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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

Pending California Legislation

SB 1304 (DeSaulnier): This bill would mandate that private employers with 15 or more employees provide up to 30 days paid, job protected leave for organ donation in any one year period, and five days for bone marrow donation in any one year timeframe. SB 1304 has passed the Senate and is currently on the Assembly Floor.

II.

JUDICIAL UPDATE

Ninth Circuit Upholds Judgment for Employer in ADA Case

In *Brownfield v. City of Yakima*, the federal Ninth Circuit Court of Appeals (“Ninth Circuit”) held that an employer can order a fitness-for-duty exam when an employee’s emotional stability is in question, even when job performance has not been affected.

Plaintiff Oscar J. Brownfield (“Brownfield”) had been employed as a police officer for the City of Yakima Police Department (“Department”) since 1999. During 2004, Brownfield began to exhibit “emotionally volatile” behavior, including but not limited to repeatedly complaining about a fellow police officer, engaging in a disruptive argument with another fellow police officer, reporting that he “felt himself losing it” during a traffic stop, and making concerning statements such as “[i]t doesn’t matter how this ends.” Upon learning of these incidents, the Department placed Brownfield on administrative leave and ordered him to undergo a fitness-for-duty exam. The Department eventually determined that Brownfield was unfit for duty and terminated his employment in April 2007.

Thereafter, Brownfield sued the Department, alleging that it had violated the Americans with Disabilities Act (“ADA”) because an employer may not require a fitness-for-duty exam to determine whether an employee is disabled unless such exam is “consistent with business necessity.” According to Brownfield, the

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Department could not meet the business necessity standard without showing that his job performance had suffered as a result of his perceived medical health problems.

The Ninth Circuit disagreed, holding that “prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work.” The court emphasized, however, that:

the business necessity standard is quite high, and not to be confused with mere expediency. Nevertheless, the business necessity standard may be met even before an employee’s work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee’s behavior cannot merely be annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions.

In this case, the nature of Brownfield’s employment (which made it likely that he would encounter “extremely stressful and dangerous situations”), combined with his “high emotional responses on numerous occasions,” was sufficient to meet this standard, and the court upheld summary judgment in favor of the Department. The court also upheld the lower court’s ruling dismissing Brownfield’s Family and Medical Leave Act and First Amendment claims.

This case gives employers some leeway to send an employee for a fitness-for-duty examination in situations where job performance has not been affected yet there is some question as to the employee’s emotional stability. However, employers should proceed with great caution, as the business necessity standard still applies.

California Supreme Court Ruling Makes Motions for Summary Judgment More Difficult to Achieve in Discrimination Cases

In *Reid v. Google, Inc.*, the California Supreme Court limited application of the “stray remarks” doctrine which holds that “isolated” or “stray” discriminatory statements that are unrelated to an allegedly discriminatory employment decision do not create an inference of discriminatory animus.

Brian Reid, a former director of engineering, worked at Google from 2002 to 2004. He was 52 at the time he was hired. In addition to other comments, Reid claimed his supervisor stated that his opinions were “obsolete” and “too old to matter,” and described Reid as “slow,” “fuzzy,” “sluggish,” and “lethargic.” Reid also accused the Vice President of stating that Reid failed to “display a sense of urgency” and “lacked energy” – statements which he argued were code for “old.” Reid further claimed that younger co-workers called him an “old man,” “old guy” and “old fuddy-duddy.” A little over a year into his tenure with Google, Reid was discharged, allegedly because there was not a “cultural fit.”

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Google argued that the alleged remarks, even if made, constituted nothing more than “stray remarks” and that good cause existed for Reid’s discharge. The trial court agreed, and granted Google’s motion for summary judgment. On appeal, the California Supreme Court reversed, holding that a court’s determination that an apparently discriminatory statement is a “stray remark” necessarily requires that the court weigh the credibility and importance of the evidence. Doing so, however, is the jury’s responsibility – a responsibility that cannot be usurped by the court. The Court concluded that summary judgment determinations must be based “on the totality of the evidence, including any relevant discriminatory remarks.”

