

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

Premises Liability Litigation

Product Liability Litigation

Professional Liability Litigation

Real Estate Litigation

Restaurant / Hospitality Litigation

Retail Litigation

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

California Statute of Limitations Bill

Lilly Ledbetter (“Employee”) worked for the Goodyear Tire and Rubber Co. (“Employer”) for approximately 20 years. In 1998, she filed a claim with the Equal Employment Opportunity Commission (“EEOC”) alleging that during the course of her career, several supervisors had given her poor evaluations “due to her sex,” and that as a result of these evaluations, her pay was not increased as much as it would have been had she been evaluated fairly. These evaluations continued to effect her pay throughout her employment, and she was paid significantly less than male colleagues.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate against any individual with respect to his/her compensation because of an individual’s sex. An individual wishing to challenge an employment practice under Title VII must first file a charge with the EEOC within either 180 days or 300 days (depending upon the state) “after the alleged unlawful employment practice occurred.” Employee asserted that even though the alleged discriminatory acts (the unfair performance evaluations) occurred prior to the 180 day charging period, these acts had “continuing effects” during the charging period, and that each pay check constituted a separate violation, “regardless of whether the pay check simply implements a prior discriminatory decision made outside the limitations period.” The jury found for Employee and awarded her back pay and other damages.

Employer appealed, contending that Employee’s pay discrimination claim was time-barred with respect to all decisions made prior to 180 day EEOC charging period. The court of appeal reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the Employee’s pay during the 180 day EEOC charging period.

The U.S. Supreme Court agreed, asserting that the term “employment practice” generally refers to “a discreet act or singular occurrence that takes place at a particular point in time,” and that a Title VII plaintiff “can only file a charge to cover discreet acts that ‘occurred’ within the appropriate period of time.” The Court held that Employee should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. The Court concluded that “she did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a

basis for overcoming that prior failure.”

In response to *Ledbetter*, AB 437 (Jones) is winding its way through the California Legislature. This bill would expand the statute of limitations for lawsuits alleging any unlawful employment decision so long as the employee’s pay or benefits is “affected” by the decision. This expansion arguably would include employment discrimination claims for any protected class under the California Fair Employment and Housing Act, not merely wage claims. AB 437 specifies that “affected” includes, but is not limited to, each time an employee is paid following the employer’s decision. AB 437 also contains a retroactive application to pending cases. AB 437 passed the full Assembly and now is before the Senate Rules Committee.

Additional Pending California Legislations

The current legislation session ends on September 14, 2007 and Governor Schwarzenegger will have until October 14, 2007 to sign or veto bills.

In addition to AB 437, the following bills are also under consideration.

AB 435 (Brownley) would amend California Labor Code section 1197.5 to require longer retention of wage and job classification records (five years up from the current two) and extend the time for filing a civil lawsuit to recover wages to four years (currently the time limit is two years). Employees would have five years for filing suit for willful violations. AB 435 passed the Assembly and is currently before the Senate Appropriations Committee.

SB 11 (Migden) addresses California’s domestic partnership law. Existing law provides that two unmarried, unrelated adults with a common residence may establish a domestic partnership by filing a declaration with the Secretary of State if both persons are members of the same sex or are over 62 years of age. This bill would delete the same-sex or age eligibility requirements, thereby allowing any two persons who meet the other, specified criteria to register as domestic partners. SB 11 passed the Senate and is now before the Assembly Appropriations Committee.

SB 836 (Kuehl) would add “familial status” to the list of prohibited basis of discrimination under California’s Fair Employment and Housing Act. SB 836 is currently before the Assembly Appropriations Committee.

National Minimum Wage Increase

On May 25, 2007, President Bush signed into law an increase in the federal minimum wage to \$7.25 per hour in three steps over 26 months. The legislation marks the first time the Federal Fair Labor Standards Act minimum wage has risen since 1997. The first increase raised the minimum wage to \$5.85 per hour, effective July 24, 2007. The rate will increase to \$6.55 per hour on July 24, 2008 and then to \$7.25 per hour on July 24, 2009. Because California already has a higher minimum wage, the federal rate will not impact most California employees. However, companies with employees in other states should review the state minimum wage to determine wage obligations. In addition, many cities and counties have living wage rates that apply to city/county contractors.

California’s minimum wage is currently \$7.50 per hour and it will climb to \$8.00 per hour on January 1, 2008.

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II.

JUDICIAL UPDATE

Appellate Court Confirms that Arbitration Agreements can be Waived

In *Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.*, a California Court of Appeal confirmed that although the enforcement of arbitration agreements is generally favored by both state and federal courts, a party may waive its right to enforce its own arbitration agreement by engaging in acts inconsistent with its right to arbitrate, when such acts prejudice the party opposing arbitration. A party may waive arbitration by “substantially [invoking] the litigation machinery” of the civil court system.

