

## 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

12250 El Camino Real, Suite 350 San  
Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1108  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

## I.

### **LEGISLATIVE/ADMINISTRATIVE UPDATE**

#### California Legislation

September 11 was the last day for both the Senate and the Assembly to pass legislation for consideration by Governor Arnold Schwarzenegger. Governor Schwarzenegger has until October 14 to enact or veto the following bills:

**AB 8 (Nunez):** creates the California Cooperative Health Insurance Purchasing Program, which would function as a statewide purchasing pool for employee health care coverage and be administered by the Managed Risk Medical Insurance Board (“the Board”). Beginning in 2009, employers would be required to elect to either: (1) make health care expenditures in an amount that is equivalent to a minimum of 7.5% the total social security wages for the employer’s full-time and part-time employees; or (2) pay an employer “fee” in that amount. AB 8 would require an employer to commence paying this fee or making the health expenditures on October 1, 2009. The bill also authorizes the Employment Development Department to assess a penalty against any employer that fails to comply with these requirements.

**AB 392 (Lieu):** seeks to require employers with 25 or more employees to permit spouses of certain members of the Armed Forces, National Guard, and Military Reserves deployed during military conflict to take up to ten days of unpaid leave when the service member is home on leave.

**AB 435 (Brownley):** would amend California Labor Code section 1197.5 to require longer retention of wage and job classification records (from the current two years to five years) and extend the time for filing a civil lawsuit to recover wages to four years. Employees would have five years to file claims for “willful” violations.

**AB 448 (Arambula):** would amend Labor Code sections 98 and 1194.2 to permit the Labor Commissioner to award liquidated damages to employees who prevail in complaints alleging payment of less than the state minimum wage.

**SB 549 (Corbett):** prohibits an employer from discharging, disciplining, or discriminating against any employee for inquiring about, requesting,

*We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.*

*We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.*

*We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.*

12250 El Camino Real, Suite 350 San  
Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1108  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

or taking up to four days of “bereavement leave” upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. The leave would be unpaid, but an employee would be entitled to use vacation, personal leave, or compensatory time off that is otherwise available to him/her.

SB 836 (Kuehl): would add “familial status” as a protected status under the California Fair Employment and Housing Act. The bill defines “familial status” to include “being an individual who is or will be caring for or supporting a family member.” The bill defines “caring for or supporting” a family member as: providing supervision or transportation; providing psychological or emotional comfort and support; addressing medical, educational, nutritional, hygienic or safety needs; or attending to an illness, injury or mental or physical disability. The bill defines “family member” as a child, parent, spouse, domestic partner, parent-in-law, sibling, grandparent or grandchild.

The following bills **did not** pass the full Legislature this year:

AB 437 (Jones): would have, in effect, removed any statute of limitations for lawsuits challenging any employer decision that affects pay or benefits.

SB 11 (Migden): would have amended 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: (1) members of the same sex; or (2) over 62 years of age. This bill would have deleted the same-sex and age eligibility requirements, thereby allowing any two persons who meet the other, specified criteria to register as “domestic partners.”

SB 622 (Padilla): would have mandated increased penalties for employers who “willfully” misclassify employees as independent contractors. The bill sought to authorize the Labor and Work Force Development Agency to assess a civil penalty between \$5,000 and \$15,000 per violation of this new law. Moreover, SB 622 would have authorized the Labor and Work Force Development Agency to assess a civil penalty of between \$10,000 and \$25,000 if it determines there has been a pattern or practice of violations.

SB 747 (Corbett): would have expressed the intent of the California legislature to enact legislation that would promote compliance with the Americans with Disabilities Act and similar state laws that govern access to public facilities, through education and certification programs. The bill would have had a complementary goal of reducing litigation that permits the recovery of attorneys’ fees and damages without facilitating compliance with those laws.

## II.

### JUDICIAL UPDATE

#### 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

#### Enforceability of Class Action Waivers in Employment Arbitration Agreements

In *Gentry v. Superior Court*, the California Supreme Court held that class action waivers may be enforceable in certain situations. The Court opined that:

At least in some cases, the prohibition of class-wide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws.

