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I.

JUDICIAL UPDATE

California Supreme Court Holds that Employers may satisfy their obligation to Reimburse Employees for the use of Personal Vehicles by Increasing the Employees' Compensation

California Labor Code section 2802 ("Section 2802") requires an employer to indemnify its employees for all expenses they necessarily incur in the discharge of their duties. Included in this obligation is the duty to reimburse employees for all reasonable costs associated with the employees' use of their own personal vehicles for company business. Such costs include payments for gas, maintenance, and insurance, as well as the depreciation of the vehicle itself. Employers usually satisfy this obligation in one of two ways: 1) paying the actual costs incurred by the employer; or 2) paying a reasonable mileage reimbursement. Because determining the actual costs associated with the business use of an employee's personal vehicle is both complicated and burdensome, most employers opt to pay an agreed-upon per mile fee. (The mileage fee established by the IRS is presumed to be reasonable.)

On November 5, 2007, the California Supreme Court confirmed a third option. In *Gattuso v. Harte-Hanks Shoppers, Inc.*, the Court held that an employer may satisfy its Section 2802 obligations by paying employees "enhanced compensation" in the form of increased base salary or commission rates, provided that: 1) the employer establishes some means to identify the portion of overall compensation that is intended as expense reimbursement; and 2) the additional compensation "is sufficient to fully reimburse the employees for all expenses actually and necessarily incurred."

While this option may appear attractive, employers must remember that even if an employee agrees upon the "appropriate" amount of increased compensation, the employer remains legally obligated to ensure that the employee is "fully" reimbursed for all actual expenses.

Federal District Court Rules that Employer Must only Provide the Opportunity to Take a Meal Break

In *White v. Starbucks Corporation*, a federal district court held that California Labor Code section 226 and the IWC Wage Orders' requirement that employers "provide" employees with meal periods means that the employer must only offer its employees meal periods. California's Division of Labor Standards Enforcement has taken the position that employers must ensure that meal breaks are taken, and that a failure to do so should result in the imposition of a penalty

equal to one-hour of pay at the employee's regular rate.

In *White*, however, the district court held that in order to prevail on a meal period claim, an employee would have to show that he or she was “forced to forego” a meal period by the employer. The court opined:

[T]he interpretation that [plaintiff] advances – making employers ensurers of meal breaks – would be impossible to implement [in industries] in which large employers may have hundreds or thousands of employees working multiple shifts. Accordingly, the court concludes that the California Supreme Court, if faced with this issue, would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that he was forced to forego his meal breaks as opposed to merely showing that he did not take them regardless of the reason. . . . [Otherwise,] employees would be able to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation. This cannot have been the intent of the California Legislature, and the court declines to find a rule that would create such perverse and incoherent incentives.

The *White* decision is significant because it does not place the burden on the employer to force employees to take meal breaks. Rather, it simply requires that the employer provide the opportunity to take the meal break. Note that *White* was issued by a federal district court; accordingly neither California courts nor the Ninth Circuit are bound by the decision.

Appellate Court Agrees with *White v. Starbucks* in Unpublished Decision

In *Brinker Restaurant Corp. v. Superior Court* a California Court of Appeal addressed the question of whether employers are obligated to “provide” meal breaks to employees simply by making such breaks available or – as many plaintiffs have argued – whether the obligation to “provide” meal breaks in fact carries with it an obligation for employers to forcefully ensure that employees actually take such breaks (e.g., to actively police employees to ensure meal breaks are both offered and taken).

Appearing to address this issue favorably for employers, a California court of appeal issued a recent (but unpublished) decision which reversed a trial court's class certification order (which included alleged meal and rest break violations), stating that the trial court's order relied on improper criteria and incorrect assumptions, including its failure in deciding the issue of what it means to “provide” meal breaks. The court held that the class certification order was erroneous and had to be vacated because, among other reasons, “the class certification order rests on an incorrect assumption with respect to the meal period claims to the extent those claims are based on the theory that [the employer] had a duty to ensure that its hourly employees took the meal periods it provided to them, and thus the court abused its discretion in finding that these claims are amenable to class treatment.”

The decision contains a positive analysis concerning these claims as well as their amenability to class treatment, including a discussion of when breaks must be

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provided in terms of timing during the workday and that rest periods may be waived. Further, the opinion apparently endorses *White v. Starbucks Corp.*'s opinion that an employer's obligation to "provide" employees with a meal break merely means to "offer" meal breaks or to make such breaks available. Unfortunately, the *Brinker* decision avoids a completely clear ruling on this question and is not a published decision. It therefore cannot be cited as binding authority.

Is Clarification on the Way?: The California Assembly adjourned the 2007 session without voting on AB 1711 (Levine), a bill that proposed significant changes to the Labor Code provisions regulating meal and rest break requirements imposed on California employers, among other items. It is likely that the Legislature will address the meal and rest break issue when it reconvenes in January 2008.

II.

LEGISLATIVE UPDATE

Federal Civil Rights Legislation Advances

On November 7, 2007, the U.S. House of Representatives voted to approve HR 3685, which would ban workplace discrimination based upon sexual orientation. The legislation was passed by the House only after a provision which would also make it illegal to discriminate based upon transgender and/or gender identify status was dropped from the Bill. HR 3685 would apply to companies with 15 or more employees, but would exempt the Armed Forces, private clubs, and religious organizations.

The protections afforded by this federal legislation are already guaranteed to California workers pursuant to the California Fair Employment and Housing Act.

Mandatory Health Care Legislation Moves Forward

Earlier this year, the California Legislature passed legislation requiring health care benefits for all California residents. The legislation was thereafter vetoed by Governor Schwarzenegger. On November 16, 2007, a revised plan was approved by the Assembly Health Committee. The new plan includes a "sliding scale" employer tax of between 2% and 6.5% of an employer's social security wages, a 4% tax on hospitals, and a \$2.00 per pack increase in the tobacco tax.

The plan would require every resident of the state to maintain a minimum policy of health care coverage for himself/herself, and his or her dependents. Exceptions would be made for those individuals for whom the costs of a minimum policy (including all out-of-pocket expenses) would exceed 6.5% of the family's income, or where other significant financial hardships exist.

Given that both the Legislature and the Governor have pledged to enact some form of universal health care legislation, California employers should expect a great deal of activity regarding this issue during the coming year.

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 Kristi Tremble at (858) 755-8500 or Eric DeWames at (310) 417-1136.

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