

## Areas of Practice

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

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## I.

### **LEGISLATIVE/ADMINISTRATIVE UPDATE**

#### Pending California Legislation

A number of bills are pending before the California state legislature which, if signed, would impact the landscape for California's employers and employees. These bills include:

**AB 2340 (Monning):** This bill would require every employer to provide every employee who has been employed for at least 60 days prior to the commencement of the leave with up to three days of non-consecutive unpaid bereavement leave within 13 months of the death of a spouse, child, parent, sibling, grandparent, grandchild or domestic partner. This bill passed the Assembly Labor and Employment Committee and has been referred to the Assembly Appropriations Committee.

**SB 1304 (DeSaulnier):** This bill would require employers to provide paid leave of up to 30 days for organ donations and five days for bone marrow donations. The bill is currently before the Senate Appropriations Committee.

**SB 1335 (Cox):** This bill would have permitted a nonexempt employee to request an employee selected flexible workweek schedule providing for workdays up to 10 hours in a day within a 40-hour workweek, and would have allowed an employer to implement such a schedule without an obligation to pay overtime. SB 1335 failed to pass in the Senate Labor and Industrial Relations Committee.

#### The DLSE Revises Its Unpaid Intern Test

On April 7, 2010, California's Division of Labor Standards Enforcement ("DLSE") rejected its previous 11-factor test and, instead, accepted the intern test promulgated by the federal Department of Labor in addressing whether interns and trainees must be treated as employees under California's rubric of wage and hour law. Critically, if the interns or trainees are deemed employees, they are then entitled to minimum wage, overtime pay, meal periods, rest periods and other protections.

*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.*

Pursuant to the recent DLSE opinion letter, in order for a California employer to properly categorize an intern or trainee as “unpaid” under California law, it must establish that its training or intern program meets six specific criteria:

1. The training, even though it includes actual operation of the employer’s facilities, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainees or students;
3. The trainees or students do not displace regular employees, but instead work under the close observation of such regular employees;
4. The employer derives no immediate advantage from the activities of trainees or students, and on occasion the employer’s operations may actually be impeded;
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

Even with implementation this new test, California employers should continue to be cautious, particularly because most unpaid programs fail to meet the requisite criteria.

## II.

### JUDICIAL UPDATE

#### Ninth Circuit Holds Police Officers Not Entitled to Compensation for Donning and Doffing Uniforms

In *Bamonte v. City of Mesa*, the Ninth Circuit Court of Appeals held that the donning and doffing of police uniforms and related gear were not compensable activities under the Fair Labor Standards Act (“FLSA”) where municipal police officers had the option of doing so at home or at work.

The City of Mesa (“City”), like most municipalities, requires its police officers to wear uniforms and related gear. In support of their argument that the time spent donning and doffing the uniforms and related gear was compensable, the plaintiff police officers emphasized the relationship between their uniforms and the performance of their duties. Specifically, they relayed their belief that the uniforms and gear contributed to their command presence, thereby promoting officer and public safety in furtherance of law enforcement goals. The officers also explained that it was *preferable* to don and doff their uniforms and gear at the police station in light of considerations such as the risk of loss or theft, the risks associated with performing firearm safety checks at home, and the risk of being identified as police officers while off duty.

The court found the officers’ arguments unavailing, holding that because the officers had the option and ability to don and doff their uniforms and gear at home, the specific activity of donning and doffing uniforms and gear at the

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workplace was not compensable under the FLSA. The court acknowledged that under the FLSA, employers must pay employees for all hours worked. The court explained, however, that under the Portal-to-Portal amendment to the FLSA, an employer is relieved of responsibility for compensating employees for activities which are preliminary or postliminary to the principal activities of a given job. The court found that the relevant inquiry was not whether the uniform itself was indispensable to the job, but rather, whether the nature of the work required the donning and doffing process to be done on the employer's premises. Although logical reasons existed for the police officers not to avail themselves of the at-home donning and doffing option, those reasons reflected preferences rather than mandates. Because the donning and doffing of uniforms and related gear were not required by law, the employer (City), or the nature of the police officers' work to be performed on the employer's premises, the City was not required to compensate the officers for those acts.

### Restaurant Managers Denied Class Certification

In *Arenas v. El Torito Restaurants, Inc.*, a California court of appeal affirmed the decision of a Los Angeles Superior Court in denying class certification in a wage and hour lawsuit. The lawsuit was brought by a group of restaurant workers in California who were employed as salaried exempt managers. Alleging that they were misclassified as being exempt from California's overtime laws based on their job descriptions, the plaintiffs attempted to show that they all worked under standard policies and procedures of the restaurant. The plaintiffs claimed that they spent more than half their time performing non-exempt duties, and spent less than half their time performing managerial work and exercising independent judgment, and were therefore misclassified as exempt. The plaintiffs filed a motion to certify three subclasses of employees: kitchen managers, department managers, and general managers.

During the class certification stage of a lawsuit such as this, the court cannot deny certification based on its assessment of the merits of the claims. Rather, the inquiry is focused on whether common questions of law and fact predominate over individualized issues. In this case, the court ruled that common questions did not predominate and denied the plaintiffs' motion to certify the class. The court found that the plaintiffs' duties and time spent on individual tasks varied widely from one restaurant to another. The court could also reasonably conclude that there was insufficient evidence of widespread misclassification, and the plaintiffs' theory of recovery was therefore not susceptible to common proof. Accordingly, the court concluded that the plaintiffs' claims were not suitable for class treatment. This is an encouraging case for employers defending wage and hour class actions.

*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.*

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