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EMPLOYMENT LAW UPDATE

Relationship-Driven Results   October 2008

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I.

LEGISLATIVE/ ADMINISTRATIVE UPDATE

California Legislation Vetoed by Governor Schwarzenegger

As has been the case throughout this administration, Governor Arnold Schwarzenegger vetoed most of the employment-related bills that wound up on his desk. A few of the most significant bills **vetoed** included:

AB 437 (Jones): AB 437 would have stated the Legislature's intent to reject the U.S. Supreme Court's decision in *Ledbetter v. Goodyear* regarding the statute of limitations in discrimination cases.

AB 2279 (Leno): AB 2279 would have required employers to accommodate an employee's use of medical marijuana, thereby overruling the California Supreme Court's decision in *Ross v. RagingWire Telecommunications, Inc*. (wherein the Court stated that there is no duty under the California Fair Employment and Housing Act to "reasonably accommodate" medical marijuana use as treatment for a "disability"). In light of *Ross* and the rejection of AB 2279, employers may deny employment based on positive drug tests for marijuana, whether medically approved or not.

AB 2874 (Lieber): AB 2874 would have removed the $150,000 cap on damages available in administrative hearings conducted by the California Fair Employment and Housing Commission for violations of the California Civil Rights Act of 2005.

AB 2918 (Lieber): This bill would have outlawed most credit checks for job applicants or employees except in narrow and specified circumstances.

AB 3062 (Committee on Labor and Employment): AB 3062 would have expanded the Labor Code's protection of employees whose wages are garnished.

AB 3063 (Committee on Labor and Employment): This bill would have imposed additional limitations on pre-employment inquiries regarding criminal convictions.

SB 1583 (Corbett): SB 1583 would have imposed penalties on non-lawyer consultants who give erroneous advice on classifying employees as independent contractors in order to avoid "employee" status.

New California Laws

California employers should consider the following bills which were recently signed into law:

AB 10 (Committee on Budget): The "computer professional" special exemption from overtime has a "duties" component and a "minimum pay" component, as codified in Labor Code section 515.5. On September 30, 2008, Governor Schwarzenegger signed AB 10, which changes the minimum pay requirement from $36 per hour, to a salary above $75,000 per year (paid at least once per month in a monthly amount that exceeds $6,250). Pursuant to the new law, the minimum compensation requirement will be adjusted each year, based on the Consumer Price Index. AB 10 is an "urgency" statute which took effect immediately after it was signed on September 30, 2008.

AB 2075 (Fuentes): AB 2075 amends Labor Code section 206.5, which prohibits releases of any claims for unpaid wages unless payment has previously been made. AB 2075 adds subsection (b), which defines "release" to include "requiring an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period which the employer knows to be false." This amendment impacts those California employers who require employees to certify hours worked prior to receiving a paycheck. Employers with such a practice must ensure that the reported hours are accurate and that employees are provided the opportunity to correct time worked when appropriate. This law goes into effect on January 1, 2009.

SB 28 (Simitian): This bill prohibits California drivers from using any electronic communications device to write, send or read any "text-based communication" including text messages, e-mails and instant messages. The fine is $20 for the first offense and $50 for repeat offenders. Employers should ensure their electronic communications policies, and other impacted policies, highlight this new law, which becomes effective on January 1, 2009.

SB 940 (Yee): As described in greater detail in our August 2008 update, this new law amends Labor Code section 201.3 and revises payroll policies as applied to "temporary services workers." Employers who hire temporary agencies should ensure that such vendors are in compliance with the revised Labor Code section 201.3.

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We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

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II.

JUDICIAL UPDATE

California Supreme Court to Review *Brinker*

On October 22, 2008, the California Supreme Court agreed to review the San Diego-based appellate court's decision in *Brinker Restaurant v. Superior Court*, a critical case for California meal and rest period class action lawsuits. This July, the Court of Appeal ruled that employers are not required to force their non-exempt employees to *take* California mandated meal breaks; holding that employers need only make the requisite breaks available. The appellate court further held that employees are allowed to take their meal breaks at any time during a shift; not necessarily in the middle, as argued by the plaintiffs in the case. The appellate court also decertified the class in *Brinker*, ruling that analysis of employer liability for employees' missed meal periods must occur on an individualized basis.

Given that the Supreme Court has decided to consider on the case, the appellate court's ruling cannot be cited as law. We therefore encourage employers to remain vigilant in ensuring that employees take 30-minute unpaid, duty-free meal periods.

The Supreme Court will likely take at least one year before issuing a decision in the case. Though no outcome is guaranteed, a careful reading of last year's important *Murphy v. Kenneth Cole* case, suggests that the Supreme Court will uphold the *Brinker* standard with respect to the provision of employee meal periods.

Court of Appeal Affirms Summary Judgment on Perceived Disability Claim

In *Mangano v. Verity*, a California Court of Appeal affirmed summary judgment for Verity, Inc. ("the Employer") on charges of discrimination and harassment based on a "perceived disability." Thomas Mangano ("the Employee") was the Employer's director of manufacturing. After the Employee worked for the Employer for twelve years, the Employer hired a new CFO, who became the Employee's direct supervisor. The CFO called the Employee "Rainman" approximately six to ten times. The Employer also sought to recruit a new vice-president of manufacturing and operations, which would constitute a level of supervision between the Employee and the CFO. The Employee applied for the position, but was told the by CFO that he was not qualified. When the new vice-president was hired, the Employee's job was restructured. Four months after the new vice-president was hired, and seven months after the CFO ceased calling the Employee "Rainman," the Employee was diagnosed with Asperger's Syndrome.

The Employee filed a civil lawsuit alleging, among other things, that the Employer harassed and discriminated against him in violation of the California Fair Employment and Housing Act ("FEHA"). The trial court granted summary judgment in favor of the Employer and the appellate court affirmed the decision. In an attempt to defeat summary judgment, the Employee argued that any problems in the department (which may have rendered him unqualified for the vice-president position) were caused by the CFO, not by the Employee. The court rejected this notion and specifically stated: "FEHA does not protect against bad managers, only decisions and actions with a discriminatory basis."

The appellate court similarly refused to permit the harassment claim to proceed. Though the Employee's claim centered on the CFO's use of the names "Tommy" and "Rainman," evidence revealed that the Employee's family called the Employee Tommy, and that the CFO did not call the Employee "Rainman" to imply a disability. The court held that "[t]he sporadic use of ambiguous but potentially demeaning nicknames, absent any indication from the employee that the names are offensive and absent any other harassing actions by the employer, is insufficient to create an objectively hostile workplace environment."

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Have you registered?
Pettit Kohn Ingrassia & Lutz PC's
2nd Annual
Employment Law Symposium on November 19, 2008.
Please contact Cathy Johnson (858) 755-8500 x129 with any questions.
We look forward to seeing you there!

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, or Tyler Theobald at (858) 755-8500 or Eric DeWames at (310) 417-1136.

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