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California Update

EMPLOYMENT LAW

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U.S. Supreme Court Overturns California Law on Arbitration Agreements

California courts have been on a march in recent years, striking down arbitration agreements on the ground that they are "unconscionable." That march has just come to a halt.

In *AT&T Mobility v. Concepcion*, the U.S. Supreme Court held that a class action waiver in an arbitration agreement is enforceable in the consumer context, and ruled that, as a matter of pre-emptive federal law, arbitration agreements must be enforced "according to their terms." The case overruled a case decided by the California state Supreme Court, *Discover Bank v. Superior Court* (2005), which held that a similar arbitration provision was "unconscionable" and unenforceable. Other California cases that relied on *Discover Bank* have likely also been overruled.

In another case, *Gentry v. Superior Court* (2007), the California Supreme Court effectively held that class action waivers in the employment context were not enforceable based on the *Discover Bank* case. The court in *Gentry* held that agreements that prohibited class-wide arbitration are "unconscionable under California law." But now, the U.S. Supreme Court has overruled *Discover Bank*, on which *Gentry* explicitly relied. *Gentry* has therefore been implicitly reversed. Given the decision in the *AT&T Mobility* case, a court will now be hard-pressed to deny the enforceability of class action waivers in the employment context. At least one superior court judge agrees and found *Gentry* overruled. As a result, employers may compel cases to individual arbitration and avoid class litigation. Based on *AT&T Mobility*, employers should:

- Consider implementing class action waivers in arbitration agreements for all new employees
- Consider implementing class action waivers for existing employees during updates of other company policies, performance evaluations, or with additional consideration
- Attempt to decertify any pending class action and move to compel individual arbitration, in the event that the plaintiffs have arbitration agreements with class action waivers

Calculation of Reporting Time Pay Clarified

Finally a helpful wage and hour decision for California employers on the issue of reporting time pay.

Section 5 of each of the Industrial Welfare Commission Wage Orders requires the following: *Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.*

The interpretation of this provision has been tricky when applied to a non-exempt employee who usually works an eight-hour shift when called into work for a two-hour training session, disciplinary meeting, or departmental meeting on a day the employee does not normally work.

Until recently, the Department of Labor Standards Enforcement (DLSE) instructed employers to pay the employee four hours, not just two. That was because the DLSE interpreted the wage order as requiring pay for "half the usual or scheduled day's work" to be four hours if the employee's usual shift was eight hours, and the meeting was not on a normal work day.

Thankfully, a recently published appellate decision, *Price v. Starbucks Corporation*, interprets this wage order provision in a more logical way. Now California employers need only pay the two-hour minimum when it is clear that the employee expected to work two hours or less. The court held that because the employee didn't expect to work a full shift, the employer wasn't required to pay for "half the usual or scheduled day's work." Instead, the two-hour minimum applies. Finally, logic prevails.

Late Breaking News: U.S. Supreme Court Decides *Dukes v. Wal-Mart*

The United States Supreme Court recently raised the bar for bringing class action discrimination claims. Six women complained of sex discrimination in pay and promotion decisions, and sought to bring a class action on behalf of all women who have worked at Wal-Mart since December 1998. The purported class encompassed more than 1.5 million women. The Supreme Court held that a class action was inappropriate, in part, because plaintiffs failed to show that common questions of law and fact predominated, reversing the Ninth Circuit's decision in the case.

For more information on this case, see our blog article online at http://californiaemploymentlaw.foxrothschild.com/

In This Issue:

Frequently Asked Questions Regarding the "Suitable Seating" Requirement of the California IWC Wage Orders

1. Do we need to provide seats for our employees?

Yes. Section 14 of almost all of the California Wage Orders provides the following:

- All working employees **shall** be provided with suitable seats when the nature of the work reasonably permits the use of seats; and
- When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats **shall** be placed in reasonable proximity to the work area and employees **shall** be permitted to use such seats when it does not interfere with the performance of their duties.

Ultimately, the Wage Order obligates employers to provide seats to all of their employees, regardless of whether that employee requests a seat and in addition to any employees who require a seat as a reasonable accommodation. Neither the courts, nor the Division of Labor Standards Enforcement (DLSE) have provided any substantive guidance on what constitutes "suitable seating" for employees.

Only Wage Order 17 (Miscellaneous Employees) does not have a provision for seats. Wage Order 14 (Agricultural Occupations) and Wage Order 16 (Construction, Drilling, Logging and Mining Industries) have provisions for seats that are more specific to their industries.

2. What type of seat is "suitable?"

Suitability may depend on the circumstances of the workplace. A basic stool or chair that is capable of holding an average person is likely acceptable in most workplaces. In some workplaces, a bench or seat that folds down from a wall may be most practical.

