

## Areas of Practice

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

11622 El Camino Real, Suite 300  
San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1030  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

## I.

### **LEGISLATIVE/ADMINISTRATIVE UPDATE**

#### **The Patient Protection and Affordable Care Act**

On March 23, 2010, President Obama signed into law H.R. 3590, the Patient Protection and Affordable Care Act. This wide-ranging law includes a multitude of provisions that will impact both employers and employees.

First, penalties will be assessed on an employer with 50 or more employees who declines to offer health care coverage to employees. The penalty will be assessed if even one employee receives a subsidy to purchase coverage through a health insurance exchange. Employers will also incur penalties if the coverage offered is considered unaffordable to the employee or if the health plan has an actuarial value of less than 60% or pays less than 60% of covered health care expenses.

Second, starting in 2014, this new federal law requires individuals to purchase health insurance coverage, or pay a penalty. This phased-in penalty starts at \$95 or 0.5% of income per individual in 2014 and increases to \$750 or 2% of income in 2016. The penalty for a family would not exceed \$2,250. Religious and hardship exemptions to the penalty will be available.

Third, employers offering health plans that exceed a certain cost (the total employee and employer cost) will be subject to an excise tax on the amount above that value. For individual coverage, the threshold would be \$8,500 and for family coverage, the threshold would be \$23,000. These thresholds would be indexed with the Consumer Price Index plus one percentage point. Certain high-risk provisions will have an even higher cost threshold.

Fourth, the new law requires insurance plans to provide coverage to any individual who requests insurance. The new law further includes a prohibition on pre-existing condition restrictions in the individual and small group health care market. Health insurance premiums will be allowed to vary based solely on tobacco use, age, family composition and geography. Large employers that purchase coverage through a health care exchange will be eligible for the above-

*We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.*

*We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.*

*We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.*

referenced insurance protections. Both self-insured and fully-insured plans will be required to provide dependent coverage for children up to age 26. Health plans are also prohibited from establishing annual and lifetime dollar limits on coverage.

Fifth, starting in 2014, employers can offer increased incentives or rewards to employees for participation in wellness programs or for meeting certain health status goals or requirements. Rewards or premium reductions up to 30% of the cost of coverage will be allowable.

Sixth, employers offering coverage will be mandated to provide free choice vouchers to a qualified employee to purchase insurance through the insurance exchanges. To be eligible for a voucher: (1) an employee's contribution under the employer's plan must be between 8% and 9.8% of the employee's income; and (2) the employee's income must be at or below 400% of the federally determined poverty level.

Seventh, starting in 2010, contributions to health flexible savings accounts would be capped at \$2,500 and over-the-counter medicines will only qualify for reimbursement if accompanied with a doctor's prescription.

Finally, starting in 2013, an additional Medicare tax of 0.9% will be imposed on joint tax filers with income in excess of \$250,000 and single tax filers with income in excess of \$200,000.

Some additional changes to The Patient Protection and Affordable Care Act are anticipated as part of budget reconciliation. These changes, which may impact several of the effective dates and requirements detailed above, may be part of the agreement negotiated between the House and Senate to approve the overall health care reform package.

#### Stop-Gap Legislation Extends COBRA Subsidy

Earlier this month, President Obama signed legislation that extends the eligibility period for the federal COBRA premium subsidy to the end of the month. Absent this legislation, employees involuntarily discharged after February 28, 2010 would not have been eligible for the COBRA subsidy. Moreover, further expansions of the subsidy may also occur. The Senate is currently considering legislation that will continue the extension through the remainder of 2010.

In addition to extending the COBRA subsidy period, the newly-signed legislation also expands the definition of "assistance eligible individual" to include individuals who are terminated from employment after experiencing a reduction in hours. As originally enacted, the subsidy applied only to individuals (and their qualified dependents) who were eligible for COBRA because of an involuntary discharge during the subsidy eligibility period. Now, if an individual had a COBRA-qualifying reduction in hours on or after September 1, 2008, and is subsequently discharged, the individual and his or her qualified dependents will be eligible for the subsidy on the basis of the reduction in hours. Finally, the new legislation also provides that government agencies may assess monetary penalties and file civil actions for violations of the COBRA subsidy provisions.

11622 El Camino Real, Suite 300  
San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1030  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

Covered employers will be required to provide COBRA subsidy notices to individuals who are eligible for the subsidy as a result of a reduction in hours followed by an involuntary discharge. In addition, COBRA notices for recently discharged employees should be updated to reflect the new COBRA subsidy extension.

