RECENT DEVELOPMENTS IN CALIFORNIA EMPLOYMENT LAW -- 2005

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The materials contained herein are intended to apprise our clients of general developments in rapidly changing areas of the law. They do not necessarily include all information necessary to evaluate any specific case. They are not intended as legal advice or as legal treatises and should not be relied on as such.

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Note: The statutes and cases mentioned in this paper were selected as those of greatest significance or broadest application, from among a larger number of new state and federal statutes, court decisions and administrative developments. Many potentially significant items were omitted due to space constraints. Cases decided after December 20, 2004 have generally not been included.

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I. STATUTORY DEVELOPMENTS

A. **Summary of Assembly Bill 1825 (Mandatory Sexual Harassment Training)**

**Effective Date:** January 1, 2005

**Summary:** Requires all employers who employ 50 or more employees (including independent contractors) to provide at least two hours of sexual harassment training to all supervisory employees by January 1, 2006, unless the employer has provided such training to supervisory employees after January 1, 2003. Requires that all supervisory employees receive similar training once every two years after January 1, 2006.

**Application:** Applies to all employers who employ 50 or more persons (including independent contractors). The statute does not state that at least 50 employees must be employed in California.

**Substantive Provisions:** Requires that all covered employees provide at least two hours of “classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position.” An employer who has provided equivalent training to supervisory employees after January 1, 2003 is not required to provide the training by the January 1, 2006 deadline. Each covered employer must provide the same training to all supervisory employees every two years beginning January 1, 2006.

The content of the training must include “information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment and employment.” The training must also include “practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.” The training must be presented by “trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation.”

Failure to provide this training shall not, in and of itself, result in liability against the employer in any claim alleging sexual harassment. Conversely, the employer’s compliance with the section does not insulate the employer from liability for sexual harassment by any current or former employee.

There is no specific statutory penalty for failure to provide the training, other than the possibility that the Fair Employment and Housing Commission may cite the employer and require it to comply.

**Practical Effect:** Most employers already provide sexual harassment training to supervisory employees, although some do not provide two hours’ training. It is important that employers document the training that was provided, and keep copies of the written materials distributed, and keep attendance records. The exact content of the training is not clearly defined, although it is likely that some form of on-line training is permissible. The statute requires “classroom or other effective interactive training and education …” The training should be provided by
experienced human resource professionals or employment attorneys. It should include information regarding the definition of sexual harassment, practical examples which train supervisors regarding the prevention and correction of harassment, and information regarding remedies available to victims. In order to fully comply, the employer should provide the training twice a year, as the statute requires that all new supervisory employees be trained within six months of their assumption of a supervisory position. It is likely that simply watching a video tape will not suffice, since there is no interactive component to a video tape.

The statutory definition of “employer” may include employers who have less than 50 employees working in California, if the total work force in other states exceeds 50. The definition of “employee” includes independent contractors. There is no specific definition of “supervisory employee” but the term is defined elsewhere in the Fair Employment and Housing Act, as “any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them or adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment.”

See Pillsbury Winthrop LLP Client Bulletin on AB 1825, attached as Item 3.
B. **Summary of Proposition 72 (Mandatory Employer-Provided Health Insurance)**

**Effective Date:** November 3, 2004

**Summary:** This proposition repealed Senate Bill 2, a statute passed in 2003 and signed by Governor Davis shortly before he left office. Senate Bill 2 would have mandated that employers of fifty (50) or more employees provide health insurance with specific coverage features to their employees, beginning in January 2006. As a result of Proposition 72, Senate Bill 2 will not go into effect.

**Application:** All private employers.

**Substantive Provisions:** Repeals Senate Bill 2.

**Practical Effect:** Proposition 72 means, simply, that Senate Bill 2 will not go into effect. There is currently no legislative mandate in California that private sector employers provide health insurance to their employees. Of course, many employers do so. Many commentators expect the legislature to attempt to re-enact some less onerous version of Senate Bill 2.
C. **Summary of Senate Bill 1809 (Amendments to Labor Code Private Attorneys General Act)**

**Effective Date:** This “urgency” legislation was effective immediately upon being signed by Governor Schwarzenegger on August 11, 2004.

**Summary:** SB 1809 amends the Labor Code Private Attorneys General Act of 2004 (“PAGA”) (see summary of PAGA, infra). While leaving intact the essential structure of PAGA, SB 1809 made several significant changes to the original statute. These include (i) a requirement that an employee or former employee, prior to bringing a PAGA lawsuit, provide written notice to the employer and to the California Labor and Workforce Development Agency (“LWDA”), or to one of LWDA’s agencies or divisions (which include the Labor Commissioner) of the specific Labor Code violation; (ii) that a PAGA action may be filed only after specific time periods in which the LWDA may elect to prosecute the alleged violation itself; and (iii) granting courts discretion to reduce the statutory penalties in appropriate circumstances and to supervise settlements of private PAGA actions.

Overall, while these amendments to PAGA are welcome, they do not fundamentally change the statute, which remains a powerful weapon against employers.

**Application:** Applies to all private-sector employers. No exemption for small employers.

**Substantive Provisions:**

1. **Written Notice Required Prior to PAGA Lawsuit.**

   Prior to bringing a PAGA action, an aggrieved employee, or his/her representative must give written notice by certified mail to the LWDA and to the employer involved, including the specific alleged Labor Code violation and the “facts and theories to support the alleged violation.” The LWDA, within 30 days of the date of the notice, must notify the employer and the aggrieved employee or representative by certified mail if it does not intend to investigate the alleged violation. If the LWDA elects not to investigate, the aggrieved employee may commence a civil PAGA action. If the LWDA determines to investigate the violation, it must notify the employee or representative and the employer within thirty-three days of the date of the original written notice. If so, the private PAGA suit cannot proceed immediately. For the next 120 days, the LWDA may investigate the alleged violation and issue any appropriate citation. If LWDA determines that no citation shall be issued, it will notify the employer and the employee, and the civil PAGA case may proceed at that point. If the LWDA issues a citation, no private PAGA case may go forward.

2. **Distribution of Penalties Collected.**

   SB 1809 changes the original distribution of penalties from the formula established in the original statute. Under the revised formula, 75% of all penalties collected under PAGA are remitted to LWDA, and 25% to the aggrieved employee.
3. Exclusion for Posting Violations and Failure to File Employment Application with Labor Commissioner.

SB 1809 prohibits any PAGA claims based on failures to post legally-required employment rights posters. It also repeals Labor Code Section 431, which previously required all private employers to file with the Labor Commissioner a copy of any employment application being used. The prohibitions on PAGA cases alleging posting violations or failures to file employment applications are expressly retroactive and apply to all on-going cases filed under the original PAGA statute.

4. Court Supervision of Penalties.

In any civil PAGA action, the court is authorized to award a lesser amount than the maximum civil penalty established by PAGA, if, in the court’s discretion, it is necessary to do so to avoid an “unjust, arbitrary, oppressive or confiscatory” penalty.

Additionally, whenever the Labor Code grants the LWDA, or any of its divisions, discretion to assess a civil penalty, a court in a PAGA civil case is authorized to exercise the same discretion. Further, the Superior Court must review and approve any penalties sought as part of a proposed settlement of a civil PAGA case.

5. “Cure” Provision

The statute creates a provision by which an employer may “cure” various Labor Code violations. However, as to all of the most common Labor Code violations, the “cure” provision does not insulate the employer from liability for penalties under PAGA if a violation occurred prior to the cure.

Practical Effect: While ameliorating some of the more extreme aspects of PAGA, SB 1809 leaves the essential statutory penalty scheme intact. It eliminates PAGA cases based on posting violations or violations of Labor Code Section 431 (failure to file employment applications with the Labor Commissioner). However, the “administrative exhaustion” requirement in practice will not screen out any significant number of PAGA cases. Experience so far indicates the DLSE will simply decline to investigate any alleged violation where a private attorney may bring a PAGA case. The “cure” provisions are of little assistance to employers because they exclude all of the most significant and most common Labor Code violations. The employer, of course, will want to cure any violation in order to insure future compliance and avoid further penalties. Even if the LWDA investigates the matter and decides not to proceed, a private PAGA claim may be brought anyway.

The provision granting the courts discretion to reduce PAGA penalties from the statutory maximum is helpful, although substantial penalties still may be awarded in many cases.

The new allocation in disbursement of PAGA penalties creates a perverse incentive for the LWDA not to intervene. If the LWDA investigates the claim, issues a citation and recovers penalties from the employer, it receives none of those monies. Conversely, if the LWDA simply declines to investigate at all, and a private attorney recovers penalties, LWDA receives 75% of the penalties.
There are many unanswered issues involving PAGA, as amended. For example, there will be constitutional challenges that the statute deprives employers of due process (for example, even Labor Code violations which cause no economic harm can result in large penalty assessments). Also, the definition of “aggrieved employee” is uncertain. Whether the original PAGA statute is retroactive remains an unresolved issue.

For a further discussion of SB 1809, see Pillsbury Winthrop LLP Client Bulletin on the subject, attached as Item 4.
D. **Summary of Assembly Bill 2208 (Health Insurance Coverage for Domestic Partners)**

**Effective Date:** January 1, 2005

**Summary:** Requires that all health care service plans and health insurers provide coverage to registered domestic partners of an employee that is equal to the coverage provided to the spouses of employees. Applies to all forms of insurance regulated by the Department of Insurance and to all policies issued, amended, delivered or renewed after January 1, 2005. While nominally an amendment to the Insurance Code, in practice this statute will force many private employers either to provide domestic partner coverage under their health plans (if spousal coverage is provided); or to drop spousal coverage; or to self-insure. NOTE: whether this statute is preempted by the Employee Retirement Income Security Act of 1974 is an unresolved issue.

**Application:** Applies to all health care service plans and health insurers issuing policies of insurance in California.

**Substantive Provisions:** Requires that every policy of insurance issued, amended, delivered or renewed in California shall provide coverage for the registered domestic partner of an insured or policy holder that is equal to, and subject to the same terms and conditions, as coverage provided to a spouse of an insured or policy holder.

**Practical Effect:** AB 2208 does not on its face require or mandate domestic partner coverage be provided by employers. However, it has the practical effect in many cases of doing so. Many private sector employers provide health coverage through insured plans or HMOs, both of which are regulated by this statute. Under AB 2208, an insurance company could not lawfully sell to an employer a group health care service plan, or any other form of insurance, which provides spousal coverage but fails to provide identical coverage for registered domestic partners.

If the statute is not preempted by ERISA, employers who have insured health plans will have three choices: (1) provide no spousal coverage; (2) provide both spousal and domestic partner coverage on equal terms; or (3) adopt a self-insured plan (which is not regulated by AB 2208).

A separate provision of this statute provides that insurers and health care service plans may require domestic partners to verify their status as registered domestic partners only if the plan or insurer also requires similar verification from spouses prior to granting spousal coverage.

See also discussion of AB 205, infra.
E. **Summary of Senate Bill 1618 (Truncated Social Security Numbers)**

**Effective Date:** January 1, 2005

**Summary:** Requires that, by January 1, 2008, an employer’s itemized statement of wages would include only the last four digits of the employee’s Social Security number or an existing employee identification number other than a Social Security number. This would change the current requirement in Labor Code Section 226(a) that the complete Social Security number be included on the itemized wage statement.

**Application:** All private employers.

**Substantive Provisions:** Changes Labor Code Section 226(a) to provide that, by January 1, 2008, only the last four digits of an employee’s Social Security number be shown on the employee’s itemized wage statement. An employer may also use “an existing employee identification number other than a Social Security number” to be shown on the itemized wage statement. There is no penalty for an employer to use the truncated version of the Social Security number (i.e. the last four digits) after January 1, 2006 and before January 1, 2008.

**Practical Effect:** No substantial practical effect other than employers must begin using the truncated Social Security number by January 1, 2008, or use an employee identification number other than a Social Security number.
F. **Summary of Proposition 64 (Revisions To Unfair Competition Law, Business & Professions Code Section 17200)**

**Effective Date:** November 3, 2004

**Summary:** Limits “representative” and other actions under Business & Professions Code so that the plaintiff must have suffered an injury in fact, and “representative” actions must be certified as class actions in order to obtain relief for plaintiffs who are not actually parties to the case. Any actions brought on behalf of the general public may be brought only by the Attorney General or by local officials having authority to do so.

**Application:** Theoretically, all private sector employers could be effected by Proposition 64.

**Substantive Provisions:** Makes the following changes to California’s Unfair Competition Law (Business & Professions Code Section 17200).

