

Areas of Practice

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11622 El Camino Real, Suite 300
San Diego, CA 92130
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Los Angeles, CA 90045
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I.

ADMINISTRATIVE/LEGISLATIVE UPDATE

Governor Schwarzenegger Signs Disability Access Law

Governor Arnold Schwarzenegger signed SB 1608 (Corbett) into law. SB 1608 arrives at a solution for disability access issues through a combination of the following provisions:

- A new disability commission will be tasked with evaluating and providing recommendations on disability issues;
- Establishing continuing education requirements for building inspectors and architects on disability access laws;
- Incentivizing building owners to use state-certified access specialists to ensure compliance with disability access laws; and
- Establishing new court procedure to encourage early resolution of disability access lawsuits.

One of the important reforms in SB 1608 is a provision clarifying that plaintiffs may recover damages only for a violation they personally encountered or that deterred access on a particular occasion, rather than for alleged violations that may exist at a place of business but did not cause a denial of access.

In addition, SB 1608 clarifies that a court can consider reasonable written settlement offers made and rejected in determining the amount of reasonable attorneys' fees to be awarded at the end of a case, which is aimed at reducing unnecessary protraction of litigation by either party.

The DLSE's October 23, 2008 Memorandum Regarding Meal Periods

The California Division of Labor Standards Enforcement's ("DLSE")

October 23, 2008 memorandum stated the agency's interpretation will be "that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken." The DLSE set forth additional principles to "provide some guidance on how California's meal period requirements are to be enforced by the [DLSE]:"

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- Employers may not require employees to work through their meal periods;
- An employer does not satisfy its obligations under Labor Code section 512 and the applicable wage order if its policies or practices prevent or discourage employees from taking their meal periods;
- The facts in each case must be carefully analyzed;
- The first meal period must commence prior to the end of the fifth hour of work;
- An employer must provide a second meal period for any employee employed for a work period of more than ten hours per day, except if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period is not waived;
- There is no controlling legal authority interpreting California's meal period regulations to require employers to provide meal periods every five hours (i.e., no "rolling five" hour rule);
- Employers have a duty to record their employees' meal periods; and
- The employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day the meal period was not provided.

Driving Restrictions Expanded

As most Californians know, a law went into effect on July 1, 2008 that prohibits Californians from operating cellular phones while they are driving, unless they utilize a hands-free device. These prohibitions will be expanded on January 1, 2009, thanks to SB 28 (Simitian) which prohibits drivers from "texting, e-mailing, or instant messaging while driving." The new law imposes civil penalties of \$20 for the first violation and \$50 for each subsequent violation.

Employers whose employees operate vehicles during working hours should consider augmenting their employment policies to include these prohibitions.

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II.

JUDICIAL UPDATE

Another Court Of Appeal Holds That Employers Need Only “Make Available” Meal Periods

On October 28, 2008, only six days after the California Supreme Court’s decision to review *Brinker v. Superior Court*, a different California Court of Appeal reached the same conclusions about an employer’s obligation to provide meal and rest periods. In *Brinkley v. Public Storage, Inc.*, a class of plaintiffs sued their employer alleging, among other things, that the company had failed to provide adequate meal and rest periods.

The Court of Appeal found that the employer was under no obligation to “ensure” that employees take meal or rest periods. Instead, employers need only make sure that meal and rest periods are “made available” to employees. Looking at the evidence, the Court of Appeal agreed that although some employees may have missed meal and rest breaks at times, there was no evidence that any of the plaintiffs were denied an opportunity to take such breaks. The court also found in favor of the employer on the rest break claims because the employer made rest breaks available to its employees.

Regarding the claim for inaccurate pay stubs, the court found for the employer because there was no evidence that the employer knowingly and intentionally failed to comply with the pay stub requirements in the California Labor Code. The court also noted that an employee must suffer an injury as a result of a pay stub error in order to bring this type of claim.

The *Brinkley* decision is not final. The California Supreme Court could be asked to review *Brinkley* at the same time it reviews *Brinker*. While there are several persuasive federal court decisions that discuss employer compliance with California meal and rest period laws, the California Supreme Court has yet to issue its decision. For now, employers should ensure that all workplace rules regarding meal and rest periods are in compliance with the laws currently in effect, and that policies and procedures are made clear to all employees.

