

Areas of Practice

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Civil Litigation & Trials

Employment / Labor

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Premises Liability Litigation

Product Liability Litigation

Professional Liability Litigation

Real Estate Litigation

Restaurant / Hospitality Litigation

Retail Litigation

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

California's Prohibition Against Social Security Numbers on Pay Statements Takes Effect on January 1, 2008

Labor Code section 226 requires California's private employers to furnish an employee with an itemized wage statement showing nine specific items, one of which has historically been the employee's Social Security number. Effective January 1, 2008, California employers will be permitted to list only the last four numbers of an employee's Social Security number on pay statements. As an alternative, the employer may list an employee identification number that is not the employee's Social Security number. The revision to the Social Security number language was added to the Labor Code in 2005, but employers were given time to correct their payroll systems in preparation for the January 1, 2008 deadline. This change also applies to any electronic wage statements issued to employees. Employers who knowingly and intentionally violate Labor Code section 226 may be subject to both misdemeanor criminal charges and civil penalties.

Cell Phone Restrictions Take Effect on July 1, 2008

On September 15, 2006, Governor Schwarzenegger signed legislation making it illegal for an individual to drive a motor vehicle while using a wireless telephone, unless that telephone is designed and configured to allow hands-free listening and talking operation, and is used in that manner while driving. There are exceptions for certain drivers and emergency situations. This legislation takes effect on July 1, 2008. Employers should take steps to comply with this law by implementing a policy that requires applicable employees to use hands free devices while driving on company business.

II.

JUDICIAL UPDATE

One Year Statute of Limitations Applied to Lawsuits Seeking Late Payment of

Penalties

In *McCoy v. Superior Court*, California's Fourth Appellate District ruled that when an employee seeks only waiting time penalties under Labor Code section 203, the statute of limitations is one year pursuant to California Code of Civil Procedure section 340(a).

Derrick McCoy ("the Employee") worked as a temporary employee for

Kimco Staffing Agency (“the Employer”). The Employee, on behalf of himself and a class of similarly situated employees, sued the Employer for failure to pay final wages on completion of temporary work assignments. Critically, the Employee did not sue for the underlying wages, which were typically paid on the normal payday following an employee’s discharge or resignation. The Employer moved to strike the portions of the complaint alleging that the waiting time penalties were subject to the four year period prior to the filing of the complaint.

The California Labor Code does not contain a statute of limitations applicable to actions which only seek the recovery of the waiting time penalties made available by Labor Code section 203. The court recognized that the intent of Labor Code section 203 is to compel speedy payment of wages; the waiting time penalty constitutes an inducement to do so. The court held that if employers could be subject to a penalty regardless of when back wages are paid, the penalty could be a disincentive to pay promptly. The court stated: “once 30 days have elapsed and wages have not been paid the incentive is lost. Allowing another three or four years time to sue for the penalty does nothing to ensure promptness.” Accordingly, those portions of the complaint seeking penalties for the four years prior to the filing of the lawsuit were struck from the complaint.

Court Refuses to Enforce Phantom Arbitration Agreement

In *Mitri v. Arnel Management Company*, California’s Fourth Appellate District confirmed a lower court’s refusal to enforce an arbitration agreement between two employees and their employer, Arnel Management Company (“the Employer”). Although the Employer’s employee handbook stated that “as a condition of employment, all employees are required to sign an arbitration agreement,” the Employer could not produce copies of the signed arbitration agreements for the employees in question (“the Employees”). The Employer argued that its employee handbook’s reference to arbitration was sufficient to force the Employees to arbitrate their claims. The Employer also submitted a declaration stating that the company’s custom and practice was to require all employees to sign arbitration agreements prior to or upon the commencement of employment. The Employees, however, both submitted declarations denying that they had ever signed the arbitration agreement.

The court of appeal noted that the Employer bears the burden of proving the existence of an arbitration agreement. The court held that the documents submitted by the Employer did not show that either of the Employees ever consented to arbitration. Interestingly, the court viewed the handbook passage set forth above to imply that there existed an intent to have the Employees sign a separate arbitration agreement to effectuate the Employer’s policy of arbitrating employment disputes, thereby undermining the Employer’s argument that the Employees accepted the arbitration agreement by signing the employee handbook. This case does not stand for the proposition that an arbitration agreement cannot be contained within a handbook. Rather, the *Mitri* court held that if an employer states in its handbook that there is a separate arbitration agreement, the employer should ensure the separate arbitration agreement is signed.

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

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