- A plaintiff cannot sue under the UCL unless the plaintiff “has suffered injury in fact and has lost money or property as a result of the violation.”

- “Representative actions” (actions brought purportedly on behalf of the general public or a class of persons) must be certified as class actions and must meet the criteria for certified class actions in California.

- Actions brought on behalf of the general public may be brought only by the Attorney General or by local officials having authority to do so (such as district attorneys or city attorneys).

Prior to Proposition 64, the plaintiff in a UCL case did not have to prove he or she suffered any injury. Private, for-profit corporations had been established for the purposes of suing employers for Labor Code or other violations. Additionally, prior to Proposition 64, “representative actions” could be brought essentially by any person, purporting to represent the public, and were not subject to the procedural restrictions of class actions. Many attorneys added UCL claims to Labor Code or wage/hour class actions because Business & Professions Code Section 17200 contains a longer statute of limitations (four years) than applies to Labor Code violations (three years).

**Practical Effect:** Proposition 64 will stop the most flagrant abuses of the UCL. It now requires that a plaintiff has “standing” (“has suffered injury in fact”). It means that “strangers” (e.g., persons who were never employees) cannot sue employers for purported Labor Code or other violations. Because it limits UCL cases to individual cases or bona fide class actions, the amorphous “representative” action is no longer available.

Proposition 64 leaves many questions unanswered. The primary whether it will apply to cases currently being litigated but which have not yet been resolved. There is a strong legal argument that Proposition 64 will apply to all cases in the court system which have not yet been resolved. If so, it would require the dismissal or restructuring of many existing cases. Additionally, some commentators believe that Proposition 64 impliedly repeals the case law which authorized Labor
Code claims to proceed under the UCL, as employees who have overtime claims have not suffered a “competitive” injury.
G. **Summary of American Jobs Creation Act of 2004, Section 708**

**Effective Date:** Applies to judgments and settlements occurring after October 22, 2004

**Summary:** This federal statute creates a tax deduction for attorneys’ fees received by individuals who obtain a judgment or settle a lawsuit involving “unlawful discrimination.” The statute resolves uncertainty whether, when a plaintiff receives an award of attorneys’ fees in an employment case, the attorneys’ fees are taxable only to the attorney receiving them, or to the plaintiff, or both. Under the new federal statute, the plaintiff who receives the attorneys’ fees may deduct the fees as an “above-the-line deduction” (not subject to the restrictive rules regarding “miscellaneous, itemized deductions”). The net result of this statute is that plaintiffs will receive greater economic benefit from many settlements or judgments, due to the tax deduction for attorneys’ fees awards. This will permit settlements in some cases for lower amounts, given the tax-favored treatment of attorneys’ fees awards.

One unresolved issue is the definition a claim for “unlawful discrimination.” It is not clear whether all state law employment claims are covered by the federal statute, although the definition in the statute is quite broad.

**Application:** All employers who settle or pay judgments in employment claims for “unlawful discrimination” as defined in the statute.

**Substantive Provisions:** Attorneys’ fees received for a claim in “unlawful discrimination” are deductible to the employee/former employee as an above-the-line deduction (i.e., not subject to Schedule A limitations for miscellaneous itemized deductions). This means that the full amount of attorneys’ fees is excludable from the recipient’s gross income.

Claims for “unlawful discrimination” include a long list of state and federal employment – protection statutes, including the National Labor Relations Act; the Fair Labor Standards Act; Title Seven of the Civil Rights Act of 1964; the Worker Adjustment and Retraining Notification Act; the Family and Medical Leave Act; the Americans with Disabilities Act; the Age Discrimination in Employment Act; any federal “whistle-blower” statute, or “any provision of federal, state or local law, or common law claims permitted under federal, state or local law providing for the enforcement of civil rights or regulating any aspect of the employment relationship . . .” Most commentators believe that this provision means that attorneys’ fee awards will be excludable from the income of the recipient in almost any employment case which is settled, or in which a judgment is paid, after October 22, 2004.

This statute does not apply to cases in which the judgment or settlement was paid before the date of enactment. The United States Supreme Court has before it a case which will probably resolve the issue of “double taxation” of legal fee awards where the amount was paid prior to the enactment of the American Jobs Creation Act. Note, also, that this new statute does not apply to legal fee awards in cases which are not employment-based.

**Practical Effect:** Because of the exclusion from income for the employee who receives an attorney fee award, this new statute will in practice make settlements of employment cases slightly less expensive. The employee no longer needs to worry about being taxed on the amount received as attorneys’ fees. Employers and their counsel will wish to structure
employment litigation settlements to take advantage of the favorable tax treatment and reduce the amount of the settlement accordingly.
H. **Summary of Senate Bill 1661 (Paid Family Leave)**

**Effective Date:** Payroll deductions from employees’ paychecks begin January 1, 2004. Eligible employees may take paid family leave beginning July 1, 2004.

**Summary:** Creates Paid Family Leave (“PFL”) program which will enable eligible employees to take up to six weeks paid time off for (1) birth, adoption or placement in foster care of a child of the employee, or child of the employee’s spouse or domestic partner; and (2) to care for a sick child of the employee, of the employee’s spouse or domestic partner; or (3) to care for a sick spouse or domestic partner or the employee’s sick parent.

This program will initially be funded by contributions from employee paychecks. Employees will be eligible to receive up to 55% of their wages, not to exceed a statutory cap (estimated to be about $720 per week).

**Application:** Applies to all employers covered by the State Disability Insurance Program (basically, all private sector employers).

Unlike the Family Medical Leave Act (FMLA), no minimum length of employment requirement. No minimum number of hours per year for employee eligibility.

All employer facilities are covered regardless of size of facility, as long as the employer is covered by the State Disability Insurance Program.

**Substantive Provisions:** See discussion at Section XV, infra, re new EDD Regulations regarding Paid Family Leave. See also Pillsbury Winthrop LLP Client Bulletin on PFL, attached as Item 5.

PFL leave can be taken for (1) the birth of a child or adoption or placement in foster care of a child of the employee, child of the employee’s spouse or domestic partner; (2) to care for a sick spouse or domestic partner or parent of the employee; or (3) to care for the sick child of the employee or of the employee’s spouse or domestic partner.

Beginning January 1, 2004, employees will start paying for these benefits with contributions from wages, estimated at approximately $50 per year for the average worker. Benefits will be payable beginning July 1, 2004, up to 55% of the employee’s wages, to a maximum estimated to be between $720 to $730 in 2004.

An eligible employee must present medical certification establishing a serious health condition of a family member that “warrants the participation of the employee.”

If the participation of the employee is needed for “providing psychological comfort and arranging ‘third party’ care for the child, parent, spouse or domestic partner, as well as directly providing or participating in the medical care,” the employee is eligible.

There is no mandatory reinstatement right under this statute, unlike the FMLA and California Family Rights Act (CFRA).
Individuals who are eligible for FMLA or CFRA leave must take PFL leave concurrently with FMLA/CFRA leave.

There is a one-week “waiting period” before a worker can apply for the program. Presumably, the worker could use Labor Code Section 233 (the “Kin Care Statute”) to take paid sick leave during the one-week period, if the employee has accrued sick leave available.

An employer may require employees, prior to using PFL, to use up to two full weeks of accrued vacation. This requirement could also be used to provide paid leave (vacation) for the seven-day waiting period.

**Practical Effect:** The bill is not well-coordinated with the FMLA/CFRA or with Labor Code Section 233. A recently enacted statute, SB 727, made technical changes to the original PFL statute (SB 1661) but still did not attempt to coordinate PLA with the CFRA. An employee is eligible for PFL regardless of his or her eligibility for the FMLA/CFRA.

This bill may encourage additional absenteeism since it will provide a paid benefit for a wide variety of events or conditions.

Employers should adopt policies requiring the employee to use up to two weeks of vacation prior for applying for PFL. Employers probably will wish to use the mandatory vacation requirement to provide pay for the one-week waiting period.

Many commentators believe that the employee-funded feature will fail and that ultimately, employer contributions will be required. Some analyses indicate that the current funding scheme requires 83 employees to continue to work for each employee who is on PFL leave.

There is no mandatory reinstatement or return to work provision. Technically, PFL is a wage-replacement statute. It does not, unlike FMLA, create a leave entitlement. Also, employers should review their past practice with respect to employees who have taken leave for conditions covered by state disability insurance, but were not FMLA-eligible.

An employee may take this leave if necessary, among other things, to provide “psychological comfort” to a child, parent, spouse or domestic partner. This provision is not currently in the FMLA or CFRA eligibility factors.

There is no provision for intermittent PFL leave. FMLA/CFRA-eligible employees clearly may take intermittent leave under appropriate circumstances.
I. **Summary of Senate Bill 727 (Technical Changes to the Family Temporary Disability Insurance Program)**

**Effective Date:** January 1, 2004.

**Summary:** Changes the name of the “Family Temporary Disability Insurance” (FTDI) compensation program passed in 2002 (SB 1661) to “Paid Family Leave” (PFL) and makes other “conforming and clarifying changes” to the various portions of SB 1661.

**Application:** Same scope as the State Disability Insurance (SDI) program. All employers and employees covered by SDI are also covered by the PFL.

**Substantive Provisions:** Clarifies that an individual is eligible to receive family temporary disability insurance benefits equal to one-seventh of the weekly benefit amount for each full day he or she is unable to work.

Defines the disability benefit period as beginning with the first day a valid claim for family temporary disability insurance benefits is established. Periods of family care leave for the same care recipient are to be considered one disability benefit period, as are periods of disability for pregnancy and periods of family care leave for bonding associated with the birth of that child.

Clarifies that an individual is not eligible for family temporary disability insurance benefits if another family member is ready, willing, able and available to provide the required care for the same period of time.

Requires an individual entitled to leave under the FMLA and CFRA to take PFL concurrently. An employer may also require an employee to take up to two weeks of vacation time prior to the initial receipt of family temporary disability insurance benefits. One week of such vacation time will be applied to the otherwise unpaid seven day waiting period.

Authorizes the Director of the Employment Development Department to request additional medical evidence to supplement the claim for family temporary disability insurance benefits, and to require the care recipient to submit to reasonable examinations. Requires an individual to establish eligibility for family temporary disability insurance benefits by filing a claim supported by the certificate of a treating physician or practitioner.

States that medical records obtained for the filing, determination and payment of family temporary disability insurance benefits will be treated as confidential, and the identity of the claimant and family member will not be disclosed, except as necessary or otherwise provided by law.

**Practical Effect:** The Paid Family Leave program will take effect on January 1, 2004, with employers required to provide notice of the program and start deducting from employees’ paychecks on that date. Claims will be payable for benefit periods that begin on or after July 1, 2004. SB 727 mainly clarifies certain provisions of last year’s SB 1661, to deter the likelihood of fraud and abuse.
SB 727 defines the benefit period for purposes of the PFL. Because the periods of leave for the care of the same family member are considered one benefit period, a claimant would not need to fulfill the seven day unpaid waiting period for eligibility when it is necessary to take leave at different times to care for that family member.
J. Summary of Senate Bill 777 (Expanded Whistleblower Protection, Hotline & Posting)

**Effective date:** January 1, 2004.

**Summary:** Extends current whistleblower protection to employees who report a violation of state or federal law, or who refuse to participate in an activity that would result in a violation of or noncompliance with state or federal law or regulation. Prohibits retaliation against an employer for exercising these right, adds an additional civil penalty for violations and places the evidentiary burden on employers. Requires an employer to post a list of employee’s rights under the whistleblower laws.

**Application:** All employers.

**Substantive Provisions:** Amends Labor Code Section 1102.5 to prohibit an employer from:

(a) Adopting a policy that prevents an employee from disclosing to a government or law enforcement agency information which the employee has reasonable cause to believe is a violation or noncompliance with state or federal law;

(b) Retaliating against an employee for disclosing such information to a government or law enforcement agency;

(c) Retaliating against an employee for refusing to participate in an activity that would result in a violation or noncompliance with state or federal law; and

(d) Retaliating against an employee for exercising rights under (a), (b) or (c) at a current or former job.

These prohibitions do not apply to employer’s policies or actions with respect to employees who violate the confidentiality of the lawyer-client privilege, the physician-patient privilege, or trade secret information.

In addition, the Attorney General must establish a telephone “hot line” to “encourage employees to notify an appropriate government or law enforcement agency when they have reason to believe their employer is violating laws enacted for the protection of corporate shareholders, investors, employees and the general public.”

