

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

Premises Liability Litigation

Product Liability Litigation

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**I.**

**LEGISLATIVE/ADMINISTRATIVE UPDATE**

Effective Date of E-Verify Rule Again Delayed

For the third time, the federal government has delayed implementation of a new rule requiring federal contractors to utilize the federal government's E-Verify electronic employment eligibility verification system. The effective date for implementation is now set for June 30, 2009.

Pending California Legislation

**AB 23 (Jones):** This bill would require employers and health insurers, among others, to provide notice of the availability of health plan premium assistance under the federal stimulus package to individuals eligible for that assistance. It would also make changes to permit those individuals to receive Cal-COBRA coverage with that premium assistance. This bill, marked as urgent, has already passed the State Assembly and is expected to pass the Senate. AB 23 is currently before the Senate Appropriations Committee.

**AB 141 (Tran) and SB 187 (Benoit):** These two bills are collectively called the "Workplace Flexibility Act of 2009," and would permit employers to adopt – at an employee's request – a "4/10 work schedule" (whereby the employee works four 10-hour days per week) without the obligation to pay daily overtime, and without requiring the employee's work unit to formally adopt an alternative work schedule. AB 141 has been referred to the Assembly Committee on Labor and Employment. SB 187 is set for hearing in the Senate Committee on Labor and Industrial Relations in late April.

**AB 793 (Jones):** The recently-enacted Lilly Ledbetter Fair Pay Act amended existing federal law to increase the length of time an employee has to file a pay discrimination claim. (See, Pettit Kohn's February 2009 Employment Law

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Update for a detailed discussion on this new law.) AB 793 would amend California law to mirror the requirements of the new federal law, and has been referred to the Assembly Judiciary Committee.

**AB 943 (Mendoza):** Under current law, an employer may obtain a prospective or current employee's credit report if the employer obtains written authorization from the employee and provides the employee with a copy of the report. AB 943 would prohibit an employer from using such credit reports unless: (1) the information contained in the credit report is job-related, and (2) the position is either managerial in nature, is a city or county or law enforcement position, or is a position for which the information contained in the report is required to be disclosed by law or to be obtained by the employer. The bill has been referred to the Assembly Committee on Labor and Employment.

**AB 1000 (Ma):** This bill would require all California employers to provide every employee who works in the state for more than seven days with paid sick leave benefits equal to one hour of paid leave for every 30 hours worked.

**AB 1001 (Skinner):** This bill would amend the California Fair Employment & Housing Act to include "familial status" as a protected class. AB 1001 has been referred to the Assembly Judiciary Committee.

**SB 242 (Yee):** The California Fair Employment & Housing Act makes it an unlawful employment practice for an employer to adopt or enforce a policy that prohibits the use of any language in the workplace, unless: (a) the policy is justified by business necessity; and (b) notice of the policy and consequences of its violation are provided to employees. SB 242 would amend the Unruh Civil Rights Act to provide similar provisions. SB 242 passed the full Senate and has been forwarded to the Assembly for consideration.

## II.

### JUDICIAL UPDATE

#### *Moreno v. Hanford Sentinel, Inc.: California Living in the Cyber Age*

In *Moreno v. Hanford Sentinel, Inc.*, a California Court of Appeal affirmed the dismissal of a complaint for invasion of privacy and confirmed a new rule: if you do not want what you say to be public information, do not say it on the web — ever.

After leaving her hometown of Coalinga, California to attend U.C. Berkeley, Ms. Moreno wrote a poem describing her dislike of her hometown and its

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residents, and posted it on her MySpace page. After removing the post from the website, Ms. Moreno was shocked to see the poem appear in Coalinga's newspaper (Ms. Moreno's former high school principal found the poem online and forwarded it to the newspaper). The town retaliated: Ms. Moreno's family became the target of death threats, and a boycott forced the closing of the family business.

Ms. Moreno sued the newspaper and her former principal for invasion on privacy, arguing that they had wrongfully disclosed "private" information. The court disagreed, holding that in order to assert a claim for invasion of privacy, there must be an "expectation of privacy" regarding the information in question. The court further held that when private facts enter the public domain, they are no longer "private." Even if Ms. Moreno intended for only a small audience to access her poem, the potential number of readers was enormous. Thus, when Ms. Moreno posted her poem to the Internet, she made it available to anyone with an Internet connection, thereby extinguishing any reasonable expectation of privacy.

### California Appellate Court Refuses to Enforce Employer-Friendly Arbitration Agreement

In *Sanchez v. Western Pizza Enterprises, Inc.*, a California Court of Appeal affirmed the trial court's denial of an employer's motion to compel arbitration, finding that: (1) the provision in the parties' arbitration agreement prohibiting class arbitration was unenforceable; (2) other terms of the agreement were unconscionable; and (3) the agreement could not be enforced.