Employer’s Duty to Accommodate Disabled Employees Continues to be Broadly Construed

Nadaf-Rahrov v. The Neiman Marcus Group involved an employee (“Employee”) who availed herself of a lengthy leave of absence relating to various physical ailments. Throughout her leave, which was extended on multiple

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occasions, Employee produced physician’s notes that stated that she was “unable to work.” Her employer voluntarily extended the leave on multiple occasions, but finally discharged her after she failed to return to work.

The Employee filed a lawsuit alleging violations of the California Fair Employment and Housing Act, including disability discrimination, failure to accommodate disability, and failure to engage in the interactive process, among other claims. Although the trial court granted summary judgment in favor of the employer, a California Court of Appeal reversed.

The appellate court confirmed that reassignment from one position to another may constitute a reasonable accommodation, and that the employer need not promote an employee to accommodate her. The court, however, also held that the employer’s accommodation analysis is not limited solely to the employee’s current job, and that the employer must consider other vacant positions in the organization (including positions that are not yet vacant, but “might” come open). The court also noted that an employer cannot avoid analyzing other potentially vacant positions simply because the employee’s doctor’s note suggests that the employee is unable to work in a specific job. In a break with other appellate courts, however, the court suggested that an employer cannot be liable for failure to engage in the interactive process unless the employee can demonstrate a reasonable accommodation was ultimately possible.

Filing Deadlines for Fair Employment and Housing Complaints Extended by Use of Internal Grievance Procedures

The California Fair Employment Housing Act (“FEHA”) requires that claims must be filed within one year of the last act of harassment or discrimination. Failure to timely file a claim generally precludes an employee from pursuing such claims. In situations where employees avail themselves of their employer’s “internal” grievance procedures or alternative dispute resolution mechanisms, however, this one-year statute of limitations will be tolled (extended).

In *McDonald v. Antelope Valley Community College Dist.*, plaintiff Sylvia Brown (“Employee”) filed suit against the Antelope Valley Community College District (“the District”) for racial harassment, discrimination, and retaliation. In October 2001, Employee complained of discrimination in a letter to the Vice Chancellor of Human Resources for the District, and filed a formal discrimination complaint with the Chancellor’s office in early November 2001. The Chancellor’s office forwarded the complaint for investigation and urged Employee to “work with the District” to resolve the matter. The Chancellor’s office also advised Employee that she could file a FEHA complaint at any time.

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The District investigated the claims and ultimately found that they were without merit. The Employee's appeal resulted in a similar finding. In May 2003, the matter was closed by the District.

Employee filed an administrative complaint with the California Department of Fair Employment and Housing ("DFEH") on October 11, 2002 (while the internal proceedings were pending). She received a right to sue letter dated October 24, 2002, and filed a superior court action on October 24, 2003.

The District moved for summary judgment, arguing that the DFEH complaint was untimely, because the last act of discrimination/harassment complained of occurred in January 2001, and the DFEH complaint was not filed until October 2002. Employee argued that the statute of limitations should be tolled (extended) during the time the District was investigating her complaint.

The trial court concluded that because the Chancellor's office had advised Employee that she could file a DFEH complaint simultaneously with her internal grievance, Employee was not entitled to toll the statute of limitations. The Court of Appeal, however, reversed the decision, and held that traditional equitable tolling principles may apply to extend the statute of limitations for filing a FEHA complaint. The District appealed that ruling to the California Supreme Court, which agreed with the Court of Appeal.

As a preliminary matter, the Court confirmed that the doctrine of equitable tolling applies "when an injured person has several legal remedies and, reasonably and in good faith, pursues one." Such tolling eases the pressure on parties to seek redress in two separate forms at the same time. By alleviating the fear of claim forfeiture, it affords claimants the opportunity to pursue informal remedies. The Court concluded that the internal remedy Employee pursued with the District "offers precisely the sorts of benefits equitable tolling is designed to preserve," and concluded that the FEHA does not preclude such tolling during the voluntary pursuit of internal administrative remedies.

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.

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