

Areas of Practice

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Restaurant & Hospitality

Retail

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

Pending California Legislation

There are a number of bills under consideration by the California Legislature that, if signed into law, would impact California's employers and employees. These bills include:

AB 482 (Mendoza): This bill would prohibit an employer, with the exception of certain financial institutions, from obtaining a consumer credit report for employment purposes unless: (1) that information is substantially job-related, meaning that the position of the person for whom the report is sought has access to money, assets, or other confidential information, or (2) the position of the person for whom the report is sought is a managerial position, a position in the State Department of Justice, or a sworn peace officer or other law enforcement official. AB 482 passed the Assembly and has been referred to the Committees on Labor and Industrial Relations and Judiciary.

AB 2187 (Arambula): This bill would create a separate prohibition against a person or an employer who, having the ability to pay, willfully fails to pay all wages due to an employee who has been discharged or who has quit within 90 days of the date of the wages becoming due, and would impose additional criminal penalties for such conduct. The bill would also require a person or employer who violates these provisions to pay restitution in an amount equal to the amount of unpaid wages to the aggrieved employee and prosecution costs upon the conviction becoming final. AB 2187 passed the state Assembly and is now before the Senate Committee on Labor and Industrial Relations.

AB 2727 (Bradford): This bill would prohibit an employer from denying an application for employment because the applicant has previously been convicted of a criminal offense, unless the employer determines that there is a direct relationship between the prior conviction and the employment sought, or the granting of employment would involve an unreasonable risk to property or persons. AB 2727 passed the Committee on Labor & Employment and has been placed in the Appropriations suspense file.

AB 2773 (Swanson): This bill would eliminate judicial discretion to reduce or eliminate legal fees in California Fair Employment and Housing cases heard in

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unlimited civil court which do not result in damage awards in excess of what is mandated to remain in limited civil jurisdiction (\$25,000). AB 2773, which seeks to overturn a recent California Supreme Court decision, is currently before the Assembly Judiciary Committee.

II.

JUDICIAL UPDATE

The California Supreme Court Defines “Employer” in Wage and Hour Matters

In *Martinez v. Combs*, the California Supreme Court articulated a framework for determining which entities can be held liable for unpaid wages. The Court ultimately held that business partners cannot be held liable for unpaid wages as an employer. In this case, an employer that hired, supervised, and initially paid its farm workers, declared bankruptcy of its strawberry picking operations. Unable to recover wages from the employer, the employees sued two of the produce merchants through whom the employer sold strawberries, its principals and its field representative.

In support of its decision, the California Supreme Court noted that California Labor Code section 1194 does not specify who is responsible for paying wages. The Court first decided that liability under Labor Code section 1194 is limited to employers set forth in the Industrial Welfare Commission’s (“IWC”) Wage Orders, which do define employer.

The Court found that under the IWC's definition, one can become an employer in one of three ways: (1) by exercising control over wages, hours or working conditions, (2) by suffering or permitting to work, or (3) by engaging and thereby creating a common law employment relationship.

First, the Court rejected the claim that the business partners’ financial relationships with the employer resulted in de facto control over the plaintiffs’ working conditions. Second, the Court clarified that to “suffer or permit” someone to work results in a finding of employer status only when the person permitting the work has the power to also stop the work. Third, “to engage” means that the employer hires the employees to work, which is the straightforward way of establishing an employment relationship.

California Supreme Court Issues a Decision on Binding Arbitration

In *Pearson Dental Supplies v. Superior Court*, the California Supreme Court determined that courts may vacate arbitration awards pursuant to the California Fair Employment & Housing Act (“FEHA”) or other statutes when the arbitrator commits a legal error that results in a ruling in favor of the employer without a “hearing on the merits.”

The Court specifically held:

We therefore hold that when, as here, an employee subject to a mandatory employment arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based

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on legal error, the trial court does not err in vacating the award. Stated in other terms, construing the [California Arbitration Act] in light of the Legislature's intent that employees be able to enforce their right to be free of unlawful discrimination under FEHA, an arbitrator whose legal error has barred an employee subject to a mandatory arbitration agreement from obtaining a hearing on the merits of a claim based on such right has exceeded his or her powers within the meaning of Code of Civil Procedure section 1286.2, subdivision (a)(4), and the arbitrator's award may properly be vacated.

Privacy Rights in Personal E-mail

In *Stengart v. Loving Care*, the New Jersey Supreme Court held that an employee had a reasonable expectation of privacy in emails she sent to her attorney via a personal, password protected email account on a company computer. As part of her employment, Loving Care issued Ms. Stengart a laptop computer. Loving Care's electronic communications policy stated that the company had a right to review and access all material kept on its electronic media systems at any time, without or without warning. The policy also allowed employees to use its servers and computers for occasional personal email or other use.

Ms. Stengart used her company-issued laptop computer to access her personal Yahoo! email account and to correspond with an attorney regarding her allegations of harassment and discrimination by Loving Care. Ms. Stengart eventually resigned her position and sued Loving Care. The company hired a computer specialist to retrieve files from Ms. Stengart's laptop. The specialist found Ms. Stengart's correspondence with her attorney, which had been automatically saved by the laptop in a "cache" folder of temporary internet files. Loving Care argued that Ms. Stengart's emails were not privileged or confidential because she had no expectation of privacy in communications on its media systems.

The New Jersey Supreme Court disagreed, holding that Loving Care's communications policy was too broad to encompass private, password protected email communications, especially where the content was attorney-client communications. Loving Care's failure to specifically include personal, password protected email in its electronic communications policy, as well as its allowance of occasional personal use created a reasonable expectation of privacy. Although recognizing a company's ability to enact policies that protect its assets, reputation, and productivity, and to ensure compliance with company policy, the court held that Loving Care had no legitimate purpose in reviewing the content of attorney-client communications.

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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