Provides for civil penalties not exceeding $10,000 for each violation of Labor Code Section 1102.5 for employers which are corporations or limited liability companies.

In a civil action commenced under Labor Code Section 1102.5, once an employee has demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer has the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.
Requires employers to prominently display a list of employee’s rights and responsibilities under the whistleblower laws, including the Attorney General’s “hot line” telephone number. No such poster has yet been promulgated by any state agency.

A sample notice is attached to this paper as “Attachment A.”

**Practical Effect:** Posting requirement puts the burden of creating whistleblower “rights and responsibilities” poster on employer, because this bill does not oblige any state agency to create a posting. Burden of proof allegation makes it harder for employers to defend lawful terminations.
K. **Summary of Assembly Bill 205 (Domestic Partner Rights)**

**Effective Date:** January 1, 2005.

**Summary:** Grants registered domestic partners virtually all of the same rights and responsibilities, under the law, afforded to spouses.

**Application:** All employers.

**Substantive Provisions:** Grants registered domestic partners the same legal rights and protections, as well as the same responsibilities, obligations and duties, that are imposed on spouses, whether those rights and duties are derived from statute, administrative regulations, court rules, government policies, common law, or other sources of law.

Former registered domestic partners are treated as former spouses, surviving registered domestic partners are treated as widows or widowers, and the rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses.

Does not affect the benefits, protections or responsibilities covered under federal law.

**Practical Effect:** Affects employer policies mandated by California law. Effective January 1, 2005, employers must provide to registered domestic partners any benefit required by law to be provided to an employee’s spouse.

Under existing California law, “kid care” sick leave usage already applies to domestic partners and the children of domestic partners: if sick leave is provided, employees must be permitted to use one-half of their annual sick leave entitlement to care for an ill spouse, child, parent, or domestic partner. This bill grants domestic partners extended unpaid leave under the California Family Rights Act (CFRA). Under the CFRA, beginning January 1, 2005, employers with 50 or more employees must provide employees with up to 12 unpaid work weeks each year to allow them to care for a domestic partner with a serious health condition. Covered employers should revise their policies by January 1, 2005, to make it clear that domestic partners are allowed to take leave under the CFRA.
I. **Summary of Assembly Bill 17 (Domestic Partners – Discrimination in Benefits)**

**Effective Date:** Applies to contracts entered into or amended, or bid packages advertised to the public or received by the state, on or after January 1, 2007.

If a contract executed or amended prior to January 1, 2007 and extends beyond January 1, 2008, this section applies to the contract on January 1, 2008.

**Summary:** Prohibits state agencies from entering into contracts for $100,000 or more if the business discriminates, in the provision of benefits, between employees with spouses and employees with registered domestic partners.

**Application:** State agencies and employers who contract with the state.

**Substantive Provisions:** Prohibits state agencies from entering into contracts for $100,000 or more for the acquisition of goods or services if the business discriminates, in the provision of benefits, between employees with spouses and employees with domestic partners, or between domestic partners and spouses.

The requirements of this section may be waived if:

- There is only one contractor willing to enter into a specific contract with the state.
- The contract is necessary to respond to an emergency or necessary for the provision of essential services.
- The terms of section are inconsistent with the conditions of a grant and a good faith attempt has been made to change the conditions of the grant to comply with this section.
- The contractor is providing or transmitting wholesale or bulk water, power, natural gas. The exemption does not apply to contractors providing direct retail services to end users.

A contractor does not violate the section if it provides the same benefits to individuals that are provided to employees’ spouses, provides benefits on a basis unrelated to an employee’s marital or domestic partnership status, or does not provide benefits to employee’s spouses or domestic partners.

For contracts entered into or amended, or bid packages advertised to the public or received by the state, between July 1, 2004 and December 31, 2006, unless otherwise subject to this section (i.e., the contract extends beyond January 1, 2008), a contractor may require the employee to pay the costs of providing the additional benefits if the employee elects to take the additional benefits.

**Practical Effect:** Will prevent businesses from contracting with the state unless domestic partner benefits equal spouse benefits. May decrease or eliminate benefits provided to spouses and domestic partners since the only requirement is that they be equal.
M. **Summary of Senate Bill 796 (Labor Code Private Attorneys General Act of 2004)**

**Effective Date:** January 1, 2004.

**Summary:** Allows employees and former employees to bring a private civil actions against employers for violations of the Labor Code that were formerly only available to Labor Workforce Development Agency, and to recover attorneys’ fees if they prevail. Creates new civil monetary penalties for violations of the Labor Code which were previously only misdemeanor criminal charges.

**Application:** Applies to all employers regulated by the Labor Code.

**Substantive Provisions:** Note: PAGA was amended by SB 1809, effective August 11, 2004. See Summary at Section I.C, supra. Allows employees and former employees to bring private civil actions to recover monetary penalties for violations of the Labor Code and attorneys’ fees.

For each Labor Code provision which currently does not have a monetary penalty, establishes a $100 penalty for the first violation, $200 for each subsequent violation of each such provision, and $500 per violation if, at the time of the alleged violations, the employer has no employees.

**Practical Effect:** Encourages plaintiff’s attorneys to bring actions for even the most trivial violation of the Labor Code, because they are entitled to recovery attorneys’ fees if they prevail. Encourages class action lawsuits by providing that “[a]n aggrieved employee may recover the civil penalty described in subdivision (e) in a civil action filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed.” There are many unresolved issues regarding this statute, and many commentators believe it may be unconstitutional in some respects. There is no doubt, though, that it will generate additional litigation against employers.

**Retroactivity:**

The general rule is that a new law will not be applied retroactively absent a clear expression of this intent by the Legislature. Notwithstanding this general rule, courts have allowed a new law to be applied to pending litigation if the law is determined to be “procedural” in nature -- i.e. it does not substantively change the legal effect of past conduct. Because the bill does not indicate any legislative intent regarding retroactivity, plaintiff’s attorneys will argue that the bill is merely a procedural change, and not substantive, and that they should be allowed to amend their pending complaints to seek these additional penalties and attorneys’ fees.
N.  **Summary of Assembly Bill 76 (Employer Liability for Sexual harassment by Non-Employees)**

**Effective Date:** January 1, 2004.

**Summary:** Overturns Salazar v. Diversified Paratransit, Inc., 103 Cal. App. 4th 131 (2002), review granted, 130 Cal. Rptr. 2d 656, and makes employers liable under the Fair Employment and Housing Act (FEHA) for sexual harassment of employees committed by non-employees.

**Application:** All employers. Religious associations and religious non-profit corporations are exempt.

**Substantive Provisions:** Makes employers liable for sexual harassment not just by managers and co-workers, but also by third parties such as clients or customers, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

States that the extent of an employer’s control and any other legal responsibility an employer may have with respect to the conduct of the non-employees shall be taken into consideration.

Defines harassment because of sex as sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

**Practical Effect:** AB 76 brings California law into line with federal law and the Equal Employment Opportunity Commission (EEOC) guidelines on the issue of employer liability for third-party sexual harassment of employees.

Employers could now find it difficult to avoid joint-employer status with respect to out-sourced operations, since employers face liability for the sexual harassment of contract workers and will want to make sure that the contractor’s employees are aware of the employer’s sexual harassment policies and have procedures for reporting harassment.

Because the language of AB 76 is limited to harassment on the basis of sex, gender, pregnancy, childbirth or other related characteristics, employers would presumably not be liable for third-party harassment of employees that is based on other protected characteristics, such as age, race, disability, sexual orientation, etc.
O. **Summary of Assembly Bill 223 (Attorneys’ Fees in Labor Commissioner Appeals Cases)**

**Effective Date:** January 1, 2004.

**Summary:** Amends Section 98.2 of the Labor Code to state that an employee will be considered successful on appeal of a wage claim award from the Labor Commissioner as long as the employee recovers an amount greater than zero.

**Application:** All employers and employees.

**Substantive Provisions:** If a party appeals the decision of the Labor Commissioner in a wage claim action, and is unsuccessful in the appeal, the court must assess costs and reasonable attorneys’ fees against the party who filed the appeal. This statute overturned Smith v. Rae-Venter Law Group, 29 Cal. 4th 345 (2002), which held that an appealing party is unsuccessful within the meaning of the statute unless the court judgment is more favorable to the appealing party than the Labor Commissioner’s award. It restored the holdings of two cases in Smith-Cardenas v. Mission Industries, 226 Cal. App. 3d 952 (1991), disapproved of by Smith v. Rae-Venter, 29 Cal. 4th 345 (2002) and Triad Data Services, Inc. v. Jackson, 153 Cal. App. 3d Supp. 1 (1984), disapproved of by Smith v. Rae-Venter, 29 Cal. 4th 345 (2002). Cardenas and Triad held that the fee-shifting provision of the statute applied only when the trial court’s judgment completely eliminates the Labor Commissioner’s award. An employee will be considered successful in the appeal so long as the court awards the employee an amount greater than zero.

**Practical Effect:** AB 223 will require employers who appeal the Labor Commissioner’s award and have it reduced, but not completely eliminated, to pay the reasonable attorneys’ fees and costs of the employee. This is because an employee is considered “successful” in the appeal (and presumably, an employer unsuccessful) so long as the employee recovers an amount greater than zero. Thus, even if the employer succeeds in having the award reduced substantially on appeal, the employer will be, by definition “unsuccessful” under the statute, and will be required to pay the employee’s attorneys’ fees and costs. However, employees who appeal the Labor Commissioner’s award but do not have that award increased on appeal by the court, will be able to avoid paying the costs and reasonable attorneys’ fees of the employer. Therefore, employers face a greater deterrent in appealing what they feel to be an unjust award. Conversely, employees have an incentive to file even frivolous appeals. They will not be at risk to pay the employer’s costs and attorneys’ fees, so long as they recover an amount greater than zero.
P. Summary of Assembly Bill 196 (Gender Discrimination)

Effective Date: January 1, 2004.

Summary: Prohibits discrimination or harassment based on gender perception or identity.

Application: Employers with five or more employees. Exception for religious associations and religious not-for-profit corporations.

Substantive Provisions: Prohibits an employer from discriminating against or harassing an employee based on gender identity or perception by including gender in the definition of sex.

Gender discrimination occurs when an employee is treated inappropriately because of their actual sex, the employer’s perception of their sex, or because the person identifies, looks or behaves differently from what an employer considers to be “traditionally associated with the employee’s sex at birth.”

Does not affect employer’s ability to enact grooming and dress standards, provided that the employer allows an employee to appear or dress consistently with the employee’s gender identity.

Practical Effect: Primarily intended to prevent discrimination or harassment of transgender and cross-dressing employees, but can also apply to discrimination against women perceived as too masculine or men perceived as too feminine.

Employers should revise dress and grooming codes to allow employees to dress consistently with their gender identity.
Q. Summary of Civil Code Section 1798.82/Senate Bill 1386 (Privacy in Personal Information)

Effective Date: July 1, 2003.

Summary: Requires entities who own or license computerized data that includes personal information to notify any California resident whose unencrypted personal information was or is reasonably believed to have been acquired by an unauthorized person.

Application: All state agencies, and persons and entities who do business in the state of California who own or license computerized data that includes personal information. This includes employers who have such data.

Substantive Provisions: The notice obligation under this statute is triggered when the entity discovers or is notified of a breach of a security system.

A “breach of a security system” is defined as unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the entity. The good faith acquisition of personal information by an employee or agent of the business for the purposes of the business is not a security breach, provided that the employee or agent does not use or make further unauthorized disclosure of such information.

“Personal information” is defined as an individual’s first name or first initial and last name in combination with one or more of the following “data elements,” when either the name or the data elements are not encrypted:

- Social security number;
- Driver’s license number or California identification card number; or
- Account number, credit or debit card number, in combination with any required security code, access code or password that would permit access to an individual’s financial account.

The statute excludes encrypted data from the definition, but does not define “encrypted” or describe what level of encryption is sufficient to avoid triggering of the notice requirements.

Requires that the entity give notice of the security breach in the most expedient time possible without unreasonable delay, but allows for a delay if a law enforcement agency determines that the notification will impede a criminal investigation or if additional measures are necessary to determine the scope of the breach and restore reasonable integrity to the data system.

Notice must be given in one of the specified manners: written notice, electronic notice that complies with federal law, or substitute notice. Substitute notice, consisting of email, website, and media notice, is only permitted if the entity demonstrates that certain conditions exist.
Any “customer” who is injured by a violation of this statute may sue for damages and injunctive relief to stop the violation. The statute does not specify whether “customers” permitted to file a civil lawsuit includes non-customer employees whose personal information is disclosed.

