

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

Premises Liability Litigation

Product Liability Litigation

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Real Estate Litigation

Restaurant / Hospitality Litigation

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

**IRS Announces Increase in the Optional Standard Mileage Rate for the
Remainder of 2008**

On June 23, 2008, the Internal Revenue Service announced an increase in the optional standard mileage rate for the final six months of 2008. The new rate is 58.5 cents per mile, an increase of 8 cents per mile, for all business miles driven from July 1, 2008 through December 31, 2008. In recognition of recent gasoline price increases, the IRS implemented this special adjustment for the remainder of 2008. Normally, the mileage rates are updated once per year in the fall for the following calendar year.

Cell Phone Use Restrictions Take Effect July 1, 2008

The California Wireless Telephone Automobile Safety Act provides that, beginning July 1, 2008, California drivers will be prohibited from using handheld wireless telephones while driving unless such devices are configured to allow hands-free listening and talking. California drivers under the age of 18 are prohibited from using wireless telephones while operating a motor vehicle, even if equipped with a hands-free device, and from using "mobile service devices," such as BlackBerries, pagers and laptops.

Employers should consider implementing a policy on cell phone use while driving company or personal vehicles and conducting company business, particularly where employees are reimbursed for business-related cell phone use. If you would like a draft policy, please contact our office.

II.

JUDICIAL UPDATE

U.S. Supreme Court Makes it More Difficult for Employers to Defend Federal Disparate Impact Age Discrimination Cases

The U.S. Supreme Court recently handed down its much-anticipated decision in *Meacham v. Knolls Atomic Power Laboratory*. The Court ruled that an employer defending itself in a disparate impact age discrimination claim pursuant to the Age Discrimination in Employment Act (“ADEA”) bears the burden of proving that the adverse employment action was based on a reasonable factor other than age. If an employer can prove that a decision was based on reasonable factors other than age, then it is not liable under the ADEA. The Court held that an employer has the burden of proving that any decision having a statistically significant impact on older employees is based on “reasonable factors other than age.”

In *Meacham*, Knolls Atomic Power Laboratory (“the Employer”) laid off 31 employees, 30 of whom were over 40 years old. The overall workforce was sixty percent over 40 years old. Some of the laid-off employees sued the Employer under the ADEA, claiming disparate impact. The theory of disparate impact is based on the principle that a policy that seems neutral on its face may still have an adverse impact on a protected class – here, employees over the age of 40.

As its primary defense, the Employer claimed that the reduction in workforce was lawful because the layoff decisions were based on reasonable factors other than age. Employees were chosen for reduction by means of a matrix that measured various factors, including “criticality” of position, and the “flexibility” of the employee. The Court rejected the Employer’s argument and ruled in favor of the employees, finding that the “reasonable factors other than age” defense places the burden of persuasion on an employer.

In sum, the Court held that in disparate impact ADEA cases, the employer bears both the burden of producing the evidence *and* of ultimately persuading the jury that there is a reasonable explanation for the company’s action other than the employee’s age. As a result, employers must now establish the two elements in order to avoid liability: (1) that the decision was based on a factor other than age and (2) that the decision was “reasonable.”

There is, however, a silver lining for employers. In acknowledging a concern that its ruling could “nudge plaintiffs with marginal cases into court,” the Court emphasized the heavy burden on *employees* to identify a *specific* policy as being an unreasonable factor other than age.

To minimize the risk of litigation and/or an unfavorable judicial determination, employers should: 1) avoid giving managers unchecked discretion in determining which employees should be laid off; 2) ensure that the factors used for identifying employees for layoff are as objective as possible; and 3) ensure independent review of all decisions.

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.

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Holiday Pay Not Considered the “Regular Rate” for Calculating Overtime Pay

In *Tech Security v. Superior Court*, a California Court of Appeal considered whether voluntarily-provided “holiday” premium pay must be included in an employee’s “regular rate of pay” for purposes of calculating the overtime wage rate.

California Labor Code section 510 requires that an employer pay a non-exempt employee time and one-half for hours worked: (1) more than eight hours of work in one workday; (2) more than 40 hours of work in any workweek; and 3) for the first eight hours worked during the seventh consecutive day worked in any single work week. However, employers are not required to pay a premium for hours completed on holidays. An employer may voluntarily agree to pay a higher rate of pay to create an incentive or to reward employees who work on holidays.

The *Advanced-Tech* court found that Labor Code section 510 does not require an employer to compensate an employee at a rate higher than one and one-half times the regular non-holiday rate of pay when an employer voluntarily provides premium pay for holidays. With this in mind, California employers should review compensation practices and calculations for non-exempt employees to ensure that the overtime rate is being properly calculated on holidays. An employer who calculates overtime on holidays by simply multiplying the holiday pay rate by one and one-half will overpay its employees.

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