3. How many seats are necessary in each workplace?

The number of seats necessary will depend on the nature of the business and the circumstances at each workplace. Ideally, an employer should provide one seat per employee per shift. As a practical matter, however, this may not be possible. In the retail environment, given the fluid nature of the work, one seat for every three employees should be sufficient. This number, however, is not a threshold amount, and should be used as guidance in assessing your particular situation.

4. Where must the seats be located?

The exact location of a seat is left to the employer's discretion, but the Wage Orders do require that seats be placed in reasonable proximity to the work area. It is advised that all break rooms and back offices be equipped with seats. In locations where employees are required to walk around, care should be taken to place seats in locations where employees can easily view their work area so that they are immediately ready to engage when necessary. In retail environments, at least one seat should be available at each cash stand.

5. Do employees need to be allowed to sit down during all working hours?

No. The Wage Orders do not require that all employees must be able to sit at any time. They do, however, require that employees be allowed to sit down if the nature of their work reasonably permits the use of seats. For example, cashiers in many retail environments must be allowed to sit down because the nature of their work in ringing up sales reasonably permits them to sit during the performance of those job duties.

6. What about employees who are required to move around as part of their job duties?

The Wage Orders recognize that some jobs require employees to stand and move around. Those employees are entitled to have seating available near their work area. The employees must be allowed to sit when it does not interfere with the performance of their job duties. For example, a non-cashier retail associate whose job duties include customer service and restocking shelves on the sales floor must be allowed to sit if there are no customers in the store and her other job duties have been completed.

7. Can I fire an employee who refuses to stand up during the performance of his duties?

It depends on whether the employee's work reasonably allows him to sit. Employers cannot prohibit employees from sitting down if sitting down does not interfere with the performance of their job duties. The termination of an employee who asserts his or her right to sit down, when the nature of the job reasonably allows, is a violation of the Labor Code, and may be the basis for a wrongful discharge claim.

8. What are the penalties for noncompliance?

Although the Wage Orders do not contain penalties for violation of this specific provision, California courts have held that employees can recover penalties for a violation of this Wage Order provision under California's Private Attorney General Act of 2004 (PAGA). PAGA sets a penalty of $100 per employee per pay period for the initial violation, and $200 for each subsequent violation. Assessed penalties are divided between the state and the aggrieved employees pursuant to the statute. Despite the one-year statute of limitations, substantial penalties could arise under PAGA in a class action against a sizeable employer based on the suitable seating requirements.

9. What other steps can an employer take to minimize its legal risk?

Employers should audit their job descriptions and policies and revise any statements that prohibit sitting down or mandate standing up during the workday. Employers should consider implementing a policy that provides for suitable seating in all of its workplaces where the nature of the work reasonably permits the use of seats.

10. Can the suitable seating requirement be waived by a collective bargaining agreement?

No. In general, wage order provisions cannot be waived by collective bargaining agreement.

A Safe Workplace Trumps a Reasonable Accommodation

Even if their conduct is the result of a disability, employees who threaten or commit acts of violence against co-workers are not entitled to keep their jobs.

Until recently, there has been surprisingly little to guide California employers in handling employee misconduct attributed to a disability. *Wills v. Superior Court of Orange County* (April 13, 2011, G043054), __ Cal. App. 4th __, takes a first, tentative step in addressing employers' duties in dealing with bad behavior caused by a disability.

In this case, a court clerk suffered from bipolar disorder, a mental illness characterized by depressive and manic episodes. During a manic episode, the clerk could become verbally and physically aggressive and blurt out inappropriate and threatening comments.

One day, the clerk had a manic episode. She angrily swore and yelled at employees about making her wait in the heat before granting her entry to their secured workplace. She told certain colleagues that she had added them to her "Kill Bill" list. These colleagues felt threatened and reported the incident. Shortly after this incident, the clerk forwarded threatening e-mails and a cell phone ringtone to various colleagues. She was thereafter discharged for threats and poor judgment. The clerk claimed that her comments were just jokes.

Ultimately, the clerk sued her employer alleging that her termination was discriminatory because a disability, her bipolar disorder, caused the behavior in question. Her employer argued that it was entitled to take corrective action to address threats of violence regardless of any disability. The California Court of Appeal affirmed the trial court's dismissal of the case. The court held that an employer can take corrective action to address disability-related misconduct "when the misconduct includes threats or violence against co-workers." The misconduct in this case could not be addressed through a reasonable accommodation because the clerk never requested one. The court expressed no opinion on an employer's ability to address disability-related misconduct that did not involve threats or violence.

Before this case, there was no published authority that addressed whether the Fair Employment and Housing Act (FEHA) "equates disability-caused misconduct with the disability itself." Now there is support for the proposition that an employer's duty to provide a safe workplace trumps its duty to accommodate mentally disabled employees. As for less serious forms of disability-related misconduct, such as tardiness, employers are advised to carefully consider whether the behavior can be addressed through a reasonable accommodation before disciplining or terminating an employee.