**Practical Effect:** Requires employers who store “personal information” in unencrypted form in company databases to identify security breaches quickly and to generally give any notice of a security breach as soon as possible. Employers that have any agreements with vendors or licensees who maintain databases with “personal information” in unencrypted form should review such agreements and ensure that they require the vendors to notify the employer immediately of any unauthorized access.

Employers should review their existing data security policies to determine whether they require notice to employees who may be affected by unauthorized access to any unencrypted “personal information.” If so, the employer should ensure that the notice requirement is compliant with the timing provisions of this statute; if not, the employer should consider designing its own notice policy that complies with the statute.
R. **Vetoed Legislation**

Governor Schwarzenegger in 2004 vetoed the following significant employment-related bills:

**SB 1841** – Electronic Monitoring. This bill would have required an employer to provide pre-monitoring notice to employees. This is the third monitoring bill passed by the Legislature (the first two were vetoed by Governor Davis).

**AB 2317** – Gender Pay Equity. Would have expanded penalties for pay differences for the same or equivalent jobs, if the difference is based on gender. Existing law already provides extensive protections.

**AB 3018** – Meals/Breaks. This bill would have resolved whether the one-hour penalty for failing to provide a meal or break period is a “penalty” (and therefore subject to the one-year statute of limitations) or “premium pay” (and therefore subject to a three-year statute of limitations). This issue is currently being litigated in numerous class actions throughout the state. The potential impact on employers is enormous if a three-year statute of limitations is used. The LWDA is expected to issue regulations on the subject within the next year.

**SB 1538** – Meal and Rest Periods. This bill would have applied to piece-rate workers and was intended to compel piece-rate workers to take meal periods and breaks (employees who work on piece rate have an incentive to delay or forego meals and breaks). One in a series of anti-piece rate bills that have been advocated by organized labor.

**AB 2832** – Minimum Wage. Perhaps Governor Schwarzenegger’s most controversial veto. This bill would have raised the state minimum wage to make it the highest in the nation ($7.25 in July 2005 and $7.75 as of July 2006). The Governor’s veto message included the following:

> In recent years, the high cost of doing business in California has driven away jobs, business and opportunity. We have launched California’s recovery by making our state a more attractive place to do business, so that employers will stay in our state, expand in our state and create more jobs. Now is not the time to create barriers to our economic recovery or reverse the momentum we have generated….

**AB 2545** – Access to Exits. Would have imposed civil penalties for what are essentially OSHA violations. There are already existing protections for violation of workplace safety laws.

**AB 3021** – Payroll Reports. California already has extensive and complex recordkeeping and payroll requirements. This bill would have required the employer to report employment data annually to the EDD including the number of residents employed in California and the number of employees employed outside of California and internationally. This information would have then become public record and available to labor unions, plaintiffs’ attorneys or others.

**SB 1499** – Check Cashing Fees. According to the Governor’s veto message, this bill was targeted at one employer that offered, but did not require, its employees an option to cash their paychecks for a nominal fee. Current Labor Code rules prohibit an employer from charging an employee a fee to cash a paycheck.
II.

EIGHT IMPORTANT EMPLOYMENT CASES
PENDING BEFORE THE CALIFORNIA SUPREME COURT.

As of early January, 2005, the California Supreme Court is considering at least eight important employment cases. Several of these decisions are expected within the next few months, and most should be issued within the next 12 months. They are:


A potentially important case, which will decide whether, and under what circumstances, officers or directors of a corporate employer can be personally liable for allegedly unpaid wages on overtime pay. The question presented is the definition of “employer” in the Industrial Welfare Commission Orders. The Court of Appeal ruled that individual officers and directors are not liable under the facts of the case. This case could have significant implications for individual executives of struggling companies.

(b) Mackey v. Department of Corrections, 105 Cal. App. 4th 945 (2003), review granted, 133 Cal. Rptr. 2d 323.

This case addresses whether a supervisor’s preferential treatment or favoritism of an employee with whom he was sexually involved constituted sex discrimination against employees who were not asked or requested to provide sexual favors.

(c) Yanowitz v. L’Oreal USA, 106 Cal. App. 4th 1036 (2003), review granted, 135 Cal. Rptr. 2d 62.

The Court will be asked to define what constitutes an “adverse employment action” for purposes of a claim of discrimination or retaliation under the Fair Employment and Housing Act. There has been extensive litigation regarding this issue in both state and federal courts throughout the country.


This widely publicized case involved an employee on the Friends television show who claimed she was subjected to a hostile environment due to the pervasive discussion of sex and sexual matters in her workplace. The question before the Court is whether sexual coarse or vulgar language can constitute “harassment” and whether, under the circumstances, there is a First Amendment defense for media, entertainment or similar employers.


This potentially important case involves the employer’s duty to provide an employee with a workers’ compensation claim form, once the employer has knowledge of facts suggesting a work-related injury may have occurred, pursuant to Labor Code Section 5401. Under Labor
Code Section 5402, if the employer fails to comply with the statutory duty to provide the claim form, the 90-day period in which the employer must either acknowledge or deny the claim, in order to avoid a presumption that the claim is compensable, may begin to run. This case will resolve whether the 90-day period to acknowledge or deny the claim begins to run at the time the claim form should have been provided or not until the employee actually returns the completed form.


The California Supreme Court will address whether the employer’s manner of calculating bonuses (deducting amounts for workers’ compensation expenses, cash and merchandise shortages, tort claims and other losses beyond the employee’s control) violates California Labor Code Section 221, and 3751.

(g) Varian Medical Systems, Inc. v. Delfino, 113 Cal. App. 4th 273 (2003), review granted, 10 Cal. Rptr. 3d 536.

Defendants were found liable for maliciously libeling the company and managers in an Internet chat room. The Supreme Court will analyze whether use of an Internet chat room changes the defamation analysis.


Marvell Semiconductor, Inc. and Jasmine Networks, Inc. were competitors in the business of designing and manufacturing telecommunications chips. Marvell offered to buy some of Jasmine’s technology, along with some of its engineers, and Jasmine accepted after negotiating a nondisclosure agreement preventing Marvell from obtaining Jasmine’s trade secrets or employees without paying for them. During the course of the parties’ negotiations, several of Marvell’s officers and lawyers inadvertently failed to hang up their speakerphone after leaving a message on Jasmine’s voicemail system – and proceeded to be recorded discussing their plan to steal Jasmine’s trade secrets and hire away its key employees. In response, Jasmine filed suit against Marvell, alleging misappropriation of its trade secrets. Marvell then filed a motion for a preliminary injunction, enjoining Jasmine from disclosing, disseminating or referring to the contents of the inadvertently record conversation on the grounds of attorney-client privilege. The Court of Appeal held that the conversation in which the corporation’s general counsel and the corporate officers openly discussed theft of another company’s trade secret and the potential consequence of jail for the conduct fell within crime/fraud exception to attorney-client privilege.

(i) Other Employment Cases.

The California Supreme Court also has before it several additional cases which involve the rights of public sector employees, and will not be described further here.
III.

EMPLOYMENT DISCRIMINATION

A. Discrimination/Retaliation/Harassment – General and Procedural Issues

1. “Mixed-Motive” versus “Pretext” Cases: Burden of Proof


This U.S. Supreme Court decision will likely make it more difficult for defendant employers to prevail on pretrial motions for summary judgment, resulting in more jury trials. Employment discrimination cases usually are described as either “pretext” cases (where the employer offers a single reason for the challenged action, which the employee disputes), or “mixed-motive” cases (where there is evidence of two or more reasons, one of which is unlawful discrimination). This important case may in practice reduce the difference between pretext and mixed-motive cases, and arguably lowers plaintiffs’ burden in mixed-motive cases. Plaintiffs can prove discrimination claims in mixed-motive cases by circumstantial evidence. Plaintiffs are not required to present direct evidence of discrimination in order to obtain the burden-shifting mixed-motive instruction. Thus, in mixed-motive cases, a plaintiff need only show by a preponderance of either direct or circumstantial evidence that race, color, religion, sex, or national origin was a motivating factor for any challenged employment practice.

**Stegall v. Citadel Broadcasting Co.**, 350 F.3d 1061 (9th Cir. 2004)

This is one of the Ninth Circuit’s first opinions addressing the “mixed-motive versus pretext” issue in the wake of the Supreme Court’s decision in **Desert Palace v. Costa**, supra. The opinion contains a fair amount of discussion that can (and will) be used by both employer and employee advocates. The Ninth Circuit reversed a summary judgment on a former employee’s retaliatory claim under Title VII, finding that the employee proffered enough specific circumstantial evidence to show that the employer’s reasons for terminating her were retaliatory. Analyzed as either a mixed motive or pretext case, the employee’s circumstantial evidence (timing of termination, evidence of tumultuous relationship with a fellow employee who may have played a role in her termination, “overhaul” of company which only resulted in firing two women who complained of gender discrimination) raised a triable issue of fact, because it could demonstrate that a discriminatory reason was a motivating factor for the retaliation or that the company’s reason for firing her was unworthy of credence. The Ninth Circuit emphasized that very little evidence is required to survive summary judgment on the question of pretext: when direct or circumstantial evidence consists of more than the McDonnell Douglas presumption, “a factual question almost always exists with respect to any claim of nondiscriminatory reason.”

**Ostad v. Oregon Health Sciences University**, 327 F.3d 876 (9th Cir. 2003)

In a mixed-motive case, the burden of proof will often shift to the employer. Plaintiff alleged that his termination was illegal retaliation in violation of his First Amendment right of speech. The jury returned a verdict against the defendants, who appealed.
Defendants argued that the lower court’s jury instructions misstated the burden of proof applicable to mixed-motive employment claims. The Ninth Circuit concluded that the jury instruction defining “substantial or motivating factor” as a “significant factor” did not misstate the law. Accordingly, once an employee proves that retaliation was a substantial or significant factor in the adverse employment action, the employer must show, by a preponderance of the evidence, that it would have reached the same decision as to the adverse action even in the absence of the protected conduct.

2. **What Is An “Adverse Action”?**

**Note:** The California Supreme Court will address the issue of what constitutes an “adverse action” in *Yanowitz v. L’Oreal*, supra, at Section II.

**Coszalter v. City of Salem**, 320 F.3d 968 (9th Cir. 2003)

This case arose under the First Amendment, and the employee is a public entity; but it is instructive nevertheless. The Ninth Circuit defined an “adverse employment action” in First Amendment retaliation cases as an act that is reasonably likely to deter employees from engaging in constitutionally protected speech. To deter speech, the action need not remove a benefit, impose a burden, or be of a certain type or level of severity.

The Ninth Circuit also held time periods of three to eight months between the protected activity and the adverse action were sufficient to support an inference of retaliation. The court rejected a brightline rule about the timing of the actions which indicates that retaliation was a substantial or motivating factor. It stated that three to eight months was “easily” within the time range supporting an inference of retaliation. However, “[t]here is no set time beyond which acts cannot support an inference of retaliation, and there is no set time within which acts necessarily support an inference of retaliation.” Whether the proximity in time between the protected speech and the adverse employment action is considered proof of retaliation should be considered with regard to the factual setting.

**Hillig v. Rumsfeld**, 381 F.3d 1028 (10th Cir. 2004)

In 1995 and 1996, an employee filed two discrimination complaints against her employer, which were settled in 1996. Almost two years later, the employee applied for a job with another employer. Her supervisors provided the prospective employer with negative recommendations, and she was not hired for the position. The employee claimed that the negative recommendations constituted unlawful retaliation for her earlier discrimination complaints. The lower court subsequently granted the employer judgment as a matter of law. The Tenth Circuit Court reversed the lower court’s holding, finding that the employee had established retaliation. The court reasoned that an act by an employer which results in more than *de minimis* harm – including material harm to an employee’s future job prospects – amounts to an adverse employment action for purposes of a retaliation claim. In this case, although the prospective employer claimed that its decision to not hire the employee was *not* based on the negative recommendation, it also represented that such negative representations would have disqualified the employee.
from consideration for the position. Thus, the court found that the negative recommendations amounted to an adverse employment action.

**Stewart v. Ashcroft**, 352 F.3d 422 (D.C. Cir. 2003)

No “adverse action” where there is a lateral transfer, without any diminution in pay or benefits. However, a transfer which does result in lower pay or reduced supervisory duties will constitute an “adverse action.”

3. **Other Significant Cases**


Employee may bring FEHA harassment claim against both an employment agency and the agency’s client, where both the agency and the client exercised control over the employee and his or her working conditions.