Given this ruling, it will now be more difficult for employers to obtain summary judgment in discrimination cases. As always, employers can best protect themselves (and their employees) by ensuring that discriminatory remarks, jokes and commentary are not tolerated in any form.

California Supreme Court Holds that Labor Code Section 351 Does Not Provide Employees with a Private Right of Action to Recover Allegedly Misappropriated Tips (but Leaves the Door Open for Alternative Methods of Recovery)

Labor Code section 351 prohibits employers from taking any gratuity or part thereof that patrons leave for an employee, and declares that the gratuity is the sole property of the employee. Alleged violations of section 351 have most frequently arisen in the context of “tip pooling” practices in the service industry, such as restaurants (e.g., tips left by patrons at a restaurant, or portions of those tips, are pooled and split among the various employees who were involved in the service, such as waitstaff, food servers, buspersons, etc.). Courts of Appeal have concluded that certain tip pooling policies utilized in the restaurant industry do not violate section 351.

In *Lu v. Hawaiian Gardens Casino, Inc.*, a casino argued that section 351 does not provide employees with any private right of action to recover tips allegedly misappropriated by their employers.

The casino in *Lu* had a tip pooling policy that required card dealers to set aside 15 to 20% of the tips they received to be pooled and split among employees who provided service to casino patrons, such as chip service people, poker coordinators, hosts, floormen and concierges. The plaintiff card dealer claimed that this policy violated section 351, among other Labor Code sections. The trial court and Court of Appeal both ruled that section 351 did not provide plaintiff the right to sue to recover tips allegedly misappropriated by the casino. The Supreme Court agreed, finding that the language of section 351 does not provide for a private right of action, nor does its legislative history indicate that the Legislature intended to create one. Thus, the Supreme Court conclusively established that employees may not look to section 351 as a means of recovering any allegedly misappropriated tips, whether in the context of tip pooling or any other context.

The Supreme Court added, however, that its holding “does not necessarily foreclose the availability of other remedies.” It opined that employees may, under the proper circumstances, be able to use a conversion (theft) cause of action to recover allegedly misappropriated tips. The elements of conversion are very general (that the plaintiff had ownership or right to possession of property, that the

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defendant wrongfully interfered with the plaintiff’s right, and that the plaintiff suffered damages). California authority holds that money cannot be the subject of a conversion cause of action unless a “specific, identifiable sum” is involved. There is some limited federal authority holding that the statutory remedies available under the California Labor Code are the exclusive remedies for wage and hour violations, and thus alleged lost wages cannot be recovered through a conversion cause of action—at least under the facts of those cases. It remains to be seen what circumstances would be proper for allowing a plaintiff to recover allegedly misappropriated tips through a conversion cause of action.

It should also be noted that the appellate court deciding *Lu* held that while a violation of section 351 does not provide a private right of action, the violation may, under the proper circumstances, serve as the predicate for a claim under the Unfair Competition Law (“UCL” – Business and Professions Code sections 17200 et seq.). The Supreme Court did not address this specific issue. Therefore, if a plaintiff were successful in proving a violation of section 351, he or she could potentially recover the misappropriated tips as “restitution” under the UCL.

Finally, a violation of section 351 could potentially serve as a predicate for a claim under the Private Attorneys General Act of 2004 (“PAGA” – Labor Code sections 2698 et seq.). If a plaintiff were successful in proving a violation of section 351, he or she could recover certain civil penalties established by the PAGA.

Court of Appeal Clarifies Entitlement to Attorneys’ Fees Under the Labor Code

Kirby v. Immoos Fire Protection, Inc. addresses the situation wherein an employer successfully defends allegations of Labor Code violations and then seeks to recover attorneys’ fees. This is a highly technical but very important analysis for employers defending wage and hour lawsuits in California.

The plaintiff in *Kirby* filed a class action complaint against the defendant for claims including: 1) unfair business practices under the Business & Professions Code; 2) entering into an improper contract for labor under Labor Code section 2810; and 3) failing to provide rest breaks as required under the applicable wage order. After the plaintiff’s motion to certify the class was denied, the plaintiff dismissed the entire action. Because the defendant prevailed, the trial court awarded the defendant nearly \$50,000 in attorneys’ fees. On appeal, the plaintiff argued that the trial court erred in awarding attorneys’ fees because the Labor Code prevents a prevailing defendant from recovering certain fees.

