

## 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**

#### New California Law: SB 940 - Temporary Services Employees

On July 2, 2008, Governor Schwarzenegger signed SB 940 (Yee) into law. SB 940 amends Sections 203, 203.1, 204, 210, 215, 220, and 2699.5 of the California Labor Code and adds Section 201.3 to the California Labor Code.

This new law will change payroll practices applicable to “temporary service” workers as defined in the statute. Labor Code section 201.3 defines a “temporary services employer” as “an employing unit that contracts with clients or customers to supply workers to perform services for the clients or customers and that performs all of the following functions:

(A) Negotiates with clients and customers for matters such as the time and place where the services are to be provided, the type of work, the working conditions, and the quality and price of the services.

(B) Determines assignments or reassignments of workers, even if workers retain the right to refuse specific assignments.

(C) Retains the authority to assign or reassign a worker to another client or customer when the worker is determined unacceptable by a specific client or customer.

(D) Assigns or reassigns workers to perform services for clients or customers.

(E) Sets the rate of pay of workers, whether or not through negotiation.

(F) Pays workers from its own account or accounts.

(G) Retains the right to hire and terminate workers.”

However, a “temporary services employer” does not include: a bona fide nonprofit organization that provides temporary service employees to clients; farm labor contractors; or garment manufacturing employers.

Generally, covered temporary workers must be paid weekly. Wages for the current week’s work are due on the payday of the following calendar week. The following exceptions are set forth, however:

- When an assignment is completed, the final wages for the assignment may be paid on the regular payday in the week following the completion of the assignment (not the final day).

- If a temporary worker or any worker is assigned to work “day to day,” from a centralized pool, employees’ wages are due at the end of each day, but only if; (A) the employee reports to the office of the temporary services employer or other location; (B) the employee is dispatched to a client’s worksite each day and returns to or reports to the office of the temporary services employer or other location upon completion of the assignment; and (C) the employee’s work is not executive, administrative, or professional, as defined in California’s wage orders of the Industrial Welfare Commission, and is not clerical.

- Temporary services employees used for strike replacements must be paid at the end of each day.

- Except as previously stated, temporary services employees who are fired by the agency or who quit are paid final pay in the regular course (Labor Code sections 201, 202).

- None of the aforementioned rules apply if the employee is assigned to a client for more than 90 days, unless the agency pays weekly in accordance with this new law.

Thus, employers who use temporary agencies should ensure their vendors comply with these new and amended sections of the Labor Code, as employees (and their counsel) have been known to attempt to bring joint employer wage claims against both the client and the agency.

### Paid Sick Leave Legislation Bogs Down

AB 2716 (Ma) would mandate that all California employers provide paid sick leave to an employee after seven days of work in a calendar year to care for their own illness, or that of a sick child, spouse, domestic partner or other relative. The bill was opposed by the Deputy Director of Legislation for the California Department of Finance, and held under submission in the Senate Appropriations Committee.

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## II.

### JUDICIAL UPDATE

#### A Little Competition Never Hurt Anyone

Many employers request employees execute agreements promising the employer that the employee will not “compete” against the employer once the employment relationship ends. In California, however, such agreements are generally not enforceable. The California Supreme Court confirmed, in *Edwards v. Arthur Andersen LLP*, that California Business & Professions Code section 16600 prohibits non-competition agreements unless the agreement falls within a specified exception. The Court specifically rejected the Ninth Circuit “narrow restraint exception” indicating that non-competition agreements are prohibited, even if the agreements are narrowly written and leave a substantial portion of the available employment market open to the employee. The Court emphasized the law in California that non-competition agreements are against public policy because they restrict an individual’s ability to earn a living. A non-competition agreement will be unenforceable in California unless it clearly falls under one of the following statutory exceptions:

1. *Business & Professions Code § 16601*: Sale of a business, which can legally restrict a seller’s ability to compete with the buyer in the geographic location where the seller had carried on his or her business.
2. *Business & Professions Code § 16602*: Dissolution of a partnership, which can legally define a geographic area within which one of the partners cannot conduct a similar business.
3. *Business & Professions Code § 16602.5*: Dissolution or termination of a limited liability corporation member’s interest which can legally define a specified geographic area within which the member cannot conduct a similar business.

The Court further held that a contractual waiver of “any and all” claims does not necessarily encompass an illegal waiver of employee indemnification rights unless the waiver specifies that indemnification is being waived.

#### Employees Have a Reasonable Expectation of Privacy in Electronic Communications

In *Quon v. Arch Wireless*, the Ninth Circuit overturned a district court decision against an employee who alleged violations of the Stored Communications Act (“SCA”) and the Fourth Amendment. The City of Ontario Police Department (“Ontario”) provided employees with pagers for work-related text messaging. Ontario contracted with a third-party wireless communications provider, Arch Wireless (“Arch”), to provide the text messaging services, and capped each employee’s monthly usage at 25,000 characters.

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Ontario maintained a formal policy regarding monitoring and usage of e-mail and other electronic communications, but did not have a formal policy regarding text messaging. Instead, Arch instituted an informal policy, whereby it told employees that their messages would not be audited, unless they failed to pay any usage overage charges. In response to a number of employees exceeding their allotted monthly character limit, Ontario audited the text messages, finding many to be personal and sexually explicit.


First, the Ninth Circuit held that under the SCA, Arch was an “electronic communications service” because it provided users with the ability to send or receive electronic communications. Therefore, Arch was prohibited from releasing the content of the text messages to anyone but the sender or recipient. Ontario, the subscriber, was not entitled to this information.

Second, the Ninth Circuit looked at the expectation of privacy and the reasonableness of the search under the Fourth Amendment. The court held that Ontario’s informal text message policy gave employees a reasonable expectation of privacy – as long as the employee paid the overage charge, his or her text messages would not be audited. The court stated that a text message or e-mail is identical to a mailed letter – absent an agreement to the contrary, the author has an expectation of privacy in the content of the communication, but not the address. The court also found the search to be unreasonable in scope because Ontario had other means to ensure the efficacy of the 25,000 character limit without an unannounced search of the content of past text messages.

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Check the mail  for our flyer and registration form to attend our 2<sup>nd</sup> Annual Employment Law Symposium on November 19, 2008. Please contact Cathy Johnson (858) 755-8500 x129 with any questions. We look forward to seeing you there!

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*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.*