**Cloutier v. Costco Wholesale Corp.**, 590 F.3d 126 (1st Cir. 2004)

Costco’s ban on facial jewelry did not constitute religious discrimination against a member of “The Church of Body Modification.” Nor was Costco required, as a form of reasonable accommodation, to permit an employee an exception from the ban on facial jewelry, because of her religious beliefs.

**McGinest v. GTE Serv. Corp.**, 360 F.3d 1103 (9th Cir. 2004)

The absence of documentation confirming that a company hiring freeze was in place, during the time plaintiff was not promoted, was sufficient to raise a factual dispute as to whether the employer’s asserted reason for failing to promote him was pretextual. The fact that a company the size of GTE did not have a memorandum, meeting notes or other evidence of the financial difficulties that spurred the hiring freeze provided circumstantial evidence that the hiring freeze did not exist. The court also affirmed the district court’s dismissal of plaintiff’s retaliation claim because 18 months had passed between his protected activity and the denial of the promotion (compare to Porter below). Timing alone did not establish a causal connection, and plaintiff offered no other explanation that established the causal inference necessary for his retaliation claim.

**Williams v. Admin. Review Board**, 376 F.3d 471 (5th Cir. 2004)

Employees sued under the Energy Reorganization Act (“ERA”), claiming that they were subjected to a hostile work environment in retaliation for whistle-blowing activities. As a preliminary matter, the Fifth Circuit Court found that the ERA recognizes hostile work environment claims that do not result in unfavorable personnel action. Next, the court ruled that the legal framework used in retaliatory discrimination cases also applies in the ERA context. Under this standard, the employees could not prevail on their hostile work environment claim because they failed to take advantage of remedial opportunities provided by the employer.
Porter v. Cal. Dep’t of Corr., 383 F.3d 1018 (9th Cir. 2004)

Plaintiff could pursue a retaliation claim even though 18 months elapsed between her reports of harassment and the employer’s retaliatory acts. The court found that the district court had misinterpreted Clark County School Dist. v. Breeden, 532 U.S. 268 (2001). “Mere temporal proximity” between an employer’s knowledge of protected activity and an adverse employment action is sufficient evidence of causality if the temporal proximity is very close. Although a lack of temporal proximity may make it more difficult to show retaliation, other evidence may support the inference of a retaliatory motive. In this case, the individual defendant was not in a position to retaliate until after he was promoted, and that was a valid reason for the delay between plaintiff’s alleged protected activities and the claimed adverse actions.


A single, extreme racial remark by a supervisor may be sufficiently severe to create a hostile work environment, where the racial remark provided the motivation for treating plaintiff differently and the circumstances showed that plaintiff was subjected to an abusive working environment.

The court also held that on the separate issue of disability discrimination, post traumatic stress disorder, by itself, was insufficient to establish a disability under the FEHA, since plaintiff did not show that she was unable to participate in major life activities.

Vasquez v. County of Los Angeles, 349 F.3d 634 (9th Cir. 2004), opinion withdrawn, 341 F.3d 869

A county probation officer alleged that racial harassment by his supervisor, in the form of two comments that occurred six months apart, created a hostile work environment. The supervisor purportedly said that plaintiff has a “typical Hispanic macho attitude,” and that he should consider transferring to the field because “Hispanics do good in the field.” The court compared these facts with previous cases and concluded that the alleged conduct was not sufficiently severe or pervasive enough to constitute an actionable hostile work environment.

Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107 (9th Cir. 2003)

Employer’s summary judgment reversed: there was sufficient evidence to infer that the employee was fired in retaliation for a sexual harassment complaint he made about his supervisor on behalf of another employee. The employee had offered substantial circumstantial evidence establishing retaliation – a causal link between his protected activity and the adverse employment action – by presenting evidence that the supervisor knew or suspected that the employee had reported the harassment. The supervisor had made the termination decision, and it could be inferred from the evidence that he was upset that the employee knew about his harassing conduct towards the other employee.

Participation in an internal investigation of a fellow employee’s race harassment complaint constitutes “protected activity,” at least when a charge of discrimination has been filed with EEOC by the fellow employee. Plaintiff can pursue retaliation claim based on the theory he was fired because he provided information during investigation which supported the race claim of a fellow employee.


The absence of a right-to-sue letter does not bar a plaintiff’s civil action. The DFEH initially issued the employee a right-to-sue notice, but later rescinded it. After more than a year had passed since the filing of the administrative complaint, the employee filed a civil action without first requesting a second right-to-sue notice. The civil case resulted in a jury verdict for the employee. Employer argued that the employee should have obtained a second right-to-sue notice, and her failure to do so constituted a failure to exhaust her administrative remedies. The court disagreed, concluding that an employee’s right to sue arises by operation of law when the DFEH fails to resolve the matter within one year from the time the administrative complaint is filed. Thus, within one year of the filing of the administrative complaint, an employee must obtain a right-to-sue notice before filing a civil action. If no DFEH right-to-sue letter is issued within one year of the DFEH charge, an employee does not need to obtain a right-to-sue letter prior to filing a civil case.

**Leong v. Potter**, 347 F. 3d 1117 (9th Cir. 2003)

Postal worker was fired after violating the terms of his “last chance agreement.” He complained to the Equal Employment Opportunity Commission (EEOC) and later sued in federal district court under Title VII for discrimination based on race, religion, sex and/or age. Plaintiff then amended his district court complaint to add a disability discrimination claim, but did not allege the claim with the EEOC. The court found that plaintiff failed to exhaust his administrative remedies. While the court will hear allegations that are “like or reasonably related to” allegations made to the EEOC, as well as those that reasonably could be expected to grow out of such allegations, plaintiff’s disability claim differed substantially from the Title VII claims he submitted to the EEOC. Additionally, the court dismissed plaintiff’s Title VII discrimination claims. It concluded that plaintiff was not similarly situated to those who received less harsh discipline because plaintiff was already subject to a last chance agreement.

**Manatt v. Bank of America**, 339 F. 3d 792 (9th Cir. 2003)

Plaintiff, an American citizen of Chinese descent, brought retaliation and hostile work environment harassment claim based on incidents of racial jokes and epithets occurring over a two and half year period. However, plaintiff’s claims failed to survive summary judgment. The conduct of plaintiff’s supervisor and co-workers, in making racially insensitive jokes, making fun of plaintiff’s pronunciation, and drawing back their eyes in imitation of Asian eyes, over the court of two and a half years, constituted simple teasing.
and offhand comments and was neither severe nor pervasive enough to alter the terms and conditions of employment. And while plaintiff stated a prima facie case of retaliation, she failed to offer any direct or specific and substantial circumstantial evidence of pretext to rebut the employer’s legitimate, nondiscriminatory reasons for its employment actions. A period of nine months between the protected activity and the alleged retaliatory act was too long to permit an inference of illegality.


Hearsay statement of a fellow employee, purporting to quote a supervisor’s retaliatory comment, is admissible to oppose summary judgment. A fellow employee quoted a second employee who in turn quoted a supervisor. The supervisor supposedly said she was “going to get revenge on every one of the people” involved in an investigation. This was held sufficient evidence of retaliation to reverse summary judgment in favor of the employer.
B. Discrimination – Age


Talent agencies may be sued as “aiders and abettors” to alleged discrimination, where agencies supposedly assisted television studios in implementing a systematic policy of age discrimination in refusing to hire older television writers. This case is also an important decision involving class action principles, see Section XIII, infra.


Plaintiff sued his employer when he was demoted from a management position to a route sales position. A year after the transfer, he reported severe damage to his knees that ultimately required bilateral knee surgery. He was unable to return to work. In the suit, he alleged that the demotion was a result of age discrimination. The trial court found in his favor and awarded the plaintiff damages for pain and suffering attributable to his knee injuries. The Court of Appeal reversed in part, holding that the damages associated with his knee injuries, such as pain and suffering, were not recoverable in civil court—even if indirectly related to age discrimination, in light of the workers’ compensation exclusive remedy rule.


The Supreme Court held that the Age Discrimination in Employment Act (“ADEA”) did not prohibit an employer from favoring older over younger workers when both are protected by the ADEA. Present and former employees between the ages of 40 and 49 alleged that the employer’s collective bargaining agreement, which eliminated retiree health insurance benefits for workers under 50, discriminated against younger workers. The Court held that the ADEA’s text, structure, purpose, history and relationship to other federal statutes, including Title VII, demonstrated that the ADEA did not intend to prohibit an employer from favoring an older employee over a younger employee, even when both are protected by the statute. The Court rejected the Equal Employment Opportunity Commission (“EEOC”) regulation – interpreting the statute to protect relatively younger workers from favor against relatively older workers – as “clearly wrong” and owed no deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).


The employer prevailed in this case involving restructuring (but not elimination) of an older worker’s position. The employer’s restructuring of an operations supervisor position, previously held by the plaintiff, changed the set of skills required, to include some that plaintiff lacked. Further, the employer had no further need of the skills plaintiff actually was using as an operations manager. Additionally, there was undisputed evidence demonstrating that plaintiff’s replacement had many skills that plaintiff lacked and was performing many services that plaintiff did not perform.
Finally, plaintiff unsuccessfully argued that, because the employer failed to give him an alternate position as a driver, the purported reason for his termination was a pretext. Whether the employer made plaintiff a one-time offer to become a driver or whether the employer promised plaintiff a position as a driver and then reneged on the offer was immaterial. When an employer modifies its workforce for business reasons, it has no obligation to transfer employees to another position within the company.

**Pottenger v. Potlatch Corp.,** 329 F.3d 740 (9th Cir. 2003)

Plaintiff brought suit against his former employer, alleging that he was forced to retire in violation of the Age Discrimination in Employment Act (ADEA). The trial court granted summary judgment in favor of the employer and the Court of Appeals affirmed. The Ninth Circuit held that plaintiff sufficiently made out a prima facie case of age discrimination because of evidence that plaintiff was 60 years old, that his last performance review was satisfactory, and that he was discharged and replaced by a younger employee with equal or inferior qualifications. However, the employer established a legitimate, nondiscriminatory reason for terminating plaintiff: that plaintiff could not make decisions necessary to turn around the ailing plant he headed. Further, remarks referring to an “old management team,” an “old business model,” and “deadwood” did not sufficiently support an inference of age discrimination.

Plaintiff also brought a disparate impact claim under the ADEA which was dismissed as well. Plaintiff’s statistical evidence regarding the effect of the reduction-in-force on “age classes” should be ignored, because the analysis failed to take into account job performance as a variable.

**Wexler v. White’s Furniture, Inc.,** 317 F.3d 564 (6th Cir. 2003)

A demoted store manager brought an age discrimination suit against his employer under the Age Discrimination in Employment Act (ADEA). The district court granted summary judgment for the employer. The Sixth Circuit Court of Appeals initially affirmed, but, on rehearing en banc, the Court of Appeals reversed because of evidence that supervisors referred to plaintiff a “bearded, grumpy old man,” “pops,” and “old man.” The en banc court also relied on alleged comments that plaintiff, then a manager, would be happier returning to the sales staff because he was too old for the aggravation of running a store. The en banc Court of Appeals found those remarks constituted direct evidence of age discrimination. These statements created a genuine issue of fact whether the employer acted upon stereotypical beliefs about the capabilities of older managers.

**Cerutti v. BASF Corp.,** 349 F.3d 1055 (7th Cir. 2003)

Ten former employees brought suit alleging that they were terminated and not rehired because of age discrimination, after a company restructuring. The Seventh Circuit held that alleged ageist statements by management including “out with the old, in with the new” and “how’s the old man doing today” were insufficient to establish that the employer was motivated by age when terminating plaintiffs. Further, the Court of Appeals held that plaintiffs’ argument that the employer engaged in age discrimination
simply by offering some of its older workers early retirement packages was a “nonstarter” and that “an offer of incentives to retire early is a benefit to the recipient, not a sign of discrimination.”
C. **Discrimination – Race**

**Luckie v. Ameritech**, 389 F.3d 708 (7th Cir. 2004)

Racial harassment claim fails where supervisor allegedly told African-American employee that she wanted “to change the complexion” of the department, and called a different African-American employee a “dunce.” No racial slurs or overtly race-related behavior was established. The statement regarding “changing the complexion” of the department was not, in the court’s judgment “racial in character.” The Seventh Circuit analyzes racial harassment cases under a standard very similar to that for sexual harassment, hostile environmental cases (there must be “severe and pervasive” conduct).
D. Discrimination – Gender/ Sexual Harassment/ Pregnancy

State Department of Health Service v. Superior Court (McInnis), 31 Cal. 4th 1026 (2003)

In this important case, the California Supreme Court clarified a hotly-debated issue: Is an employer absolutely liable under the FEHA for all harassment by supervisors, regardless of the employer’s preventative measures or post-complaint responses? The Supreme Court provided employers a limited but potentially valuable defense.

