

## 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**

#### **Federal ADA Amendments Move Through Congress**

On June 25, 2008, the U.S. House of Representatives voted overwhelmingly in favor of the ADA Amendments Act (HR 3195), which is designed to “clarify and strengthen” the protections of the Americans with Disabilities Act (“ADA”). The ADA currently provides that a disability must “substantially limit” a major life activity to be protected. This legislation would redefine the term “substantially limit” to “materially restricts.” HR 3195 further provides that the determination of whether an individual has an impairment that “limits a major life activity” would be made without regard to “ameliorated effects” of various “mitigating measures” such as medication. It would, however, allow for consideration of corrections or improvements in vision obtained through the use of “ordinary eye glasses or contact lenses.”

#### **Paid Sick Leave Legislation Passes California Assembly**

The “Healthy Families, Healthy Workplace Act of 2008” (AB 2716 (Ma)) would require employers to provide paid sick leave to employees working more than seven days in a calendar year. AB 2716 passed the California Assembly and is now being considered by the Senate Appropriations Committee. The legislation would require employees to accrue sick leave at a rate of no less than one hour for every 30 hours worked. The accrued sick leave would be available for use beginning on the 90<sup>th</sup> calendar day of employment. Employees would be permitted to use paid sick time for their own health conditions, the health conditions of a family member, or a leave related to domestic violence or sexual assault. It should be noted that employers with existing personal time off policies which permit the accrual and use of an equivalent amount of time off for personal or family illness would not need to create a new sick leave benefit.

## California WARN Act Revisions Under Consideration

AB 1989 (Swanson) seeks to redefine the term “mass layoff” under the California WARN Act. The bill will make the following changes: (1) employers would be required to provide advance notice of “off shoring” of operations (defined as removing the employer’s operations outside the United States); (2) the definition of “mass layoff” would be changed from the elimination of 50 jobs within a 30-day period to the elimination of 25 jobs within a 90-day period; and (3) the layoff notice period would be increased from 60 to 90 days. This bill passed the Senate Labor and Industrial Relations Committee, but was placed in the Senate Appropriations Committee suspense file.

### **II.**

#### **JUDICIAL UPDATE**

##### **A California Court of Appeal Favorably Resolves Meal and Rest Period Issues**

California employers have finally been provided much-needed relief from onerous meal and rest period requirements. Last week, a California Court of Appeal issued an important decision on meal and rest period claims, when the court resolved the dispute regarding what it means to “provide” employees with meal and rest periods. Following some unusual bounces between the trial, appellate, and California Supreme Court, the Court of Appeal issued a new published (i.e., binding as legal authority) court decision in *Brinker Restaurant Corporation v. Superior Court*.

Resolving the issue favorably for employers, the Court of Appeal reversed the trial court’s class action certification order, and concluded that the trial court improperly classified the plaintiffs as a class. The highlight of this opinion was the court’s analysis of what it means to “provide” meal and rest periods. The court made the following significant conclusions:

- “While employers cannot impede, discourage or dissuade employees from taking meal or rest periods, they need only provide them, and not ensure they are taken;”
- “Employers need only authorize and permit rest periods every four hours or major fraction thereof and they need not, where impracticable, be in the middle of each work period;”
- “Employers are not required to provide any meal period for

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every five consecutive hours worked;” and

- “While employers cannot coerce, require or compel employees to work off the clock, they can only be held liable for employees working off the clock if they knew or should have known they were doing so.”

In other words, the court made it abundantly clear that the employer must make meal and rest periods available, but the employer does not have to force an employee to take such a break. The court also provided examples of how an employer would be non-compliant, such as when an employer did not schedule meal periods, did not have a policy authorizing meal periods, or pressured employees to skip meals. The court further noted that if an employer knew that employees were working while eating, and did not take steps to address the situation, the employer would be depriving employees of such breaks and, thus, would have failed to provide meal periods.

In discussing the reasons for denying class certification, the court said that each employee’s claim should be decided on a case-by-case basis in order to determine why breaks were taken or shortened. Violations of the Labor Code would only occur if the employer failed to make the rest or meal periods available rather than if the employee chose not to take them. Factors such as a lack of a class-wide practice regarding meal periods or lack of evidence showing denial of meal periods favor individualized adjudication over class treatment. Similarly, the timing of rest periods would also require determinations based on the nature of an employee’s job, and thus liability would only be established on an individual basis. In addition, the remaining claims involving off the clock work and time-shaving required a case-by-case analysis of whether each employee did so voluntarily, was required to do so by the employer, and whether the employer was aware of such a practice.

Further, the *Brinker* court favorably discussed two federal trial court decisions which implicitly came to the same conclusion. By referencing these two cases, the *Brinker* court effectively solidified these cases as positive opinions for employers.

This decision provides California employers with a new level of flexibility in scheduling and permitting employees to take their meal and rest periods. In addition, the decision highlights the importance of employers’ policies and procedures regarding wage and hour practices and policies, and serves as a reminder for employers to review employee handbooks and other policies to ensure compliance with the clarified meal and rest period laws.

Bear in mind that this appellate court decision may be overruled by the California Supreme Court. Should the state's highest court decide to review the decision, the effect will be that attorneys cannot cite the case as binding authority while the decision is under review. Thus, employers can take comfort in the opinion for now, but the highest court may have the final say on this issue.

Temporary Staffing Company and Its Client Deemed to be “Joint Employers” in FMLA Claim

Generally, a “joint employer” relationship is assumed where two or more businesses exercise some control over the work or working conditions of one employee. The Federal Department of Labor’s regulations add that a joint employer relationship exists where “one employer acts directly or indirectly in the interest of the other employer in relation to the employee.”

In *Grace v. USCAR and Bartech Technical Services, Inc.*, Rosalyn Grace (“Grace”) worked as a contract employee for USCAR, providing information technology (“IT”) services. During that time, she was employed through various temporary staffing agencies, including Bartech Technical Services, Inc. After approximately eight years of “placement” with USCAR, Grace developed a respiratory disability and began a leave of absence under the Family and Medical Leave Act (“FMLA”). Approximately one month later, USCAR decided to outsource its IT duties and terminated Grace’s assignment. Grace sued both USCAR and Bartech for violation of the FMLA, arguing that the entities were “joint employers” for purposes of imposing liability. After the trial court dismissed the action, Grace appealed to the federal Sixth Circuit Court of Appeals which, after noting that “the FMLA itself is silent about the issue of joint employment,” determined that Bartech and USCAR were in fact “joint employers” based on the fact that one alleged employer (Bartech) was acting “directly or indirectly in the interest of the other employer [USCAR] in relation to the employee.”

Given many employers’ reliance upon temporary staffing agencies and relationships, it is important to remember that the joint employer doctrine exists, and will be aggressively applied to protect the interests of “temporary” employees.

*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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