

EMPLOYMENT LAW UPDATE

Relationship-Driven Results

January 2009

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

New Laws for 2009

AB 2075 (Fuentes), effective January 1, 2009, makes it illegal to require an employee, as a condition of being paid, to sign a statement of hours worked (such as a timesheet) for a pay period if the employer knows the statement is false.

AB 2654 (Laird), which also became law on January 1, 2009, synthesizes anti-discrimination provisions in California state law to ensure that the anti-bias provisions are consistent with those in the Unruh Civil Rights Act and the California Fair Employment and Housing Act.

SB 28 (Simitian), effective January 1, 2009, makes it an infraction to drive a motor vehicle while using an electronic wireless communication device to write, send or read a text message. This new law covers any use of any electronic wireless communication device to manually communicate using a text-based communication, such as text messages, instant messages or e-mail. The law imposes a \$20 fine for the first offense and \$50 for each subsequent violation. There are two limited exceptions: (1) a person will not be considered to be "writing, reading, or sending a text-based communication" if he or she is simply reading, selecting or entering a phone number or name in a device to make or receive a phone call while driving; and (2) emergency services personnel operating an authorized emergency vehicle in the course of their job duties are exempt. For employers who employ personnel who drive as part of their job duties and responsibilities, it is wise to ensure that these employees are educated about the new law against texting, e-mailing and instant messaging. This law joins the California law that became effective on July 1, 2008 prohibiting Californians from using cell phones while driving unless using a hands-free device.

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SB 940 (Yee), also effective January 1, 2009, sets special payday rules for temporary employees, lessening confusion for temporary services employers after the California Supreme Court's decision in *Smith v. Superior Court* (2006) 39 Cal.4th 77. SB 940 specifies that "temporary services employers" must pay wages at least weekly to employees assigned to work for a client or customer, regardless of when an assignment ends. In other words, pay is not immediately due to a temporary services worker when an assignment concludes, except in certain circumstances. Work performed during a calendar week must be paid no later than the regular payday of the following calendar week. This new law does not apply if an employee of a temporary services employer is assigned to work for a client for more than 90 consecutive calendar days, unless the temporary employer pays the employee weekly, as described above. The law contains a number of other exceptions to the weekly pay requirement. First, final wages are due immediately if a temporary worker is discharged by the client or temporary agency. Additionally, if a temporary worker resigns employment with the agency, he or she is due all wages within 72 hours. Further, wages must be paid at the end of each workday if the temporary worker is assigned to a client on a day-to-day basis, but only if the temporary worker's work does not qualify as clerical or for overtime exemption; the temporary worker reports to or assembles at the office of the temporary services employer; and the temporary worker is dispatched to the client's worksite each day and returns to or reports to the temporary agency at the end of the daily assignment. Finally, wages must be paid daily if the temporary worker is assigned to work for a client engaged in a labor dispute.

II.

JUDICIAL UPDATE

California Appellate Court Confirms Sufficiency of "Informal" Interactive Process in Disability Accommodation Case

The California Court of Appeal held in *Wilson v. County of Orange* that when an employer made attempts to accommodate a disabled employee, and moved the employee through multiple temporary positions before eventually settling on a permanent position, the employer had sufficiently engaged in the good-faith "interactive process" required by the California Fair Employment and Housing Act ("FEHA").

Julie Ann Wilson ("Wilson"), a radio dispatcher at the Orange County ("the County") Sheriff's Department's emergency communications system, claimed that the County failed to make reasonable accommodations for her medical condition; specifically, that she avoid the most stressful aspects of her job. She sought to be

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excused from staffing the “pursuit desk,” the communication channel that assists officers who leave their jurisdictions during a pursuit or emergency. Although the County ultimately accommodated Wilson in precisely the manner she sought, she contended that the County nonetheless violated the FEHA by not providing her the accommodation earlier and by not initiating an “interactive process” sooner to determine whether she could be accommodated.

The court found Wilson’s arguments unavailing, holding that the County provided Wilson a reasonable accommodation and engaged in a good faith interactive process to arrive at that accommodation. This conclusion was “borne out by the fact that in the end, Wilson got exactly what she wanted – albeit after a series of temporary accommodations.” As the court stated, an employer cannot be liable for failing to engage in the interactive process where the employee was in fact offered a reasonable accommodation. Moreover, the date an employer begins “formal” negotiations is not controlling: a jury may still find that the employer was in fact engaged in the interactive process all along. The “interactive process” required by FEHA is simply an informal process whereby the employer attempts to identify a reasonable accommodation that will enable the employee to perform the job effectively. Ritualized discussions are not necessarily required.

California Appellate Court Clarifies Standard for Class Action Certification

In *Ghazaryan v. Diva Limousine*, the California Court of Appeal held that denial of class certification in an employment class action cannot be based on the fact that the employer’s underlying conduct has not yet been shown to be illegal, or on the potential difficulty of assessing the validity of the employment policy in question in light of variations in the impact that policy had on particular employees.

At the trial stage, the plaintiff attempted to certify a class of fellow drivers allegedly undercompensated by Diva Limousine, Ltd. (“Diva Limo”) in violation of California’s wage and hour laws. The lawsuit specifically contested Diva Limo’s policy of paying its drivers an hourly rate for assigned trips but failing to pay for on-call time between assignments (referred to as “gap time”).¹ The trial court denied class certification because it concluded that it would be too difficult to assess the validity of Diva Limo’s compensation policy in light of variations in how drivers spent their gap time.