An employer is strictly liable under the FEHA for all acts of harassment by a supervisor. However, a plaintiff’s recoverable damages do not include those damages that a plaintiff could have avoided with reasonable effort and without undue risk, expense, or humiliation. In order to plead and prove this affirmative defense, the employer must show that (1) the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided and (3) reasonable use of the employer’s procedures would have prevented at least some of the harm that the employee suffered. The employer may then escape liability for those damages that the employee could more likely than not have avoided. The court went on to state that the reasonableness of the employee’s conduct is not as high a standard as in other areas of the law, and would depend on such things as whether an employer has an adequate antiharassment policy and procedures to enforce it, whether these were communicated to the employee, whether the employee reasonably feared retaliation, whether the employee’s natural feelings of embarrassment, humiliation and shame provided a sufficient excuse for any delay in reporting the harassment, etc.

Bodett v. CoxCom, Inc., 366 F.3d 736 (9th Cir. 2004)

Plaintiff, an evangelical Christian who was fired from her job for harassing a gay employee was not discriminated against on the basis of religion, the Ninth U.S. Circuit Court of Appeals ruled. Plaintiff was terminated for “gross violation” of company policy, which included admitted statements to a female subordinate that homosexuality is a sin, that the turmoil in the employee’s life was a result of her gay lifestyle, and that plaintiff would be “disappointed” if her employee was dating another woman. Plaintiff argued that her comments did not constitute harassment, and that the lack of progressive discipline—which was permitted, but not required by the policy—indicated that the firing was pretextual and that she was terminated because of her evangelical Christian beliefs, in violation of Title VII. The Ninth Circuit held that the plaintiff failed to carry her burden of showing an inference of disparate treatment and did not show that the stated reason for her firing was pretextual.


Federal district court certifies a class of more than one million women alleging gender discrimination based on pay discrepancies and failures to promote. The Ninth Circuit has accepted this case for review. Wal-Mart contended that “common” issues did not
predominate over individual issues, because decisions regarding pay and promotions were made store-by-store, and therefore were not centralized or subject to “common” proof. Plaintiffs assert among other things that the “excessive subjectivity” of the decision-making is itself indicative of discrimination. According to Wal-Mart, the uncontradicted statistical evidence is that women actually are paid the same or more than comparable males at many stores; yet the court included all stores in the class. This case presents many important issues for class actions in the employment discrimination field that will probably take years to resolve and give rise to additional large class claims.


Plaintiff’s evidence of sex and age discrimination was insufficient to establish a prima facie case of disparate impact for either type of discrimination. The employer’s company-wide reorganization affected administrative managers as a group, which was mostly women and employees over the age of 40. The court stated that disparate impact is not proved solely because all members of a disadvantaged subgroup (administrative managers) are also members of a protected group (women or persons over age 40). “The mere fact that each person affected by a practice or policy is also a member of a protected group does not establish disparate impact.” Plaintiff failed to establish a prima facie case of disparate impact discrimination because she offered no evidence regarding the gender or age composition of all of defendant’s employees. The evidence presented was entirely about the effect of the reorganization on administrative managers, as though they were a group protected by law.


Plaintiff, a janitor, alleged that a Guardsmark employee, a security guard, sexually harassed her in the bathroom of the building where they were both working. Summary judgment was entered in Guardsmark’s favor, and plaintiff moved for a new trial claiming that evidence acquired after the summary judgment, a letter and testimony that Guardsmark paid for the security guard’s defense in the action, was admissible to show ratification by the Guardsmark of its employee’s earlier alleged conduct. The trial court denied the motion and the Court of Appeal affirmed. Besides finding that such statements would constitute inadmissible hearsay, the Court of Appeal held that Guardsmark’s payment of the individual defendant’s attorneys’ fees did not constitute its ratification of the security guard’s alleged wrongful acts. Labor Code Section 2802, requires an employer to “indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties. …” *Id.*

**Peterson v. Hewlett Packard**, 358 F.3d 599 (9th Cir. 2004)

Hewlett Packard terminated an employee because he refused to discontinue posting biblical verses condemning homosexuality in response to the company’s diversity initiative. Hewlett-Packard asked the employee to remove his postings in the workplace and to thus comply with the anti-harassment policy. After Hewlett-Packard gave him time off to consider his decision and the employee refused to remove his postings, he was terminated for insubordination. The Ninth Circuit Court of Appeals upheld Hewlett-
Packard’s actions, stating that it was neither obligated to accommodate the employee—if
that meant allowing him to illegally discriminate against co-workers by posting harassing
and demeaning material in the workplace—nor to accommodate his request to take down
the diversity program posters.

**Jespersen v. Harrah’s Operating Company, Inc.**  ___ F.3d ___, 2004 WL 2984306
(9th Cir. 2004)

In a controversial decision, a divided panel of the Ninth Circuit held that Harrah’s
grooming standards program, which required female employees to wear make-up, did not
violate Title VII of the Civil Rights Act. The grooming standards also required male
employees to maintain short haircuts and neatly trimmed fingernails, and to refrain from
wearing make-up or colored nail polish. The Ninth Circuit held that a grooming standard
must be evaluated based on “the actual impact that it has on both male and female
employees,” considering the cost and time necessary for employees of each sex to
comply. The Ninth Circuit granted summary judgment to Harrah’s because the plaintiff
failed to show that the grooming policy imposed “unequal burdens on male and female
employees.”


Modification of a jury instruction defining “supervisor” improperly narrowed the class of
employees subject to liability for sexual harassment under the California Fair
Employment and Housing Act (“FEHA”). Because the pivotal issue for liability was
whether the alleged harasser was plaintiff’s supervisor, the court found that the modified
jury instruction was prejudicial. The individual defendant directed plaintiff in her day-to-
day duties and outlined her assignments, although he did not have the authority to
promote, transfer or fire her. While he did not prepare her performance evaluations,
those who did asked him for input. In addition, plaintiff cleared her time off with him
first.

(single racial remark may be sufficient to create hostile work environment claim).

**Vasquez v. County of Los Angeles**, supra, 349 F.3d 634 (9th Cir. 2004) (See Section
III.A.(2), supra) (allegation of two comments, six months apart, insufficient to create a
hostile work environment based on national origin or race).


In a sexual harassment case, the trial court may properly admit evidence about plaintiff’s
own workplace sexual banter, statements about her sexual history or sexual exploits, and
sexual horseplay in which she engaged. However, the admissible statements are limited
to statements made to the employees she accused of creating a hostile environment. “We
thus will consider admissible only evidence about the plaintiff’s prior sexual conduct
with the individual defendants, or others whose conduct plaintiff ascribed to the
employer, regardless of whether it occurred in or outside the workplace.”

Plaintiff alleged hostile work environment harassment based on a coworker’s repeated sexual advances, threatening gestures, and eventual battery of plaintiff while she sat at her desk. The trial court granted the employer’s motion for summary judgment on the grounds that the conduct complained of (which lasted less than a week) was not sufficiently severe or pervasive to constitute a hostile work environment. The Court of Appeal reversed, holding that the physical attack on plaintiff at her desk injected an element of violence that could be sufficiently severe or pervasive to alter the conditions of plaintiff’s employment. Plaintiff alleged she made numerous complaints to her supervisor about the coworker’s sexual advances and repeated telephone calls, made clear orally and in writing to her supervisor that the advances were unwelcome, and stated several times that—while she did not want to see her coworker lose her job over the harassment—she wanted the advances and the harassing conduct to cease. The court rejected the employer’s argument that its termination of the harassing coworker within a week of the first reported incident constituted the taking of reasonable steps to prevent the harassment as a matter of law. It held that they could determine the employer’s inaction rendered it liable under the FEHA because the severity and nature of the harassing conduct had signaled the coworker’s potential for violence.

**Holly D. v. California Institute of Technology**, 339 F.3d 1158 (9th Cir. 2003)

This ruling by the Ninth Circuit addresses in part the “Faragher defense,” which was also examined by the California Supreme Court in **Department of Health Services v. Superior Court (McInnis)**, supra.

First, the Ninth Circuit held that a plaintiff who was coerced into performing unwanted sex acts by her supervisor, upon threat of discharge, alleged a “tangible employment action.” Where there is a tangible employment action, the Faragher defense would not apply and the employer would be liable regardless of its preventive measures or response to the plaintiff’s complaint.

However, the court also found there was no evidence that this particular plaintiff, in fact, submitted to sexual advances upon threat of termination. This meant there was no “tangible employment action” and the employer could assert the Faragher defense.

The Ninth Circuit then held that the employer had established the Faragher defense, and avoided liability, because it showed it had promulgated a written policy which specifically defined prohibited behavior, had established reasonable procedures to investigate and resolve harassment complaints, and publicized the policy and conducted training on sexual harassment. Further, in the case of this particular individual, the employer’s investigation of the allegation was prompt and reasonable. Finally, the plaintiff failed to provide an explanation why she had not earlier pursued the employer’s internal complaint procedures.
Taybron v. City and County of San Francisco, 341 F.3d 957 (9th Cir. 2003)

Another case involving the Faragher defense. The court held that the employer was not entitled to summary judgment because its investigation and response to the claim of harassment was insufficient. There was evidence that the employer failed to interview all of the pertinent witnesses and that the plaintiffs were both discouraged from complaining internally and then treated unfavorably once they did complain.
E. **Discrimination - Disability**

**Note:** The enactment of Assembly Bill 2222, effective January 1, 2001, means that many federal court decisions interpreting the Americans With Disabilities Act will be of limited, if any, assistance under California law.


The FEHA has never included a requirement that a “disability” be so severe that it “substantially limit” a major life activity. The FEHA has only required that the disability “limit” a major life activity – a “substantial limitation” is unnecessary. The FEHA is different in this respect from the federal Americans with Disabilities Act, which requires a “substantial limitation.”

This case is of limited significance because, beginning in January 1, 2001, Assembly Bill 2222 clearly eliminated any requirement of a “substantial limitation,” along with eliminating other pro-employer aspects of the disability discrimination provisions of the FEHA.


An employer may lawfully refuse to rehire an employee who previously was terminated for failing a drug test. The refusal to hire was lawful, even though the former employee had successfully completed drug rehabilitation. The Supreme Court, in reversing the Ninth Circuit, held that an employer’s unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules was a legitimate, non-disability based reason for an employer’s refusal to rehire the former employee. The Supreme Court further held that, once an employer has presented a non-discriminatory explanation for its decision, the only remaining question is whether there is sufficient evidence from which a jury could conclude that the employer made its decision based on the employee’s status as disabled, despite the employer’s proffered explanation.


Plaintiff claimed that the reasonable accommodation provision of the ADA provides for a disabled employee to be awarded an alternative position, even if the employer’s well-established seniority system would be violated in so doing. The Supreme Court held that the ADA does not require an employer to assign a disabled employee to a particular position if another employee is entitled to that position under the employer’s established seniority system.

**Coons v. Secretary of the U.S. Dept. of the Treasury**, 383 F.3d 879 (9th Cir. 2004)

An employee claimed that he was demoted in retaliation for requesting reasonable accommodations for his disability. The employer argued that the employee was demoted as a result of his misuse of his office computer. The Ninth Circuit Court affirmed summary judgment of the retaliation claim in the employer’s favor. First, the employee
did not establish a causal connection between his protected activity, i.e. his request for reasonable accommodations, and the adverse employment action, i.e., his demotion. Since over a year had passed between the two events, the court found that “[t]he distant time sequence was inadequate to show a causal link.” Second, the employer articulated a legitimate reason for the adverse employment action. Specifically, the employer showed that the employee misused his office computer by accessing sex-related sites, and that the employee lied during the investigation of his improper computer use.

**Watkins v. Ameripride Serv.,** 375 F.3d 821 (9th Cir. 2004)

Watkins, a customer service representative who delivered uniforms and other products to customers on his designated route, sued his employer under the California Labor Code for improperly classifying him as exempt from overtime pay and under California’s Fair Employment and Housing Act for failure to accommodate his disability.

