

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

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

Alternative Work Week Rules Revised

As part of California's recent budget compromise, the legislature amended Labor Code Section 511, the law that governs how employers may implement alternative workweek schedules. An alternative workweek schedule is an exception to the normal daily overtime rules for non-exempt employees working in California.

First, the amended law defines what counts as a "work unit" for proposing the vote for the alternative workweek schedule as follows:

[A] division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this section is met.

Second, employers can offer either a single alternative workweek schedule option, or a menu of options, from which employees to choose. The law also now permits a regular schedule of five 8-hour days per week to be offered on an alternative workweek schedule menu, along with other choices.

Finally, employees who elect an alternative workweek schedule are now allowed, with their employer's consent, to switch from one schedule to another on a weekly basis.

California Fair Employment & Housing Commission Issues Two Comparison Charts

In order to assist employers in their efforts to comply with recent revisions to the Americans with Disabilities Act (“ADA”) and the Family and Medical Leave Act (“FMLA”) the California Fair Employment & Housing Commission (“FEHC”) has issued two comparison charts. Both charts may be found on the FEHC’s website.

Specifically, the FEHC issued a chart comparing the ADA, the 2008 amendments to the ADA, and the California Fair Employment and Housing Act’s coverage of individuals with disabilities. This chart may be found at www.fehc.ca.gov/pdf/ADA-ADAAA-FEHA_Table-2.pdf.

The FEHC also issued a chart comparing the revised FMLA and the California Family Rights Act. The chart may be found at www.fehc.ca.gov/pdf/FMLA-CFRA_Regs_Table-1.pdf.

II.

JUDICIAL UPDATE

Court of Appeal Sheds Light on California’s Tipping Pool Law

A California Court of Appeal recently issued a pro-employer ruling in *Budrow v. Dave & Buster’s of California, Inc.* The plaintiff, a former cocktail waiter, argued that the “tip pooling” policy of his former employer (Dave & Buster’s) violated California law because the servers were required to share their tips with the bartenders who did not provide “direct” table service. Dave & Buster’s required its servers to tip out busboys, bartenders, runners, hosts, and others involved in the chain of service. Under Dave & Buster’s policy, servers were to share 1% of their tips with bartenders and other employees by way of tip pooling.

The court rejected the plaintiff’s claim that this policy was unlawful. The court concluded that California law does not distinguish between “direct” and “indirect” table service for purposes of determining which employees can share in a tip pool. Rather, the relevant question is for which employee or employees the tip was left. According to the court, there is no bright line rule, and the answer may vary depending on the services provided in a particular restaurant. The court held that at Dave & Buster’s, it did not matter whether or not the bartender actually brings the drinks to the customers’ tables. The fact that the bartender mixes and pours drinks that are delivered to customers is sufficient to allow the bartender to share in the tip pool.

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The Court of Appeal also rejected the notion of excluding categories of employees based upon their duties. The court reasoned that “given that restaurants differ, there must be flexibility in determining the employees that the tip was paid, given, or left for.” The court concluded that the decision about which employees are allowed to participate in the tip pool must be based on “a reasonable assessment of the patrons’ intentions.”

Diabetic Employee Disabled Under the ADA

An employee who is an insulin-dependent diabetic can be considered “disabled” and a “qualified” individual under the Americans with Disabilities Act (“ADA”).

In the federal case *Rohr v. Salt River Project*, Larry Rohr (“Rohr”) was employed as a welder for Salt River Project Agricultural Improvement and Power District. Rohr developed type-2 diabetes. At times, Rohr was assigned to work in the field and out of town trips. However, Rohr’s doctors imposed a number of restrictions on his work due to his diabetes, including extended travel. Ultimately, the company concluded Rohr could not perform the essential functions of his job and gave him the opportunity to transfer to another job or take early retirement. Rohr sued for disability discrimination under the ADA. The district court granted summary judgment, in favor of the employer, holding he was not an individual with a disability and that he was not a qualified individual.

The Ninth Circuit reversed, concluding diabetes is a “disability” under the ADA “because it affects the digestive, hemic and endocrine systems, and eating is a major life activity.” The court then tackled whether Rohr could perform his essential job functions with or without accommodation. The company argued that Rohr could not pass a respirator test per OSHA standards. The court allowed Rohr’s case to proceed to trial because the cited test was not required by OSHA, Salt River did not consider other testing methods, and the use of a respirator may not have been “necessary” to the job.

The Ninth Circuit declined to rule whether the recent amendments to the ADA are retroactive by holding that a type-2 diabetic had a disability and was a qualified individual under the original ADA. Nonetheless, the court decided that the amendments would have lent further support to the conclusion that summary judgment should be reversed.

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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