

Areas of Practice

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

Status of Pending California Legislation

A number of bills that, if signed into law, would impact California employers are being considered by the California legislature. The bills include:

AB 2716 (Fiona) would permit employees to earn one hour of paid sick leave for every 30 hours worked. Employees who work at companies with no more than ten employees could accrue as many as five sick days per year, while employees who work with larger companies could accumulate as many as nine sick days. This bill is currently before the Assembly Appropriations Committee.

SB 1608 (Corbett) would promote compliance with disability access requirements and address burgeoning litigation in this area by: (1) creating the California Disability Access Commission, which would be an independent state commission that would serve as an advisory body and information center on disability access issues; (2) establishing continuing education requirements for building inspectors and architects on disability access laws as well as a requirement that monetary demands pursuant to disability access laws must be accompanied by an advisory statement available in multiple languages explaining owner obligations as well as legal options; (3) promoting owners to use state-certified access specialists to ensure compliance with disability access laws; and (4) establishing a court procedure available for companies who have demonstrated diligence in complying with disability access laws by hiring a state-certified access specialist. SB 1608 is currently set for hearing before both the Senate Business, Professions and Economic Development Committee and the Senate Judiciary Committee.

SB 1244 (Alquist) would create a new basis for liability under the Labor Code by adding a protected class of “a coworker or family member” of a person who has filed a claim with the Labor Commissioner or is testifying in a proceeding before the Labor Commissioner. SB 1244 has passed the Senate Judiciary Committee and is currently before the Senate Appropriations Committee.

SB 1539 (Calderon) would enact legislation to address issues related to meal periods in employment. The bill has been referred to the Senate Rules Committee.

AB 2940 (DeLeon) would make California the first state in the country to open its public retirement plan to employees in the private sector. The program

would allow employees at companies without 401(k) plans or traditional pensions to set up savings accounts through CalPERS, the California Public Employees' Retirement System. AB 2940 has been referred to the Assembly Committee on Appropriations.

II.

JUDICIAL UPDATE

California Supreme Court Rules on Two California Family Rights Act Issues

In *Lonicki v. Sutter Health Central*, Antonina Lonicki (“the Employee”) worked for Sutter Health Central (“the Employer.”) She claimed she suffered from major depression and work-related stress. The Employee subsequently stopped working for the Employer and requested medical leave. In the Employer’s view, the Employee did not have a serious health condition. The Employer ordered the Employee to return to work, and terminated her employment when she did not. However, when the Employee exercised federal Family & Medical Leave Act (“FMLA”)/California Family Rights Act (“CFRA”) leave, she worked for another hospital. While her other job was not identical to her position with the Employer, there was overlap.

The California Supreme Court considered two legal issues in *Lonicki*. First, whether the Employer could terminate the Employee’s employment without seeking a third medical certification as provided by the CFRA. The CFRA provides, in pertinent part, that an employer may mandate that an employee submit a certification to support the CFRA leave. The CFRA further states that an employer who “has reason to doubt the validity of” the employee’s health certification “may require, . . . that the employee obtain the opinion of a second health care provider. . . .” The CFRA further provides that if there is a difference of opinion between the two health certifications, “the employer may require, . . . that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee. . . .” The Court concluded that an employer’s failure to obtain a binding determination by a third health care provider when there are two conflicting opinions does not prevent the employer from later arguing that a discharge was legitimate because the employee did not meet the statutory requirement of having a serious health condition that made him or her unable to perform the job.

The second issue addressed by the Court was whether an employee who seeks FMLA/CFRA leave yet works for another employer really has a serious health condition. The Court determined that working another position is evidence that the employee’s condition might not qualify for FMLA or CFRA. The Court, however, refused to rule that working in a comparable job was “conclusive” evidence that there was not a serious health condition. The Court further opined that the proper inquiry is whether the employee can perform the functions of the job “assigned to the employee by his or her employer, . . . not . . . ‘an inability to perform the essential job functions generally, rather than for a specific employer.’”

Employer May be Held Liable for Employee’s Assault on Customer

In *Flores v. Autozone*, a California court of appeal reversed summary judgment in favor of an employer where the plaintiff alleged that an Autozone

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employee attacked him with a metal pipe after a verbal altercation. Autozone moved for and was granted summary judgment by the trial court. The appellate court overturned summary judgment, stating that an employer can be liable for the tortious or criminal conduct of an employee where the incident arises out of the employment. To determine whether or not an act arises out of employment, it is sufficient that the animus to attack grows out of an incident concerning the employee's job duties, such as an argument concerning job performance. The court was careful to note that it was not deciding whether or not Autozone was actually liable under these facts. Instead, the question of liability is a question of fact reserved for the jury.

Employer Compensated for Frivolous Claim Brought By Former Employee

Generally, in an employment discrimination case, after an employer has provided evidence that it had legitimate, nondiscriminatory reasons for its actions, the employee is charged with demonstrating that the proffered reasons were in fact, not the actual reasons for the adverse employment action. In *Villanueva v. City of Colton*, a California court of appeal held that the employer's reduction in force was a legitimate, nondiscriminatory reason for the plaintiff's discharge, and was also the actual reason for the termination. In rejecting the plaintiff's racial discrimination claim, the court noted that the plaintiff contradicted himself by testifying in his deposition that he had never heard his manager make racially insensitive or derogatory remarks. Because the plaintiff failed to allege racial discrimination in his prior grievances lodged with the company, the court found no evidence of retaliation. The plaintiff was ordered to pay \$40,000 in attorneys' fees to the employer because his claims were frivolous.

Another California Arbitration Agreement Invalidated by the Courts

In *Metters v. Ralphs Grocery*, Samuel Metters ("the Employee") worked for Ralphs Grocery ("the Employer"). The Employee sued the Employer in state court for racial harassment and discrimination. The Employer, however, had a dispute resolution policy and an arbitration agreement. The language requiring arbitration, although on the second page of the form, was surrounded by a border box, in white type on a black background, and emphasized that arbitration was mandated. However, the arbitration agreement was contained in the request for dispute resolution, not in a separate document entitled "arbitration agreement" or some similar terms.

Both the trial court and the court of appeal agreed that the Employer's forms did not establish an "agreement to arbitrate" because there was no contractual "meeting of the minds." Therefore, there was no need to determine whether the arbitration agreement was unconscionable, or whether the Federal Arbitration Act mandated arbitration.

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, or Cara Patton at (858) 755-8500 or Eric DeWames at (310) 417-1136.

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