

## 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

11622 El Camino Real, Suite 300  
San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1030  
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## I.

### **LEGISLATIVE/ADMINISTRATIVE UPDATE**

#### **EEOC Guidance on Severance Agreements and Bias Claim Releases**

Responding to the current economic downturn and the reductions in force that have occurred throughout the country, the federal Equal Employment Opportunity Commission (“EEOC”) recently issued guidance for employers regarding how to draft severance agreements that release potential bias claims.

A severance agreement is a contract between an employer and a departing employee, in which the employer provides the employee compensation in exchange for the employee releasing all known and unknown legal claims against the employer—including any claim that the employee was discriminated against on the job. As the EEOC’s guidance memorandum makes clear, the key is ensuring that the agreement is properly drafted, and that employees sign the agreement freely and voluntarily. Otherwise, an employer will have compensated an employee to sign an agreement that cannot be enforced and provides the company no legal protection.

Important components of a valid severance agreement include:

1. The employee must be paid compensation or given some benefit—in addition to what the employee is already entitled to—in exchange for signing the agreement;
2. The agreement must be written in a way that the employee can fully understand (e.g. without a slew of legalese), and presented to the employee without coercion or intimidation, and;
3. The terms of the agreement must comply with all applicable state and federal employment laws.

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## II.

### JUDICIAL UPDATE

#### Ninth Circuit Establishes Claim Requirements Under the Whistleblower-Protection Provisions of the Sarbanes-Oxley Act

In *Van Asdale v. International Game Technology*, the Ninth Circuit Court of Appeals addressed the substantive requirements necessary to establish a claim under the whistleblower-protection provisions of the Sarbanes-Oxley Act (“SOX”), which prohibit employers of publicly-traded companies from “discriminating against an employee in the terms and conditions of employment” for “providing information...regarding any conduct which the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.”

The plaintiffs, two intellectual property attorneys working in-house for defendant International Game Technology (“IGT” or “the company”), alleged that IGT violated SOX by terminating their employment shortly after they accused high-level IGT executives of engaging in fraud in connection with a company merger. Prior to their discharge, both plaintiffs had received high performance reviews and had seemingly engaged in no conduct which would have corroborated the company’s assertion that they were discharged for poor performance.

In reversing the district court’s decision to grant summary judgment in favor of IGT, the Ninth Circuit explained that the plaintiffs’ SOX-based claim required analysis under a burden-shifting scheme, whereby the plaintiffs were first required to make out of prima facie case of retaliatory discrimination. If the plaintiffs met their burden, the burden would then shift to IGT to demonstrate by clear and convincing evidence that it would have taken the same action against the plaintiffs in the absence of plaintiffs’ protected activity.

The Court ultimately concluded that the plaintiffs had set forth a prima facie case by presenting sufficient evidence with respect to all four elements required by Department of Labor regulations: (1) they engaged in protected activity or conduct; (2) IGT knew or suspected, actively or constructively, that they engaged in protected activity; (3) they suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor to the unfavorable action. With respect to the first element, the Court confirmed that employees need not prove that the employer *actually* engaged in illegal activity; rather, they need only show that they reasonably believed that illegal activity may have occurred.<sup>1</sup> With respect to the fourth element, the Court held that in the absence of direct evidence proving that the protected activity was a contributing factor to the adverse employment action, employees can meet their burden by showing a temporal proximity of the two events which, within the

<sup>1</sup> Notably, an “employee’s reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of [SOX]” is a protected activity.

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context of the factual setting, would reasonably lead a factfinder to conclude that the employer's asserted reason for the adverse action was merely a pretext for unlawful retaliation.

Because the Court concluded that the plaintiffs had established a prima facie showing of retaliatory termination in violation of SOX, and because IGT failed to argue on appeal that it could prove that it would have discharged the plaintiffs even in the absence of their whistleblowing activity, the Court concluded that the district court had erred in disposing of the case via summary judgment.

### Corporate Officers May Be Forced to Pay Out-of-Pocket Under the FLSA

In 2005, the California Supreme Court ruled in *Reynolds v. Bement* that, under California law, individual managers and corporate officers could not be held personally liable for unpaid wage claims. In other words, only the company could be forced to pay back wages. This was an important victory for California employers. But the Ninth Circuit Court of Appeals – (which covers California among other states), however, recently ruled that managers and officers do not benefit from the same protection under the federal Fair Labor Standards Act (“FLSA”).

In 2003, The Castaways casino in Las Vegas, Nevada filed for bankruptcy, and then ceased operations in early 2004. A handful of employees sued The Castaways, claiming that they had not been paid their final wages or accrued vacation earnings. Since the corporation was in bankruptcy, the employees named three top level managers—the CEO, the CFO, and the Labor Relations Manager—as defendants in the lawsuit. Both the trial court and the Nevada Supreme Court ruled that, under Nevada state law, individual managers and officers could not be held liable for unpaid wages and dismissed the case.