The Department of Labor issued five model Notices for Group Health Plans to provide individuals who experience a covered qualifying event. Congress is currently considering the American Workers, State and Business Relief Act of 2010. This bill would extend the COBRA subsidy provision through December 31, 2010.

## II.

### JUDICIAL UPDATE

#### California Supreme Court Provides Narrow Interpretation of Employer's Sick Leave Policy

In *McCarther v. Pacific Telesis Group*, the California Supreme Court held that employers who have a policy of providing compensation for employee sick days on an as-needed basis only, with no banking or accrual of unused sick days, do not have a "sick leave" policy which would entitle their employees to compensation to care for ill family members.

Plaintiffs Kimberly McCarther and Juan Herta ("Plaintiffs") were employees of SBC Services, Inc. and Pacific Bell Telephone Company, respectively. Both were denied compensation for leave taken to care for ill family members pursuant to a collective bargaining agreement which compensated employees only for absences due to their own injury or illness. Plaintiffs subsequently filed a class action lawsuit, alleging that their employers had violated Labor Code section 233 (commonly referred to as the "kin care law"), which provides that "any employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement, to attend to an illness of a child, parent, spouse or domestic partner."

In holding that the employer had not violated Labor Code section 233 by denying Plaintiffs paid leave to care for ill family members, the California Supreme Court explained that the statute does not apply to any and all forms of compensated time for illness, but rather only to "sick leave" as defined by the statute and in the amount specified. Because section 233 specifically defines "sick leave" as "accrued increments of compensated leave" and further limits the amount of sick leave that can be used to care for an ill family member to "an amount not less than the sick leave that would be accrued during six months," the Court found it reasonable to conclude that the reach of the statute is limited to those employers who provide a measurable, banked amount of sick leave. Because the collective bargaining agreement at issue did not provide a bank of sick leave hours/days to

#### Areas of Practice

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

11622 El Camino Real, Suite 300  
San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1030  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

*We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.*

*We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.*

*We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.*

11622 El Camino Real, Suite 300  
San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1030  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

which the employee was entitled in a six or twelve-month period,<sup>1</sup> it would be impossible to determine the amount of compensated “kin care” to which an employee might be entitled under section 233. As such, the employer’s policy did not fall within the purview of section 233, and Plaintiffs were not entitled to paid time off to care for ill family members pursuant to that statute.

### The Potential Impact of Megan’s Law on California Employers

In *Mendoza v. ADP Screening and Selection Services*, the plaintiff, William Mendoza (“the Applicant”) applied for a job. The employer conducted a background check through defendant ADP Selection Services. As part of its services, ADP reviewed California’s Megan’s Law website, wherein information about registered sex offenders is maintained. The court’s decision implicitly suggests that the Applicant was denied employment because of his inclusion on the Megan’s Law website.

The Applicant sued ADP, alleging that its use of the Megan’s Law website was unlawful since it provided the information to the potential employer. The Applicant claimed the disclosure violated Megan’s Law itself, as well as California’s Investigative Consumer Reporting Agencies Act.

ADP filed a special motion to strike the complaint, arguing the Applicant’s lawsuit was a “SLAPP” – a strategic lawsuit against public participation. ADP claimed it had the free speech right to republish the Megan’s Law information and that the Applicant was seeking to interfere with that right by filing suit.

The trial court and appellate court concurred with ADP’s theory. Thus, ADP prevailed and obtained an award of attorney’s fees, as is provided by the applicable statute.

However, unless the employer uses information from the Megan’s Law website to “protect a person at risk,” which has not been defined by either statute or case law, it is unlawful for an employer to use such information to deny employment – regardless of whether such information comes from the Megan’s Law website or a third party. Thus, California employers should carefully consider whether to permit third party background investigators to disclose information found on the Megan’s Law website.

### No Attorney’s Fees for Minimal Recovery in FEHA Case

In *Chavez v. Los Angeles*, the California Supreme Court held that trial courts may deny attorney’s fees to prevailing plaintiffs in discrimination cases brought under the California Fair Employment and Housing Act (“FEHA”) if the plaintiff recovers less than the \$25,000 jurisdictional minimum mandated for superior court. In *Chavez*, the plaintiff recovered approximately \$11,000 in damages and thereafter attempted to recover over \$800,000 in attorney’s fees.

<sup>1</sup> The collective bargaining agreement provided that an ill employee would be compensated for up to a specified limit for each instance of illness, with the only limitation on the number of compensable illnesses imposed by the employers’ attendance policy.