Western Pizza Enterprises, Inc. ("Western Pizza") attempted to enforce its arbitration agreement ("the agreement") after one of its employees filed a putative class action complaint which alleged that the company failed to reimburse job expenses, failed to pay minimum wage, and engaged in other unfair business practices. The agreement, which Western Pizza's employees were *not* required to sign, stated that: (1) any dispute between the parties would be submitted to binding arbitration before an arbitrator mutually selected from a "panel" of arbitrators; (2) the arbitrator would be responsible for resolving any disputes over the interpretation or application of the agreement; and (3) the interpretation, scope and enforcement of the agreement would be governed by the Federal Arbitration Act ("FAA"). The agreement also included a waiver of "class arbitration," leaving the arbitrator without power to certify a class or decide claims raised on behalf of a class.

The appellate court held that the class arbitration waiver was unenforceable. Generally, such waivers will be invalidated if they impermissibly "interfere with unwaivable statutory rights." In determining whether "impermissible interference" exists, the court reviews a variety of factors, including the size of potential individual recovery, the potential for retaliation against members of the class, and

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the fact that absent members of the class may be ill-informed about their rights. If the court concludes, based on these factors, that a class arbitration is likely to be a significantly more effective means of vindicating the rights of affected employees than individual litigation or arbitration, it must invalidate the class arbitration waiver and allow the employees to vindicate their “unwaivable” rights in arbitration. In this case, the court found the fact that any individual recovery was likely to be modest, the potential for retaliation against the low wage earning class was significant, and the language barrier that existed among most of the class members made it likely they were unaware of their legal rights. Accordingly, the court invalidated the class waiver provision.

The court also found the agreement to be unconscionable given that: (1) the low-wage employees likely felt pressured to sign the agreement; and (2) the agreement failed to mention that the “panel” of arbitrators actually consisted of only one arbitrator selected by Western Pizza.<sup>1</sup>

Because the invalid class arbitration waiver and unconscionable arbitrator selection clause caused the agreement to be “permeated by an unlawful purpose,” the court found the entire agreement to be unenforceable.

#### No Employer Liability for Post Termination Torts of Employees

A California Court of Appeal rejected a negligent hiring and retention lawsuit against a company whose former employee met a woman during a service call one month before his employment with the company ended, and then murdered her two years later.

James Joseph Cain (“Cain”) shot and killed Judith Phillips (“Phillips”) in May 2005, two years after he was discharged from his job as a plumbing service repairman. Cain and Phillips met in April 2003 after the company dispatched Cain on a service call to Phillips’ residence. After the termination of Cain’s employment, Cain and Phillips began a relationship, which Phillips later ended.

After Cain murdered Phillips, her daughter sued Cain’s former employer, alleging that the employer knew Cain had been convicted of domestic violence and/or arson when it hired him in 1999. The court granted the employer’s motion for summary judgment, holding that the company’s alleged negligence was not a legal cause of Phillips’ harm because Cain was not the company’s employee at the time of the murder. The court asserted that “because the employer-employee relationship ends on termination of an employee’s employment . . . an employer does not owe a plaintiff a duty of care in a negligent hiring and retention action for

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<sup>1</sup> The court also found this provision to be unconscionable since the designation of a single arbitrator for all potential disputes gave rise to a significant risk of financial interdependence between Western Pizza and the arbitrator, and an opportunity for Western Pizza to gain an advantage through its knowledge of and experience with the arbitrator.

an injury or harm inflicted by a former employee on the plaintiff even though that former employee, as in this case, initially met the plaintiff while employed by the employer.”

California Appellate Court Extends Tip Pooling to Restaurant Employees in the Chain of Service

A California Court of Appeal issued yet another opinion regarding the practice of “tip pooling” in restaurants. The court ruled that tip pooling is legal when tips are apportioned to non-management employees in the “chain of service.” Thus, any non-managerial employee who contributes to the service a restaurant patron receives (e.g., busboys, bar backs, bartenders, and hosts), that may participate in the tip pool.

In *Etheridge v. Reins International California, Inc.*, the plaintiffs filed a class action lawsuit on behalf of certain servers who were employed by Reins International California, Inc. (“Reins”). The plaintiffs alleged that Reins violated tip pooling by permitting the employees who provided “indirect table service” to customers (such as kitchen staff, bartenders and dishwashers) to share in the tip pool. Reins’ mandatory tip-pooling policy required its servers to share tips with Reins’ employees who did not provide “direct table service.” The appellate court agreed with the employer, reasoning that “tip pooling is not illegal when the participants in the pool contribute to the patrons’ service, even if not providing direct table service.” The court then stated that any server in the “chain of service” may take from the tip pool, and that all staff is encouraged to do the best job possible as they know they will reap the financial rewards of the customers’ satisfaction.

The *Etheridge* case adds weight to the previous favorable ruling for employers, *Budrow v. Dave & Busters*, which was recently decided and discussed in the Pettit Kohn’s March 2009 Employment Law Update. Therefore, as long as management does not share in the tips, tip pooling is permitted in California.

*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, Jenna Leyton or Andrea Kaplan at (858) 755-8500 or Eric DeWames at (310) 417-1137. For access to previous updates and reports, please go to <http://www.pettitkohn.com/EmployLabor.html>.*

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