Aviation Data, Inc. involved a class action lawsuit wherein Defendant American Express Travel Related Services Co., Inc. (“AmEx”) allegedly defrauded millions of customers who purchased travel insurance by failing to refund or credit premiums assessed for cancelled flights or unused tickets. After two years of “intense litigation,” AmEx agreed to settle the lawsuit by prospectively changing its computer program/code to reduce the number of occasions on which a premium is triggered inappropriately. In doing so, AmEx represented to the plaintiff class and the court that although there would be no monetary settlement of the claims, the class would benefit from the settlement by AmEx’s prospective use of the “new” computer code. As it turns out, AmEx lied; the “new” code was already in existence and had been used for several years. The court set aside the settlement and reinstated the litigation.

AmEx then filed a motion to enforce its arbitration agreement. The court denied the motion, holding that AmEx had waived arbitration by: (1) invoking the litigation process to settle the claims; and (2) failing to take affirmative steps to implement the arbitration process until several years after the litigation was first filed. The court of appeal affirmed, stating that “in pursuit of settlement, AmEx indisputably made use of the judicial process.” The court added that by crafting a proposed settlement structured around “largely illusory relief,” AmEx forced the plaintiff to engage in protracted and costly discovery and appearances before the court, thereby prejudicing the plaintiff.

Labor Commissioner’s Precedent Decisions Challenged

In *Corrales v. Bradstreet*, a California Appellate Court recently concluded that the Administrative Procedure Act does not allow California’s Labor Commissioner to issue legally controlling Precedent Decisions. In other words, the Labor Commissioner can issue Precedent Decisions as persuasive authority for Division of Labor Standards Enforcement (“DLSE”) Hearing Officers, but such decisions bind neither the officers nor civil courts. Precedent Decisions are those made by the Labor Commissioner that address a common DLSE issue that has a significant legal or policy impact.

The particular Precedent Decision that was overruled by the appellate court pertained to classifying a missed meal or rest period as a penalty rather than a wage. The Labor Commissioner previously issued a decision to address two contradictory positions taken by different enforcement officers. Notably, the issue of missed meal and rest periods was recently addressed and ruled upon in the opposite manner by the California Supreme Court in *Murphy v. Kenneth Cole*

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Productions (holding that a missed period constitutes a “wage”). The *Corrales* court addressed the issue nonetheless, reasoning that the Labor Commissioner’s ability (or lack thereof) to create binding precedent was a matter of public interest.

The practical effect of this decision is two-fold. First, the Labor Commissioner will likely issue fewer Precedent Decisions, which may cause more inconsistent rulings among DLSE enforcement offices. Second, employers are no longer required to follow the previously-issued Precedent Decisions. However, savvy employers will remain aware of issued Precedent Decisions, as it is likely that DLSE hearing officers will continue to follow such decisions, particularly in factually similar cases.

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Employment Law Symposium – NOTE THE NEW DATE

Wednesday, November 7, 2007

***San Diego Marriott Mission Valley
8757 Rio San Diego Drive, San Diego CA 92108***

Join our team of employment law attorneys as we address the changes in employment law over the past year.

Registration will be from 8:00 am – 8:30 am, with continental breakfast offered.
(Morning & Afternoon sessions @ \$100/per person, \$115 after November 2, 2007)

We will be holding a morning session from 8:30 am – 12:30 pm where the following topics will be discussed in detail:

- Wage & Hour Issues
- Discrimination & Harassment
- Retaliation
- Leaves of Absence

Our afternoon session will feature Tom Ingrassia as he presents his highly acclaimed Sexual Harassment Prevention Training for supervisors and managers.

Registration for the afternoon session will be from 1:30 pm – 2:00 pm.

(Afternoon session only @ \$60/per person, \$75 after November 2, 2007)

From 2:00 pm – 4:30 pm, you and your management team can learn important information regarding:

- Quid pro quo harassment
- Hostile work environment harassment
- Supervisor responsibilities once a complaint is received
- Retaliation and how to prevent it
- Other forms of discrimination
- How to create and maintain a culture of mutual respect

Who should attend: Business Owners, Executives, Human Resource Professionals, Managers and Supervisors.

Attached is our registration form for our Employment Law Symposium with more details. Please contact Janice Bryant at (858) 755-8500 with any questions. We look forward to seeing you there!

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, Hilary Vrem or Cara Patton at (858) 755-8500 or Eric DeWames at (310) 417-1136.

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