Trending Now: Calculation of the Regular Rate

A new trend has emerged in wage and hour litigation that targets the calculation of the regular rate. California law follows federal law and the Fair Labor Standards Act (FLSA) in defining what constitutes an employee's regular rate. The general rule is that the "regular rate" includes "all remuneration." 29 U.S.C. § 207(e). There are only eight exemptions from the general rule. Recent litigation focuses on employers' failure to include shift differentials in the regular rate, which ultimately impacts the employee's overtime rate. A "shift differential" may refer to the premium paid for the difference between working different jobs (and thereafter provided in a blended rate) or may refer to the premium paid for the difference between working different shifts. In either event, those wage differences must be used in determining an employee's regular rate.

Clever plaintiffs' attorneys have now also asserted that the value of a free, employer-provided meal should also be included in the regular rate. According to the California Division of Labor Standards Enforcement (DLSE) Policies and Procedures Manual, the regular rate of pay includes "many different kinds of remuneration, for example: hourly earnings, salary, piecework earnings, commissions, certain bonuses, and the *value of meals* and lodging." The DLSE manual, however, does not have the force of law, and relies on case law and federal regulations that are out-of-date. One of the FLSA's exemptions from the regular rate excludes payments "incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment. . . ." 29 U.S.C. § 207(e)(2). As a general rule, expenses that employees incur for their employer's convenience are not included in an employee's regular wage rate, so long as the reimbursement reasonably approximates the expenses incurred. 29 C.F.R. § 778.217(a). Conversely, reimbursement for expenses that are personal to the employee are included in the employee's regular wage rate. *Id.* at § 778.217(d). Accordingly, the critical issue is whether the employer-provided meal is for the benefit of the employer or a benefit that is personal to the employees.

The position that the free meal is not compensation for hours worked and for the convenience of the employer is defensible, but the defense is not bullet proof. It is certainly arguable that the value of the meal is akin to reimbursing the employee for buying his or her own personal lunch, and therefore subject to inclusion in the regular rate. Employers should scrutinize the factual circumstances at their workplaces where free meals are provided to their employees.

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Fed OSHA May Follow Cal/OSHA's Lead on Injury and Illness Prevention Programs

Many California employers are already required by the California Division of Occupational Safety and Health to maintain Injury and Illness Prevention Programs (IIPP) at each of their workplaces. Now, the U.S. Occupational Safety and Health Administration (OSHA) is considering requiring its own version of an IIPP for employers nationwide. This summer, OSHA plans to survey thousands of employers across the country regarding their current health and safety practices. The stated goal of the survey is to develop industry-specific, statistically accurate estimates of the current safety and health practices that may be elements of injury and illness prevention programs. OSHA has indicated that the results of the survey will not be used for enforcement and will be anonymous. OSHA has not provided a timeline for the implementation of the IIPP plan, but it is considered a top priority of the Administration. For more information on OSHA's proposals, visit http://www.osha.gov/dsg/topics/safetyhealth/index.html.

Recent Items From Our Blog:

Further Attacks on Employment Arbitrations (Posted on May 23, 2011)

Senator Al Franken, among others, has reintroduced legislation to eliminate mandatory arbitration in employment, civil rights, and consumer cases. The so-called Arbitration Fairness Act of 2011 (S. 987, H.R. 1873) bears a striking resemblance to the Arbitration Fairness Act of 2009, which went nowhere. This latest attempt seems to be a response to the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*.

The legislation is premised on several questionable assumptions, including assumptions that:

- The broadly worded Federal Arbitration Act was never intended to apply to employment disputes and the Supreme Court has misinterpreted it in that respect.
- An employee can't knowingly agree to arbitration until after a dispute has arisen.

The Federal Arbitration Act and decades of court cases explain that the goal is to put arbitration agreements on the same footing as other contracts. Saying that this bill is intended to give effect to the original legislative intent is clearly inaccurate. To quote Al Franken's SNL character Stuart Smalley, "That's just stinkin' thinkin'!"

There's an App for That! (Posted on May 10, 2011)

From a May 9, 2011 Department of Labor press release:

> The U.S. Department of Labor announced the launch of its first application for smartphones, a timesheet to help employees independently track the hours they work and determine the wages they are owed. Available in English and Spanish, users conveniently can track regular work hours, break time and any overtime hours for one or more employers. This new technology is significant because, instead of relying on their employers' records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records.
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> The free app is currently compatible with the iPhone and iPod Touch. The Labor Department will explore updates that could enable similar versions for other smartphone platforms, such as Android and BlackBerry, and other pay features not currently provided for, such as tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest.
>
> For workers without a smartphone, the Wage and Hour Division has a printable work hours calendar in English and Spanish to track rate of pay, work start and stop times, and arrival and departure times. The calendar also includes easy-to-understand information about workers' rights and how to file a wage violation complaint.

No doubt this will make Division of Labor Standards Enforcement hearings more interesting. One issue this raises is discovery. Will employers now need to subpoena carriers for this information?

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