Prior to enforcing such waivers, where it is alleged that the employer denied proper overtime pay, California's trial courts must now consider the following factors: (1) the (modest) size of the potential individual recovery; (2) the potential for retaliation against members of the class; (3) the fact that absent members of the class may be ill-informed regarding their rights; and (4) other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration.

After applying these four factors, if the trial court determines that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver.

The Court's opinion revolved around its concern that:

Class arbitration waivers cannot, consistent with the strong public policy behind [California's overtime protections], be used to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical obstacles in the way of employees' prosecution of those claims.

California's employers should note, however, that the Supreme Court did not declare all arbitration agreements with class action waivers as either enforceable or unenforceable. Rather, the Court stated that where the class action waiver is found invalid under the four announced factors, it may be severed from the arbitration agreement, and the remainder of the agreement may be enforced.

#### Bonus Plan Based on Operating Expenses Upheld

In *Prachasaisoradej v. Ralphs Grocery Company, Inc.*, the California Supreme Court held that an employer does not violate California wage protection laws by providing bonuses if and when the collective efforts of the employees produce a positive overall financial result for the employer.

12250 El Camino Real, Suite 350 San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1108  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

*We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.*

*We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.*

*We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.*

In upholding the Ralphs Grocery Company bonus plan, the Court relied on three key facts: (1) all Ralphs employees were to receive their normal rate of pay without regard to their store's performance; (2) the plan allowed for incentive payments above and beyond regular wages; and (3) after the incentive compensation was calculated, no deductions were taken. In reaching its conclusion, the Court affirmed the use of "normal concepts of profitability" to determine bonus payments. Thus, an employer may include "ordinary business expenses, such as store-wide workers' compensation costs, and store-wide cash and merchandise losses, along with such other store expenses as the electric bill and the cost of goods sold, to determine the store's profit" in calculating supplementary incentive compensation payments.

The Court rejected the employees' argument that the bonus program shifted the cost of doing business to employees, noting that "after fully absorbing the expenses at issue, Ralphs simply determined what remained as profits to share with its eligible employees in addition to their normal wages."

While this decision makes it permissible for employers to tie bonus programs to profitability, such plans should set forth (in writing) the formula for calculating the employee bonus and specify that no deductions will be taken after the bonus amount is calculated.

### The Burden to Establish Qualifications Shifts Back to Employees

In *Green v. State of California*, the California Supreme Court held that in disability discrimination claims, the plaintiff has the burden to establish that he or she is qualified to perform the job at issue, and can do so. While this decision seems axiomatic, several recent appellate courts have opined that it should be the employer's burden to prove that the employee *cannot* perform the job. In rejecting this view, the Court noted that:

The FEHA and the ADA both limit their protective scope to those employees with a disability who can perform the essential duties of the employment position with a reasonable accommodation. . . . [Thus] a plaintiff must demonstrate that he or she was qualified for the position sought or held in the sense that he or she is able to perform the essential duties of the position with or without reasonable accommodation.

After the plaintiff has established that he or she can perform the essential functions of the job, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions.

The Court did, however, distinguish claims that an employer failed to reasonably accommodate an employee's disability, noting that with regard to such claims, "the plaintiff [is] not required to prove whether she could perform the essential functions of her position in order to establish a prima facie case." The FEHA makes the failure to engage in the interactive process actionable as a separate illegal practice. *Green* makes clear the evidentiary burden that only those plaintiffs who actually can perform the job (with or without reasonable accommodation) are able to state a claim for disability discrimination.

12250 El Camino Real, Suite 350 San Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1108 Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

# *Employment Law Symposium – REGISTER TODAY*

Wednesday, November 7, 2007

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

## 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

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 Session

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

*(Morning sessions @ \$100/per person, \$115 after November 2, 2007. Morning session attendees may attend the afternoon Sexual Harassment session for free)*

### Afternoon Session

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.

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

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

***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!*

12250 El Camino Real, Suite 350 San  
Diego, CA 92130  
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1108  
Los Angeles, CA 90045  
Tel 310-649-5772 | Fax 310-649-5777

[www.pettitkohn.com](http://www.pettitkohn.com)

*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.*