

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

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Premises Liability Litigation

Product Liability Litigation

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Real Estate Litigation

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

Action Taken on California Legislation

On October 11, 2009, Governor Arnold Schwarzenegger **vetoed** a number of bills that would have impacted California's employers and employees had they been signed into law:

AB 793 (Jones) – This bill would have specified that a cause of action for an alleged unlawful employment practice with respect to compensation accrues when any of the following occur: (1) a compensation practice is adopted; (2) an individual becomes subject to a compensation practice; and (3) an individual is affected by the application of a compensation practice. This bill specifically rejected the U.S. Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 550 U.S. 618.

AB 943 (Mendoza) – AB 943 would have restricted the ability of an employer, except for certain financial institutions, from obtaining a consumer credit report for employment purposes unless the information is: (1) substantially job related, meaning that the position of the person for whom the report is sought has access to money or other assets, or confidential information and (2) the position of the person is a position in the state Department of Justice, a managerial position, a position in a city, county or both city and county, a law enforcement position, or a position for which the information contained in the report is required to be disclosed by law or to be obtained by the employer.

SB 242 (Yee) – SB 242 would have made it a violation of the Unruh Civil Rights Act, subject to minimum damages of \$4,000, if a business limited the use of a customer's language, unless such language restriction was justified by a "business necessity."

Notice of Proposed Rule to Revise ADA Regulations Coverage

On September 23, 2009, the Equal Employment Opportunity Commission's ("EEOC") Notice of Proposed Rulemaking to Revise the federal Americans With Disabilities Act ("ADA") Regulations was published. The proposed rule has been issued to align the ADA regulations' definition of "disability" with the ADA Amendment Act of 2008 ("ADAAA") which took effect on January 1, 2009.

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The proposed rule notes that the ADAAA retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, the proposed rule notes that the ADAAA changed the way the statutory terms should be interpreted in several ways. The proposed rule includes examples of impairments that will consistently meet the definition of "disability." These impairments include: deafness, blindness, intellectual disability, cancer, major depression, post-traumatic stress disorder and schizophrenia. Like the ADAAA, the proposed rule provides that corrective effects of mitigating measures, other than ordinary eyeglasses or contact lenses, are not to be considered when determining whether someone is "disabled" under the law.

The proposed rule would also revise the portion of the regulations that defined the term "substantially limits" by providing that a limitation need not significantly or severely restrict a major life activity. Rather, determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual's ability to perform the major life activity with that of most people in the general population. The proposed regulations would also delete references to the terms "condition, manner or duration" under which a major life activity is performed. The rule would also expand the definition of "major life activities" to include, among other things, major bodily functions such as functions of the immune system, special sense organs and skin; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions.

The EEOC has also proposed amending the ADA regulations to provide that the definition of "regarded as" no longer requires the showing that the employer perceive the individual to be substantially limited in a major life activity. Instead, the proposed definition states that an applicant/employee who is subjected to an act prohibited by the ADA because of a perceived impairment will be "regarded as" being disabled unless the impairment is both transitory (defined as lasting or expected to last for six months or less) or minor.

The public may comment on these regulations for 60 days. At the end of the comment period, the EEOC will evaluate the comments and make revisions in response thereto.

II.

JUDICIAL UPDATE

Ninth Circuit Limits Federal Anti-Hacking Law

In *LVRC Holdings LLC v. Brekka, et al.*, Christopher Brekka ("the Employee") was an employee of LVRC Holdings, LLC ("the Employer"). While employed, he was fully authorized to use the Employer's computer network. The Employee e-mailed several confidential documents to his personal e-mail account during his employment, and the Employer discovered this activity after the Employee ceased working for it. The Employer sued the Employee under the

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federal Computer Fraud and Abuse Act (“CFAA”), which provides for criminal penalties and a civil action against any person who:

intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer if the conduct involved an interstate or foreign communication . . . or who knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value

The issue was whether the Employee exceeded his authorization during his employment by sending company information to his personal account. The court held that he did not.

Specifically, the Ninth Circuit ruled that an employee’s self-dealing does not “exceed authorization” under the CFAA. Rather, a violation occurs only when an employee: (1) does not have authorization to access the files, or (2) accesses the files after authorization is terminated.

This decision does not affect any potential California law violations or torts that an employer may assert. The case underscores the need for employers to have in place effective policies and procedures for limiting computer access, particularly after employees leave the company.

