provided at least once every two years. Newly hired or promoted supervisors must be trained within six months of assuming their supervisory position.

The requirement is mandated by California Government Code § 12950.1. Given that the first training deadline imposed by the law was January 1, 2006, for many employers, the next training deadline is January 1, 2010.

Remember, California employers are subject to the training requirement if they employ 50 or more employees (including temporary service employees and independent contractors) for each working day in any 20 consecutive weeks of the year. All of these employees or contractors do not have to work at the same location or work or reside in California. Employers are required to provide training to supervisory employees who supervise California employees.

While there are no automatic penalties for violating the training requirements, employers are exposed to more claims and lawsuits—and greater liability—when untrained supervisors do not properly address issues of sexual harassment in the workplace or are later accused of sexual harassment themselves.

2010 Watch List: Employment Cases in the California Supreme Court

Pearson Dental Supplies, Inc. v. Superior Court (Turcios) (Case No. S167169). Issues presented: (1) What standard of review applies to an arbitrator's decision on an employee's FEHA claim that was arbitrated under a mandatory arbitration agreement? (2) Can a mandatory arbitration agreement restrict employees from seeking administrative remedies for FEHA violations?

Chavez v. City of Los Angeles (Case No. S162313). Issue presented: Can the court exercise its discretion under CCP §1033(a) to deny Gov. Code. § 12965 attorney fees to the prevailing plaintiff in a FEHA action if the judgment obtained could have been rendered in a court with jurisdiction over "limited" civil cases (see CCP § 85(a))?

Reid v. Google (Case No. S158965). Issues presented: (1) Should California law recognize the "stray remarks" doctrine that allows a court to disregard isolated discriminatory remarks not related to a decision making process when considering summary judgment of discrimination claims? (2) Are evidentiary objections not expressly ruled on at the time of decision on a summary judgment motion preserved for appeal?

McCarther v. Pacific Telesis Group (Case No. S164692). Issues presented: (1) Does Labor Code § 233, which mandates that employees be allowed to use a portion of "accrued and available sick leave" to care for sick family members, apply to employer plans in which employees do not periodically accrue a certain number of paid sick days but are paid for qualifying absences due to illness? (2) Does Labor Code § 234, which prohibits employers from disciplining employees for using sick leave to care for sick family members, prohibit an employer from disciplining an employee who takes "kin care" leave if the employer would have the right to discipline the employee for taking time off for the employee's own illness or injury?

Brinker Restaurant v. Superior Court (Case No. S166350) and *Brinkley v. Public Storage, Inc.* (Case No. S168806). Issue presented: What is the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly workers?

Lu v. Hawaiian Gardens Casino, Inc. (Case No. S171442). Issue presented: Does Labor Code § 351, which prohibits employers from taking gratuities paid, given to, or left for an employee, create a private right of action for employees?

Pineda v. Bank of America, N.A. (Case No. S170758). Issues presented: (1) When a worker files an action to recover penalties for late payment of final wages under Labor Code § 203 but does not concurrently seek to recover any other unpaid wages, is the statute of limitations the one-year statute for penalties under CCP § 340 (a) or the three-year statute for unpaid wages under Labor Code § 202? (2) Can penalties under Labor Code § 203 be recovered as restitution in an unfair competition law action (Bus. & Prof. Code § 17203)?

Cal-OSHA Issues H1N1 Guidance

Cal-OSHA recently issued an advisory to employers regarding how to deal with the H1N1 virus. You can find it online at http://www.dir.ca.gov/dosh/SwineFlu/SwineFlu.htm

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