

Areas of Practice

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Employment / Labor

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Product Liability Litigation

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

The Genetic Information Nondiscrimination Act Becomes Law

The Genetic Information Nondiscrimination Act (“GINA”) was signed into law by President Bush on May 21, 2008. The employment provisions of GINA take effect in November 2009 and the portions with respect to group health plans become effective in May 2009. GINA applies to employers with 15 or more employees, employment agencies, labor organizations and training programs. GINA makes it illegal for these groups to refuse to hire or discharge, any applicant or employee, or otherwise discriminate against any employee with respect to compensation, terms, or privileges of employment based on that employee’s genetic information. The definition of “genetic information” is broad and includes: (1) an individual’s genetic test (defined generally as an analysis of human DNA, RNA, or chromosomes, that detect genotypes, or mutations); (2) the genetic test of that individual’s family members; and (3) any genetic disease or disorder in family members of such individuals. The term “genetic information” excludes information about the sex or age of any individual.

GINA will also make illegal for employers to request, require, or purchase genetic information about an employee, with certain limited exceptions. GINA does, however, permit monitoring of the biological effects of toxic substances in the workplace, but only if all of the following requirements are met: (1) the employer provides written notice of the monitoring; (2) the employee agrees to the monitoring in writing or the monitoring is required by federal, state or local law; (3) the employee is informed of the results of the test; (4) the monitoring conforms to any applicable law, including OSHA regulations; and (5) the employer receives the results of the test in aggregate terms.

Pending State Legislation

There are a number of bills currently pending in the California legislature that, if signed into law, would impact California employers, including:

AB 2279 (Leno): AB 2279 would overrule the California Supreme Court’s decision earlier this year in *Ross v. Ragingwire Telecommunications, Inc.* and would make it illegal for an employer to discriminate against a person in hiring, termination, or any term

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of employment, if the discrimination is based upon a person's positive drug test for marijuana, except as specified. The bill would not prohibit an employer from terminating the employment of, or disciplining, a person who is impaired while at work or on the premises, because of the medical use of marijuana.

AB 2716 (Ma): This would create a protected paid sick leave for California's employees. The bill recently passed the full Assembly and now proceeds to the Senate for debate and consideration. Under AB 2716, businesses of 10 employees or more would be required to provide up to nine days of sick leave per year for each employee. Smaller companies would be mandated to provide up to five days of sick leave per year. Full-time and part-time employees would earn one hour of sick leave for every 30 hours worked. The benefit could be used after 90 days of employment. If signed into law, the requirement would be overseen by California's Department of Industrial Relations, but could also be enforced via civil litigation.

SB1490 (Padilla): This would create liability for improperly classifying workers as independent contractors. This bill would require an employer to provide specified information to an individual hired as an independent contractor. Specifically, the employer must provide: (1) a form that includes a notice that the individual has been hired as an independent contractor; (2) a statement explaining the impact that the individual's status has on tax obligations and eligibility for labor and employment protections; and (3) a notice that the individual may request a written determination from the Employment Development Department as to whether the individual is an independent contractor or employee. This bill would also require the person employing labor to maintain records for at least two years, including information about each independent contractor, and to make these records available for inspection. The bill would also provide criminal sanctions. SB 1490 is currently before the Senate Appropriations Committee.

SB 1583 (Corbett): This bill would create joint and several liability for advisors who work with businesses to determine whether a worker is an employee or an independent contractor, regardless of whether the misclassification was deliberate. Joint and several liability means that if multiple parties (including the advisor) were sued by a misclassified employee, the advisor may be liable for the entire damages award, despite how much or little the advisor was liable as compared to the other parties. In such a situation, the advisor would have to pay the full judgment to the successful plaintiff, then attempt to collect from the other liable parties. SB 1583 passed the full Senate and is now under consideration in the Assembly.

SB 1608 (Corbett): This bill would promote disability access compliance and reduce litigation. SB 1608 is currently before the Senate Appropriations Committee.

II.

JUDICIAL UPDATE

Same-Sex Marriage is Constitutional in California

In *In re Marriage Cases*, the California Supreme Court held that the current California statutes defining marriage must be viewed as potentially impinging upon a same-sex couple's right to marry under the California Constitution. The high court determined that California laws limiting the designation of marriage to a union "between a man and a woman" is unconstitutional, and must be stricken. Further, the designation of marriage must be available both to opposite-sex and same-sex couples. Although challenges to this decision are pending (including a measure on the November ballot), the case serves as a reminder for California employers that sexual orientation is a protected class in this state and that employers cannot discriminate based upon one's sexual orientation.

No Individual Liability for Wages or Unfair Competition Law

In *Bradstreet v. Wong*, the Wins Corporations were three garment manufacturers owned by husband and wife, Tona Quan and Anna Wong. During 2001, the Wins Corporations failed to meet payroll. When the employees began to complain about the failure to pay wages, the California Labor Commissioner sought to hold Mr. Quan and Ms. Wong personally liable for the wages under a variety of theories. The trial court held the couple could not be personally liable. On appeal, the Labor Commissioner argued that managing agents may be held personally liable when the Labor Commissioner brings an action to recover wages under Labor Code section 1193.6. Relying on a prior California Supreme Court decision (*Reynolds v. Bement*), the court of appeal held there was no personal liability for unpaid vacation, final pay, or associated penalties.

The appellate court also rejected the Labor Commissioner's argument that California Business & Professions Code section 17200 ("section 17200") permitted personal liability. The court reasoned that the remedy available under section 17200 – restitution – could not apply to the individuals because they personally did not withhold the subject wages. As such, they could not be held liable for restoring those wages to the plaintiffs. The court did leave open the possibility of individual liability, under certain circumstances of section 17200.

Of note, the Labor Commissioner did not dispute the trial court findings that the individuals were not alter egos and therefore waived the issue for appeal. The Labor Commissioner also did not challenge the trial court's conclusion that the individuals could not be held liable under a special statute applicable to the garment industry. Both of these theories remain potentially viable ways of holding individuals personally liable.

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 or Tyler Theobald at (858) 755-8500 or Eric DeWames at (310) 417-1136.

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