The Watkins court affirmed the grant of summary judgment in favor of the employer on the reasonable accommodation claim. An employer can prevail on an accommodation claim by showing one of the following: (1) a reasonable accommodation was offered and refused, or (2) there was no vacant position within the employers’ organization for which the employee was qualified and which the employee was capable of performing with or without accommodation. The Watkins court found that the employer had done both. The employer offered Watkins a position that he declined, and there were no other vacant positions for which he was qualified. The employer was not required to create a special position or assign a permanent assistant to Watkins to accommodate him. Other requested accommodations (for instance, supplying carts and dollies) would not, as a factual matter, have permitted Watkins to resume his former duties. The employer also accommodated Watkins in other ways, by allowing him to perform special deliveries at his former rate of pay for two months, and by leaving his job open for a year to allow him to reclaim his job after surgery.

**Zivkovick v. Southern California Edison Co.,** 302 F.3d 1080 (9th Cir. 2002)

The Ninth Circuit held that when an employee or an applicant requests an accommodation, or an employer recognizes that the employee needs an accommodation, but the employee cannot request it because of a disability, the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation. Applicants, as well as employees, are entitled to reasonable accommodation. The interactive process requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee’s request; (3) offering an accommodation (not necessarily the one requested) that is reasonable and effective. The employer faces liability only where the employer is responsible for the breakdown in the interactive process.
Allen v. Pacific Bell, 348 F.3d 1113 (9th Cir. 2003)

Where the employee fails to provide medical or other information, the employer may be excused from the “interactive process” required under the ADA. In Allen, a former employee worked in non-sedentary position but had become restricted to sedentary work during his employment. The Ninth Circuit held that: (1) employer did not have a duty under ADA to engage in further interactive processes, beyond attempting to find a sedentary position for employee, absent medical documentation supporting employee’s contention that his physical condition had improved, and (2) employer did not fail in its interactive duties under ADA by disqualifying employee from further accommodations after employee failed to cooperate with his collective bargaining agreement’s transfer system.

Kaplan v. City of North Las Vegas, 323 F.3d 1226 (9th Cir. 2003)

Employers are not required to accommodate employees merely regarded as disabled, but who are not actually disabled. In Kaplan, a former police officer alleged that the City of North Las Vegas discriminated against him by terminating him from his police officer position because of a disability, rheumatoid arthritis, which was later determined to be a misdiagnosis. Kaplan sought relief under the ADA as an individual who was “regarded as” having a disability under 42 U.S.C. Section 12102(2)(3), not as someone who was actually disabled. The Ninth Circuit held that an employer is not required to accommodate an employee it regards at disabled but who is not actually disabled. To hold otherwise would “do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees’ talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employer’s misperception of a disability.” The Ninth Circuit’s ruling on this point is consistent with several other circuits.

Fraser v. Goodale, 342 F.3d 1032 (9th Cir. 2003)

A former employee with severe “brittle” diabetes may be protected under the ADA, due to severe restrictions on her dietary habits. On appeal, the Ninth Circuit held that: (1) diabetes is a “physical impairment” under the ADA; (2) eating is a “major life activity” for an employee with severe diabetes under the ADA; and (3) this particular employee, who was subject to a “demanding and highly difficult treatment regimen,” could be protected. Summary judgment for the employer was reversed.

Brown v. City of Tucson, 336 F.3d 1181 (9th Cir. 2003)

The federal ADA contains not one but two anti-retaliation provisions. One such provision, Section 503(a), 42 U.S.C. Section 12203(a), is very similar to the anti-retaliation provision found in Title VII of the Civil Rights Act of 1964, and other anti-discrimination statutes. The second such provision, Section 503(b), 42 U.S.C. Section 12203(b), makes it unlawful to “coerce, threaten, intimidate or interfere “with the exercise of a person’s rights under ADA (including where an employee aids or assists another employee in doing so). The Ninth Circuit notes that the “interference” provision
“protects a broader class of persons against less clearly defined wrongs” then does the anti-retaliation provision. The Ninth Circuit then adopted a very liberal evidentiary standard for interference claims under Section 503(b) – and a standard different from retaliation claims under Section 503(a).

While giving lip service to concerns that employers would be “paralyzed into inaction” by even a request for an accommodation by an employee with performance problems, this opinion will make it more difficult for employers to balance the duty to identify and accommodate disabled workers with maintaining ordinary performance and workplace standards.

**Rauen v. U.S. Tobacco Manufacturing Ltd.**, 319 F.3d 891 (7th Cir. 2003)

A work at home arrangement is not a “reasonable accommodation” where the employee’s job requires supervision on a regular basis, or where the job’s essential functions include teamwork and coordination with others.

**Calef v. The Gillette Company**, 322 F.3d 75 (1st Cir. 2003)

The ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability. In Calef, an employee who was terminated after behaving in threatening manner toward coworkers sued employer, alleging it violated the ADA by terminating his employment, failing to reasonably accommodate him, and harassing him. On appeal the First Circuit held that held that: (1) employee was not actually disabled under ADA, absent actual proof his Attention Deficit Hyperactivity Disorder (“ADHD”) substantially limited claimed major life activities of learning or speaking; (2) the employee also was not a “qualified individual with a disability” under ADA; and (3) there was no reasonable accommodation that would have enabled employee to perform the essential functions of his job. The first of the three holdings, that plaintiff’s ADHD was not a “disability,” is probably not valid under California’s more expansive definition of that term. But the case is useful in its conclusion that unpredictable, threatening outbursts need not be tolerated, regardless of their source.

**Gowesky v. Singing River Hospital Sys.**, 321 F.3d 503 (5th Cir. 2003)

An emergency room physician contracted hepatitis C after treating a patient. After her successful treatment for the disease, her supervisors questioned her fitness to practice in an emergency room setting, but not in other less acute or risky environments. The Fifth Circuit found that the employee was not regarded as disabled because her supervisors kept reassigning her to the emergency room schedule. Thus, her employer never hindered or limited her job duties.

The employee did not prove disability-based harassment or an adverse employment decision. Although her supervisors placed conditions on her return to work, those conditions were reasonably designed to prevent the risk of infection, reassure staff and patients about her non-infectious status and confirm her ability to perform her duties. Further, even if the return-to-work conditions had been unreasonable, it is unclear that
they would be considered severe or pervasive enough to create a fact issue on a hostile work environment claim.
F. Discrimination - Family & Medical Leave Act


The Supreme Court held that a federal regulation, which imposed a penalty against employers for failing to provide prompt notice of an employee’s FMLA rights, was invalid and exceeded the Secretary of Labor’s authority. The regulation adopted by the United States Department of Labor held that, where the employer fails to give prompt notice that the employee is entitled to FMLA leave, the 12-week period does not run until notice is given. This could result in FMLA leaves far longer than 12 weeks. The Supreme Court held that the regulation created an irrebuttable presumption that the employee was harmed by lack of notice. The California regulation on FMLA notice incorporates by reference the same federal regulations found invalid in Ragsdale.


Definition of “serious health condition” entitling an employee to take CFRA leave, is not employer-specific. Employee sought CFRA leave from Sutter Health at the same time she was performing an identical job for Kaiser Hospitals in the same geographical area. She claimed that her duties at Sutter were more stressful and therefore she suffered from a serious health condition with respect to the Sutter job, but not with respect to the Kaiser job. The court held that the definition of “serious health condition” requires “an inability to perform the essential job functions generally, rather than for a specific employer.”

Aubuchon v. Knauf Fiberglass, 359 F.3d 950 (7th Cir. 2004)

An employee’s wife was expected to deliver their baby and so he told his employer he needed FMLA leave. His wife gave birth two weeks later and because his unexcused absences exceeded the limits of that employer’s attendance policy, the employer fired him. After being terminated, the employee provided his employer with a note from his wife’s obstetrician explaining that she had indeed experienced complications during her pregnancy. The court, however, found the note to be of no consequence as it was submitted too late, recognizing the difficulties employers would face if employees could essentially “cure” deficient FMLA requests after the fact. The Seventh Circuit said: “[e]mployees should not be encouraged to mousetrap their employers by requesting FMLA leave on patently insufficient grounds and then after the leave is denied obtaining a doctor’s note that indicates that sufficient grounds existed, though they were never communicated to the employer.” The court cautioned, however, that the employee’s duty is merely to place the employer on notice of a probable basis for FMLA leave and give enough information to establish probable cause for FMLA leave.


An employee’s request for FMLA and/or CFRA leave must provide “at least a verbal notice sufficient to make the employer aware that the employee needs CFRA/FMLA qualifying leave.” The employee does not, however, need to specifically assert his or her rights under the CFRA or FMLA or even mention the CFRA/FMLA. The court concluded that an employee’s request for vacation time over the Christmas Holiday to
visit his ailing parents, without any reference to his intent to care for them, was not enough to trigger the protections of the CFRA.

**Liu v. Amway Corp.**, 347 F.3d 1125 (9th Cir. 2003)

This case underscores the importance of training all managers who supervise or communicate with employees regarding the CFRA or FMLA. The court held it is the employer’s responsibility to determine when FMLA leave is appropriate, to inquire as to specific facts to make that determination, and to inform the employee of his or her entitlements. Here, plaintiff had informed her supervisor the reasons for her leave (childbirth). However, neither her supervisor nor the Human Resources Department took any action to determine whether plaintiff was entitled to FMLA leave. Rather, plaintiff’s leave was simply categorized as personal leave; a mischaracterization the court concluded qualified as unlawful “interference” with her FMLA leave. The employer also may have unlawfully terminated the plaintiff. The court concluded that where termination decisions rely largely on subjective evaluations (as was the case here), careful analysis of possible impermissible motivations is warranted. According to the court, such evaluations are particularly “more susceptible to abuse and more likely to mask pretext.” Here, the evidence of plaintiff’s drop in performance evaluation along with her supervisor’s behavior towards plaintiff’s leave suggested that her termination was the result of her supervisor’s attitude towards plaintiff’s leave. For these reasons, a triable issue existed as to whether plaintiff’s termination was in violation of the FMLA/CFRA and a summary judgment by the lower court was reversed.

**Cavin v. Honda of Am. Mfg., Inc.**, 346 F.3d 713 (6th Cir. 2003)

An employer cannot deny FMLA leave to an employee who fails to comply with the company’s internal notice requirements, if those requirements exceed or are more extensive than the DOL regulations. Employers may delay or deny FMLA leave, due to inadequate notice by the employee, only under the terms of the DOL regulations. The court further held that an employee gives his employer sufficient notice that he is requesting leave for a FMLA-qualifying condition when he provides enough information for the employer to reasonably conclude that a FMLA-qualifying event has occurred. Just as the employee does not need to expressly invoke the FMLA, an employee can give notice sufficient to make his employer aware that he needs FMLA-qualifying leave without using the words “leave” or “leave of absence.”

**Moreau v. Air France**, 356 F.3d 942 (9th Cir. 2004)

Air France is not a joint employer with several ground service companies for purposes of the FMLA or CFRA. Air France had only one employee at the San Francisco International Airport. The employee requested FMLA leave to care for a seriously ill parent. Air France denied the request, and ultimately terminated the employee when he took unauthorized leave. In a closely watched decision, the Ninth Circuit held Air France was not a joint employer with its several ground service vendors (food and baggage handling). If joint employer status had been found, the sole Air France employee would
have been entitled to FMLA leave. The ground service companies were bona fide third parties and not controlled by Air France.


An employee’s misuse of FMLA leave (to golf and install a sprinkler system while simultaneously caring for his injured father) was proper grounds for termination.


Because plaintiff’s FMLA interference claim was substantially dependent on an interpretation of a collective bargaining agreement, the claim was preempted by federal labor – management law.

**Pharakhone v. Nissan North Am., Inc.**, 324 F.3d 405 (6th Cir. 2003)

The employer did not violate the FMLA by refusing to reinstate an employee at the conclusion of his FMLA leave. During his FMLA leave the employee violated a company policy that prohibited unauthorized work for personal gain while on leave. While on FMLA leave the employee worked for his wife’s business.

**Faris v. Williams WPC-I Inc.**. 332 F.3d 316 (5th Cir. 2003)

A post-termination release of FMLA claims is enforceable.

**Perry v. Jaguar of Troy**, 353 F.3d 510 (6th Cir. 2003)

A child’s attention deficit hyperactivity disorder (“ADHD”) did not constitute a serious health condition, and no FMLA leave was available. However, the case turns on the absence of medical evidence indicating that the ADHD-afflicted child actually was limited in ordinary daily activities. “The fact that a child with learning disabilities does not function at the same level as a child of the same age without learning disabilities sheds no light on whether that child can perform regular daily activities.”