Ninth Circuit Holds that Commute in Employer’s Vehicle Not Compensable Time

In *Rutti v. Lojack Corp., Inc.*, Lojack, (“the Employer”) required certain employees to use a company vehicle for transportation between home and the first work assignment of the day. Analyzing the federal Fair Labor Standards Act as well as applicable California law, the Ninth Circuit held such time is not compensable time worked. Mike Rutti (“the Employee”) sought to bring a class action on behalf of all alarm install technicians.

The Ninth Circuit held that mapping out the Employee’s route, prioritizing his jobs for the day, and receiving instructions on the day’s jobs were not compensable either because they are part of the commute, or because they did not take up sufficient time and, therefore, were “de minimis.” The test for non-compensatory “de minimis” includes three factors: (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.

The Ninth Circuit added, however, that the employee potentially could be compensated for a “postliminary” activity: uploading data in a handheld computer to the company’s system. The court found that doing so was integral to the Employee’s job, required attention if the upload was unsuccessful, and was performed every day.

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The Ninth Circuit specifically declined to adopt the “continuation of the workday” principle that other courts have adopted. Under that standard, even commute time is compensable if the employee performs substantial work at home and then heads out to work somewhere else. Thus, the “postliminary” activity survived summary judgment. All of the other claims were rejected by the Ninth Circuit.

Class Certification Denied in Independent Contractor Case

In *Ali v. U.S.A. Cab Ltd.*, Abdulahi Ali and Dimitar Hristov (“the Plaintiffs”) asserted a class action on behalf of taxi drivers against U.S.A. Cab and its principals (“U.S.A. Cab”). The primary claim was that the drivers were misclassified as independent contractors. The Plaintiffs sought class certification, which the trial court denied.

The California Court of Appeal, Fourth Appellate District affirmed, on the ground that common issues did not predominate. Specifically, U.S.A. Cab submitted over 40 declarations demonstrating that each putative class member experienced different working conditions and degrees of control by U.S.A. Cab. Thus, the case was not amenable to class treatment. This case demonstrates that a motion for class certification may be defeated where the evidence demonstrates differences among each putative plaintiff’s working conditions.

Non-Solicitation Clauses Held Unenforceable

The California Court of Appeal, Fourth Appellate District held in *The Retirement Group v. Galante*, that contractual agreements not to solicit customers are not enforceable under California’s unfair competition statute, which is codified at Business and Professions Code section 16600.

The Retirement Group (“the Employer”) sued a number of former employees for purportedly stealing trade secrets and violating a non-solicitation agreement. The Employer obtained a preliminary injunction and the employees appealed. The Court of Appeal held that if a former employer proves misuse of trade secrets under the Uniform Trade Secrets Act or Unfair Competition Law, the former employee may be enjoined from misusing trade secrets. The appellate court held, however, that a court cannot enjoin a non-solicitation clause merely because it appears in an agreement. Rather, court specifically held:

We distill from the foregoing cases that section 16600 bars a court from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee’s new business, but a court may enjoin tortious conduct (as violative of either the Uniform Trade Secrets Act and/or the Unfair Competition Law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise

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unfairly compete with the former employer. Viewed in this light, therefore, the conduct is enjoined not because it falls within a judicially-created “exception” to section 16600’s ban on contractual nonsolicitation clauses, but is instead enjoined because it is wrongful independent of any contractual undertaking.

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INGRASSIA & LUTZ ♦ ATTORNEYS

3rd Annual Employment Law Symposium

Wednesday, November 18, 2009

8:00 am to 3:00 pm

Mission Valley Marriott

8757 Rio San Diego Drive, San Diego, CA 92108



WHO SHOULD ATTEND:
Business Owners • Human Resource Professionals
Executives • Managers and Supervisors

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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, Robert Hudock, Tyler Theobald, Jenna Leyton, Andrea Kaplan, Christine Mueller or Vanessa Maync at (858) 755-8500 or Eric DeWames or Mark Bloom at (310) 417-1137. For access to previous updates and reports, please go to <http://www.pettitkohn.com/EmployLabor.html>.

Wednesday, November 18, 2009

San Diego Marriott Mission Valley

8757 Rio San Diego Drive, San Diego, CA 92108 (619) 692-3800

8:00 am Registration & Continental Breakfast ♦ 9:00 am to 3:00 pm Program

Topics Include:

- ▶ Wage & Hour Update
- ▶ FMLA, CFRA & Leaves of Absence
- ▶ Harassment, Discrimination & Retaliation
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