However the appellate court reversed, holding that the trial court “fundamentally misconceived the import of the rule against evaluating the merits of plaintiff’s claim in deciding whether class treatment is appropriate.” Rather than

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¹ Diva Limo contended that class certification was not appropriate because some of the drivers may have used the gap time for personal pursuits.

denying class certification because the trial court should not evaluate the merits of a case at the certification stage, the appellate court concluded that the trial court must evaluate whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment.”

The appellate court further held that a class is properly defined in terms of “objective characteristics and common transactional facts,” not by identifying the ultimate facts that will establish liability. In this case, the proposed class, consisting of all drivers employed by Diva Limo during a specific time period, was sufficiently “ascertainable,” and the fact that the damages to which each class member may have been entitled would have required some individualized inquiry was irrelevant. As the court stated, “the class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description A class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery.” Here, a class action was appropriate because the common question was the overall impact of Diva Limo’s policies on its drivers, regardless of whether any one driver successfully found a way to utilize the gap time for his or her own purposes.

Recent California Court of Appeal Decision
is a Primer on Calculating “Bonus” Overtime Wages

The California Court of Appeal – First District’s recent decision in *Marin v. Costco* serves as a reminder that paying a bonus to non-exempt employees may trigger an additional overtime obligation. The case also illustrates how complicated the overtime calculation can become.

In *Marin*, several former employees, all classified as non-exempt, sued Costco for its alleged failure to pay overtime wages on the “non-discretionary” bonus it paid to these employees. This bonus was based on the number of hours the employees worked. This type of bonus is different from a discretionary bonus because non-discretionary bonuses are, in effect, deferred compensation which is tied in some way to production. Ultimately, the Court of Appeal ruled that Costco had properly calculated the overtime due. While the specific facts and holding in the *Marin* case do not create new law in California, the appellate court’s overview of the bonus overtime formula is helpful.

Although the general principle of this rule is fairly simple, its application is difficult. Under the Federal Fair Labor Standards Act and the California Wage Orders, employers must calculate overtime based on the employee’s “regular rate of pay.” This rate must be computed by each workweek, and becomes significantly

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more complicated if an employee's compensation involves more than just an hourly wage, such as profit sharing or productivity bonuses. For each workweek, the employer must total all the compensation paid, but exclude overtime payments, profit sharing, discretionary bonuses and other benefit plans, and then divide the total number of hours worked, up to 40, to determine the regular rate of pay. Significantly, non-discretionary bonuses, such as those earned by meeting performance standards, are included in the "regular rate" calculation.

"Bonus overtime" stems from the fact that overtime premium pay is computed based on a multiple (usually, 1.5 times) of the employee's "regular rate" of hourly compensation. This regular rate is calculated by dividing the number of hours worked in the week by all compensation earned for that week. If the employee is later given a bonus that is partially due to work performed in that week, this additional pay must be added to the total compensation for the week. This effectively causes a retroactive increase in the employee's regular rate of pay.

For example, suppose an employee's straight time hourly pay is \$10 per hour, and that he worked 40 regular hours and 10 overtime hours in a given week. His regular weekly paycheck would include \$400 as straight time pay plus \$150 of overtime pay (1.5 times his base rate, or \$15 an hour, multiplied by 10 hours).

Now suppose the employer has a profit-sharing program that pays this employee \$5,200 at the end of the year based on the company's overall performance. Because the bonus is equally attributable to all weeks in the year, this payment retroactively increases his weekly compensation by \$100 (\$5,200 divided by 52 weeks). Under California law, this additional \$100 per week payment also retroactively raises the employee's regular hourly rate for the week by \$2.50 (\$100 per week divided by 40 straight time hours per week). Since the employee's recalculated regular rate for this week is now \$12.50 per hour, his recalculated overtime rate increases proportionately – from \$15 an hour to \$18.75 an hour. Each employee is therefore entitled to an additional \$3.75 for each overtime hour worked, totaling \$37.50 extra for the week in which he worked 10 hours of overtime. This is known as the retroactive effect of a "non-discretionary" bonus.

In contrast, the retroactive effect of a "discretionary" bonus creates a different outcome. Suppose the same employer paid the same \$100 per week for the performance bonus based on that particular employee's volume of production during the year (e.g., making sales, manufacturing products, etc.). California law requires that the bonus overtime be calculated differently. Instead of dividing the \$100 by 40 straight time hours to determine the "regular rate" for bonus overtime, the employer is allowed to divide the amount by the total of the straight time and overtime hours worked (in this case, 50 hours). As a result, the employee's regular

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rate for the week rises by just \$2.00 (\$100 divided by 50 total hours worked). The employee would be entitled to only an additional \$20 (\$2.00 multiplied by 10 hours of overtime), as opposed to \$37.50.

The idea behind these differing calculations is that the extra production generated by working overtime hours helped contribute to achieving the “discretionary” bonus in the first place. Thus, not counting the overtime hours in the “regular rate” would amount to double recovery.

In sum, the two points to remember from the *Marin* case are that additional overtime payments are triggered when a bonus is paid; and the method for calculating the amount of this bonus overtime depends on whether the bonus is characterized as a “non-discretionary” bonus or a “discretionary” bonus. Calculating bonus overtime is complex and can be a headache for employers. However, employers who ignore this calculation do so at their own peril because the use of a mistaken formula is fertile ground for a class action or other litigation.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Cara Patton, Tyler Theobald or Jenna Leyton at (858) 755-8500 or Eric DeWames at (310) 417-1137.