One employee then pursued his unpaid wage claims under the federal FLSA. Reversing the federal district court, the Ninth Circuit ruled in *Boucher v. Shaw* that pursuant to the FLSA's definition of “employer,” if individual managers and officers control and direct the work of employees, and take actions that deprive those employees of earned wages, the individuals can be made to pay the employees out of their own pockets.

### California Supreme Court Discusses the Line Between Permissible Workplace Surveillance and Invasion of Privacy

In *Hernandez v. Hillsides*, the California Supreme Court has identified guidelines for employers regarding the scope and reasonable methods for conducting employment surveillance in the workplace, and ultimately concluded that employees have some reasonable expectation of privacy in a closed office. Specifically, the Supreme Court ruled that an employer did not invade the privacy of its employees when it set up video surveillance in the employees' offices. The Court discussed a spectrum for expectations of privacy in the workplace, which varied based upon the office environment. However, it allowed employers considerable flexibility in monitoring their employees for legitimate business reasons, so long as the surveillance was no more intrusive than reasonably necessary.

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In *Hernandez*, two plaintiffs worked at Hillside, a residential treatment center for abused children. The plaintiffs worked in a clerical capacity and shared an enclosed office where they worked on computers. It came to the employer's attention that someone was using one of the computers at night to access pornographic websites. The employer did not suspect either of the plaintiffs, but rather one of the nighttime workers. Therefore, management set up a hidden camera in the plaintiffs' office, which was activated after they left, and was turned off in the morning. The camera never taped either of the two plaintiffs, nor did the camera ever catch the person who was accessing the pornographic websites. The plaintiffs eventually discovered the video camera, and sued for invasion of privacy as well as infliction of emotional distress.

The trial court ruled in favor of the employer, finding that there could be no "intrusion" of privacy when the plaintiffs were never actually videotaped. The Court of Appeal overturned the trial court, concluding that the plaintiffs met the elements of an invasion of privacy claim because: (1) they suffered an intrusion into a zone of privacy; and (2) the conduct was so unjustified and offensive as to constitute a privacy violation.

The California Supreme Court, however, ruled in favor of the employer, concluding that while the plaintiffs had suffered an intrusion into a zone of privacy (therefore establishing the first element of their cause of action), there was no evidence whatsoever that the intrusion was unjustified or offensive. The Court began by stating the basic principle of workplace privacy: "while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether." With regard to the first element, the Court held that setting up a secret camera to watch and record employee activities which went on behind closed doors, in an office to which the general public had limited access, constituted an "intrusion." The Court focused on the fact that the office was enclosed, had a locking door and blinds that could be drawn. This protected setting "generated legitimate expectations that not all activities performed behind closed doors would be clerical and work-related." The Court noted that simply because other colleagues may access the office or because the two occupants of the office (the two plaintiffs) could see one another, there was still a reasonable expectation of privacy which was intruded upon by the employer's use of the secret camera. Essentially, the Court held that privacy is heightened in enclosed offices where an employee does not expect to be overheard or observed. The Court also noted that this means of intrusion – a secret videotape – was subject to a high standard because it was so invasive.

Importantly, the Court pointed out that a policy which permitted such monitoring may have eliminated the employees' expectation of privacy, and therefore eliminated the intrusion. However, there was no such policy here. Therefore, the plaintiffs received no warning that they would be subjected to the risk of such surveillance, nor did they agree to it in advance. Further, the employer had a computer policy which said that Internet activity might be monitored, but the policy said nothing about surveillance.

The Court then moved onto the second element – whether the employer's conduct in this case was sufficiently "serious" or "offensive" to constitute an invasion of privacy. The employer won on this point. The Court noted that this

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surveillance was limited in scope; a camera pointed at the specific computer in question. The surveillance was also limited in time; surveillance was conducted only after hours when the plaintiffs were gone. Further, it was conducted for a legitimate purpose; protecting the children which employer treated. Finally, the actual intrusion itself was limited; although the camera was present, it never actually recorded the plaintiffs. The court concluded that the intrusion was justified and was slight under the circumstances. Therefore, the employer was not liable to the plaintiffs.

The Court's reasoning suggests that any employer who wants the ability to monitor its employees' activities through surveillance, should exclusively state that possibility in its handbook and policies. The lesson for employers is that notice to employees regarding surveillance procedures will defeat claims such as these in most cases by destroying the reasonable expectation of privacy. However, employers should recognize that any employee environment which can be closed off has a higher expectation of privacy. If employers choose to conduct surveillance, it should be done for a legitimate purpose, and the scope of it should be as limited only to the scope necessary to accomplish the goal.

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## SAVE THE DATE

Pettit Kohn Ingrassia & Lutz PC's  
3<sup>rd</sup> Annual

*Employment Law Symposium*

November 18, 2009

Mission Valley Marriott

Contact Cathy Johnson at (858) 704-7113 for more information.

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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, Robert Hudock, Tyler Theobald or Jenna Leyton at (858) 755-8500 or Eric DeWames at (310) 417-1137. For access to previous updates, please go to <http://www.pettitkohn.com/EmployLabor.html>.*