Generally, a party who prevails in a case may recover attorneys’ fees only when a statute or agreement so provides. Here, in determining whether the award of fees was proper, the appellate court harmonized two sections of the Labor Code:

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- Section 1194, which provides that with respect to claims for unpaid minimum or overtime wages, *only a prevailing employee* may recover reasonable attorneys' fees (unilateral fee shifting); and
- Section 218.5, which provides that *any party* prevailing on a claim for unpaid wages and specified benefits is entitled to reasonable attorneys' fees (bilateral fee shifting).

The appellate court clarified that Section 1194 applies only to causes of action for unpaid minimum and overtime wages. Section 218.5 applies to causes of action alleging nonpayment of wages (other than unpaid minimum wages or overtime). If, in the same case, a plaintiff adds a cause of action for nonpayment of minimum wages or overtime, a prevailing defendant cannot recover attorneys' fees for work in defending against the minimum wage or overtime claims. But a prevailing defendant may still recover fees associated with the defense of claims unrelated to the minimum wage or overtime claim.

With respect to *Kirby*, the appellate court ruled that: 1) the unfair business practice statute does not provide for an award of attorneys' fees to any party, so the award to the defendant was reversed; 2) Labor Code section 2810 itself contains a provision that does not provide for an award of fees to prevailing defendants, so the award was reversed; and 3) the claim for failing to provide rest breaks is a claim for unpaid wages, and so the trial court properly awarded attorneys' fees to the defendant for its defense against this claim, requiring a remand to the trial court to determine the reasonable amount of attorneys' fees. In sum, bilateral fee shifting applied to the rest break claims.

Court Hold that Discharging an Employee Based on a Non-Compete Agreement With Former Employer Violates California Law

In *Silguero v. Creteguard, Inc.*, a California Court of Appeal expanded California's fundamental public policy prohibiting non-compete agreements. *Silguero* involved two employers, plaintiff Floor Seal Technology, Inc. ("FST") and defendant Creteguard, Inc. ("Creteguard"). In August 2007, Rosemary Silguero ("Employee") worked for FST as a sales representative. FST presented her with a confidentiality agreement that prohibited her "from all sales activities for 18 months following either departure or termination [from FST]." FST told Employee she would be discharged if she refused to sign the agreement. Employee signed the agreement; two months later, her employment was terminated.

Employee found a new job as a sales representative for Creteguard. Almost immediately, FST contacted Creteguard and demanded that Creteguard observe Employee's executed non-compete agreement with FST. In response, Creteguard terminated Employee's employment out of "an abundance of caution" to avoid any potential lawsuit from FST. In his termination letter to Employee, Creteguard's CEO explained that "although we believe that non-compete clauses are not legally enforceable here in California, [Creteguard] would like to keep the same respect and understanding with colleagues in the same industry."

Employee sued Creteguard for wrongful termination in violation of public policy, based upon California Business and Professions Code Section 16600

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(“Section 16600”), which states that non-compete agreements in California are unlawful. Creteguard argued that Section 16600 should not apply to the actions of a third party that did not impose the unlawful non-compete agreement on the employee. The trial court agreed with Creteguard and dismissed Employee’s complaint.

The appellate court reversed the decision, concluding that Employee alleged a valid wrongful termination claim. The court reasoned that Employee’s interest in employment mobility was protected under Section 16600, and this interest took precedence over Creteguard’s business interests. Even if Creteguard acted only to protect itself, Employee’s complaint alleged an “understanding” between Creteguard and FST that was “tantamount to a no-hire agreement,” in stark violation of Section 16600.

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The Dana on Mission Bay

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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, Jenna Leyton, Andrea Kaplan, Vanessa Maync or Christine Mueller at (858) 755-8500 or Eric DeWames or Mark Bloom at (310) 649-5772.

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