California Code of Civil Procedure Section 1033 authorizes trial courts to deny recovery of costs and fees when the jurisdictional minimum is not satisfied. In this case, the California Supreme Court held that section 1033 applies to FEHA claims. Additionally, the Court also found that the trial court properly considered that the plaintiff grossly inflated the request for attorney's fees.

### Ninth Circuit Issues Opinion on Tip Pooling

In *Cumbie v. Woody Woo, Inc.*, a case addressing federal law, the Ninth Circuit Court of Appeals found an Oregon restaurant's tip pooling arrangement to be valid. The plaintiff, Misty Cumbie ("Cumbie"), was a server at a restaurant where the wait staff was paid a cash wage of at least minimum wage plus a portion of their daily tips. The restaurant required its wait staff to participate in a "tip pool," whereby the collective tips were distributed to all restaurant employees. The largest portion of the tip pool went to kitchen staff, who are not customarily tipped in the restaurant industry.

In this case of first impression, the Ninth Circuit analyzed whether this arrangement was proper under the Fair Labor Standards Act ("FLSA"). Section 203(m) of the FLSA provides that, under certain circumstances, an employer may include part of its employees' tips as wage payments. Under the FLSA, an employer may make up the difference between the federal minimum wage and the employee's cash wage with the employee's tips (a "tip credit"). If the cash wage plus tips are not enough to meet the minimum wage, the employer must increase the cash wage. The FLSA further provides that an employer may only use this tip credit if: 1) the employer informs the employee of this law, and 2) the employer permits the employee to keep all of her tips, except when the employee participates in a tip pool "among employees who customarily and regularly receive tips."

Cumbie argued that even though the restaurant was not taking a tip credit, the tip pool was still invalid under the FLSA because it included the kitchen employees who were not "customarily and regularly" tipped employees. She asserted that the restaurant should pay her the minimum cash wage plus all of her tips. The court disagreed. It held that since the restaurant was not taking a tip credit, the statutory language cited above did not apply, and therefore the tip pooling arrangement was valid. The FLSA does not restrict tip pooling where no tip credit is taken.

Cumbie then argued that the tip pooling arrangement was improper under section 206 of the FLSA requiring that the minimum wage be paid "free and clear," and that her forced participation in the tip pool constituted a kick-back to the kitchen staff for the restaurant's benefit. The court found, however that Cumbie did not "own" all of her tips to begin with since she and the restaurant agreed to redistribute her tips in the tip pooling arrangement. She only "owned" the tips that were actually distributed to her. The restaurant's arrangement, therefore, did not violate the FLSA.

While this opinion provides clarity on tip pooling arrangements under federal law, employers must be cautious of tip pooling provisions under state law. Although tip credits against the minimum wage are permissible under the FLSA, California law prohibits employers from crediting any portion of tips toward their

#### Areas of Practice

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

11622 El Camino Real, Suite 300  
San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1030  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

*We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel*

*We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.*

*We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.*

state minimum wage obligations. In California, employer-mandated tip pooling is permitted for employees who contribute to the service to a patron (including kitchen staff), as long as the sharing is reasonable. Additionally, employers should remember that managers and other agents of the employer are never allowed to share tips with employees.

### Ninth Circuit Drives a Different Course in *Rutti v. Lojack*

In October 2009, this update analyzed *Rutti v. Lojack Corp.* *Rutti* was a case in which the plaintiff and a class of workers for Lojack Corporation alleged they were not paid for off-the-clock work performed at home as well as for their commutes to and from work. The initial Ninth Circuit panel opinion precluded most of the plaintiffs' claims, holding the plaintiffs' activities were either de minimus or not compensable under the federal Fair Labor Standards Act and California law. The panel did find, however, that the activity of uploading data at the end of the day was potentially compensable.

The first panel decided that the use of a company vehicle to commute to and from home was not compensable under California law. On rehearing, the panel changed its position, allowing to proceed to trial the claim whether driving to and from work is compensable under California law. The key issue will be the amount of control the company exercised over the use of the company truck.

In light of this decision, employers who provide employees with company vehicles should carefully proceed. Too many restrictions on company vehicle usage could turn commuting time into compensable time. Compensable time could necessitate the provision of overtime pay, meal periods, rest periods and the corresponding waiting time penalties and attorney's fees associated with each.

*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, Vanessa Maync or Christine Mueller at (858) 755-8500 or Eric DeWames or Mark Bloom at (310) 649-5772.*

11622 El Camino Real, Suite 300  
San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1030  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)