**Russell v. North Broward Hosp.**, 346 F.3d 1335 (11th Cir. 2003)

The phrase “more than three consecutive calendar days” of incapacity, as used in the DOL regulations implementing the FMLA, means a continuous period of incapacity extending more than 72 hours. The court further held that the DOL’s regulation defining “continuing treatment of a health care provider” as a period of more than three consecutive calendar days was permissible construction of the FMLA.


Former employee sued employer for, among other claims, breach of contract and retaliation in violation of California Government Code Section 12945.1 and 12945.2 after she was laid off by her employer while on authorized family medical leave under the
CFRA. The court held that the CFRA’s guarantee of reinstatement after such family leave does not preclude an employer from terminating the employee as part of a general work force reduction. The court further held that employer did not breach an implied agreement by including the employee in its workforce reduction because the employer’s personnel handbook and policies guaranteeing an employee’s reinstatement after completion of the employee’s leave did not supersede the employee’s express at-will employment agreement. This is especially true where, as here, the employee agreed to both the at-will employment relationship and the exclusive method for amending the at-will nature of the employment.
G. **Discrimination – Marital Status**


California’s marital status discrimination statute prohibits discharge of two married college professors where the employer decided it “simply could not have two married professors making up an entire graduate department.” The fact that two co-workers marry “is not ipso facto a reason to get rid of one of them.”
IV. LABOR CODE/WAGE-HOUR


Summary:

The California Supreme Court recently upheld class certification of a wage/hour class action involving more than 1500 managers and assistant managers of Sav-On Drug Stores. This widely publicized decision rejected Sav-On’s assertion that the Court would have to consider, on an individual basis, whether managers or assistant managers were “exempt” employees for overtime purposes. The Sav-On decision also suggests that collective or “representative” proof may be used widely in wage/hour class actions on both issues of exempt status and damages. This decision, together with other recent developments such as the California Private Attorneys General Act (“PAGA”), will encourage the filing of additional wage/hour or similar cases against employers large or small.

Background:

Sav-On operating managers (“OMs”) and assistant managers (“AMs”) moved for class certification on their overtime claims. In support, plaintiffs presented job descriptions and company policies, deposition testimony from a Sav-On representative, and 4 declarations of employees describing their non-managerial work. Plaintiffs contended that Sav-On’s operations were so standardized that there was no variation in duties, and argued that certification was appropriate because Sav-On had treated all of the managers as exempt, even though they performed mostly non-managerial work.

In response to the certification motion, Sav-On submitted the declaration of its Human Resource Manager, along with 51 declarations from current OMs and AMs, describing their work and showing significant variation in work performed. Sav-On argued that an individualized inquiry was required to determine the applicability of the overtime exemption. Based on this evidence, the trial court granted plaintiffs’ motion for class certification.

On appeal, the trial court’s certification order was reversed, with the appellate court finding that individual fact questions predominated. Central to the court’s conclusion was the evidence submitted by Sav-On, which showed that the duties of the more than 1500 managers varied widely from store to store based on a variety of factors such as store location, size, physical layout, sales volume, hours of operation, management structure and style, experience of the individual manager, and the number of hourly employees requiring supervision. It concluded that the trial court abused its discretion in granting class certification because, due to the variation in how the jobs were performed, an inquiry would be required regarding facts applicable to each member of the class. It found that the trial court unreasonably failed to specify the reasons why it found common issues predominated. Finally, it found that plaintiffs’ two declarations attesting to
uniformity in job performance were not conclusive, and that plaintiffs’ evidence was “insubstantial, conclusory or incredible.”

On August 26, 2004, the Supreme Court reversed the Court of Appeal, and found that class certification was appropriate, and that the trial court did not abuse its discretion in concluding that common issues predominated. The Supreme Court’s opinion was unanimous on the issue of class certification.

Discussion:

- The party seeking certification has the burden of establishing the prerequisites for class certification, which include the requirement that common issues predominate.
- The appellate courts are to review class certification rulings under an abuse of discretion standard, and should not disturb a trial court’s ruling that is supported by “substantial evidence” unless improper criteria were used or erroneous legal assumptions were made.
- The trial court was within its discretion to credit plaintiffs’ evidence over defendant’s evidence, and reviewing courts have no authority to substitute their judgment for the trial court’s judgment. “Questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistency in their testimony are matters for the trial court to resolve.”
- The Supreme Court found that plaintiffs’ evidence was “substantial” because it was not “qualified, tentative, and conclusionary” but, rather, “of ponderable legal significance . . . reasonable in nature, credible, and of solid value.”
- The Supreme Court found that there was substantial but disputed evidence that Sav-On deliberately misclassified its employees as part of its practice and procedure. It also focused on the fact that during the class period Sav-On reclassified all its AMs as non-exempt with no change in duties or in the job descriptions.
- The record contained substantial evidence suggesting that the predominant issue in dispute was how the various AM and OM work tasks should be classified—as exempt or non-exempt. Classification is a mixed question of law and fact appropriate for a court to address separately from calculating the amount of time specific employees actually spend on specific tasks.
- Certification can be based partly on pattern and practice evidence or similar evidence of a defendant’s class-wide behavior. California courts have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant’s centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.
- In responding to Sav-On’s argument that the factual issues are the actual tasks performed by class members and the amount of time spent on each of those tasks the Court held, “But even if some individualized proof of such facts ultimately is required to parse class members’ claims, that such will predominate in the action does not necessarily follow.”
• Predominance of common issues is a “comparative concept.” The relevant comparison lies between the costs and benefits of adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous separate actions—not between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever.

• The Court commented that: (1) California has a public policy which encourages the use of the class action device; (2) it has for years urged courts to be procedurally innovative in managing class actions and that courts routinely fashion methods to manage individual questions; and (3) if unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification.

• The Court clarified (and severely limits) the holding in Ramirez v. Yosemite Water, Inc., 20 Cal. 4th 785 (1999), stating that it is no authority for applying a particular set of “factors” whenever plaintiffs in an overtime case seek class certification. Moreover, even as an overtime exemption case, Ramirez discusses the outside salesman exemption and would not necessarily apply in every exemption context.

• “Any dispute over how the employee actually spends his or her time, of course, has the potential to generate individual issues. But considerations such as ‘the employer’s realistic expectations’ and ‘the actual overall requirements of the job’ are likely to prove susceptible of common proof.”

• In this case, Sav-On promulgated exempt job descriptions, but allegedly implemented policies and practices that “failed to afford its AMs and OMs true managerial discretion, and standardized store operations so that managers were obliged to spend over 50 percent of their time doing the same tasks as their subordinates.” The Court stated that federal authority indicates that either allegation would be sufficient to render the affected workers non-exempt.

• The Court concluded: “Many of the issues likely to be most vigorously contested in this dispute are common ones. Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants.”


A wage-hour class action damage award is upheld despite the use of “aggregate” class-wide damages (i.e., no individual proof that specific class members work specific overtime hours). The “aggregate” method of proof in a class action, using statistical methodology and extrapolation to determination class-wide damages, is appropriate and does not violate the employer’s due process rights. See discussion of this case in Section XIII, infra.

Note: After the decisions by the California Supreme Court in Sav-On, supra and the Court of Appeal in Bell, “aggregate” or “common” proof in class actions in California may be used in many cases both at the class certification and damage stages. The employer’s counsel should vigorously challenge “aggregate” proof that interferes with due process rights.

Note: The issues in this case will be reviewed by the Supreme Court in Prachasaisoradej v. Ralph’s Grocery Co., Inc., discussed in Section II, supra.

A former manager of Ralphs filed a putative class action on behalf of all Ralphs employees who received bonuses based on the store’s net earnings. The “net earnings” bonus plan allegedly violated California Labor Code Section 201, 221, 400-410, and 3751, the Industrial Welfare Commission Wage Order for non-exempt employees, and California Business & Professions Code Section 17200, because it factored cash and merchandise shortages, workers’ compensation expenses and other ordinary expenses into its calculation of employee bonuses. The Court of Appeal held that bonus calculations may not include expense items that the Legislature or the Industrial Welfare Commission has declared may not be charged to an employee (including the cost of workers’ compensation claims or cash shortages for non-exempt employees), but may include other expense items even if they are beyond the individual manager’s direct control. The court affirmed that the complaint stated causes of action for unlawful deductions from wages and unlawful business practices because it included deductions for prohibited expenses.

Note: Numerous similar putative class actions have been filed against employers who maintain “net profits” or “net earnings” bonus programs. Such programs should be carefully reviewed.

Ballaris v. Wacker Siltronic Corp., 370 F.3d 901 (9th Cir. 2004)

Plaintiffs worked in employer-Wacker’s cleanrooms where wafers were manufactured. All employees who worked in the cleanrooms were required to wear gowns to help maintain a clean environment. Plaintiffs alleged in this FLSA class-action lawsuit that Wacker had a policy of failing to pay its workers overtime wages for the time spent on gowning activities and putting on and taking off plant uniforms. In response, Wacker asserted that it need not provide any pay for the time its employees spent on the activities identified by plaintiffs because it was entitled to credit their paid lunch hour compensation against all such hours of work. The Ninth Circuit held that the employees were entitled to be compensated for the time spent “donning and doffing” the uniforms on company premises and that the company was not entitled to offset the paid lunch period against any compensation otherwise due.


The Division of Labor Standards Enforcement issued an order against a corporate employer and its director for unpaid wages owed to an employee. The employer and director attempted to appeal the administrative order de novo to the superior court, but failed to post a bond as required by Labor Code Section 98.2(b) and did not fulfill the statutory conditions allowing relief from the bond requirement. The trial court declined to grant the employer and director relief from the statutory bond requirement and dismissed the case, and the Court of Appeal affirmed.
Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931 (9th Cir. 2004)

The Ninth Circuit considered whether employees of an electric utility were entitled to overtime pay for on-call waiting time, ultimately reversing the district court’s grant of summary judgment in the employer’s favor. The court held that the two inquiries in determining whether on-call waiting time is compensable are: (1) the degree to which the employee is free to engage in personal activities (measured by the seven factor test articulated by Owens v. Local No. 169, Ass’n of W. Pulp & Paper Workers, 971 F.2d 347, 350 (9th Cir. 1992)), and (2) the agreements between the parties.


The Court of Appeals considered whether the alternative work schedule provided by California Labor Code Section 511 allows three twelve hour shifts followed by a six hour shift per week (12/12/12/6) with no overtime paid for hours nine and 10 of the 12 hour shifts. The court held that subdivision (b) of Labor Code Section 511 specifically provides for alternative work schedules that include shifts more than 10 hours, so long as the hours over 10 are paid at an overtime rate.

Watkins v. Ameripride Serv., supra, 375 F.3d 821 (9th Cir. 2004)

Watkins, a customer service representative who delivered uniforms and other products to customers on his designated route, sued his employer under the California Labor Code for improperly classifying him as exempt from overtime pay and under California’s Fair Employment and Housing Act for failure to accommodate his disability. If Watkins delivered interstate goods, he would be subject to the federal regulations referred to in the Industrial Wage Commission Order regulating the transportation industry, and not entitled to overtime in California.

Watkins court reversed the grant of summary judgment in favor of the employer on the overtime claim because a material issue of fact existed as to whether the goods delivered by Watkins were of an interstate character. If the materials were ordered from out-of-state vendors for delivery to specific intrastate customers, a temporary holding of the goods within the employer’s intrastate warehouse would not alter the interstate character of the goods. Thus, the disputed issue of fact regarding the nature of the goods precluded summary judgment.

RUI One Corp. v. City of Berkeley, 371 F.3d 1137 (9th Cir. 2004)

City of Berkeley’s “living wage ordinance” is not unconstitutional. Courts have generally upheld the validity of living wage ordinances adopted by cities or municipalities, even where they create a higher minimum wage than under corresponding state or federal law.

This case discusses, without deciding, the issue of whether the Labor Commissioner Opinion Letters and its Enforcements Policies and Interpretations Manual are unlawful “underground regulations” prohibited by the California Administrative Procedure Act. The issue of the validity of the Labor Commissioner Opinion Letters and Manual is discussed in Section XV, infra. The Court of Appeal sent the case back to the trial court to determine whether Labor Commissioner Opinion Letters were in fact statements “of policy that an agency intends to apply generally,” in which case, the letters would have to be subject to the Administrative Procedure Act and are therefore probably invalid.


The Court of Appeal held that a Labor Commissioner claim for overtime wages is not a “civil action” as defined by Labor Code Section 1194 and therefore any attorneys’ fees recovered by a successful employee are limited by Labor Code Section 98.2 (relating to administrative proceedings). The Labor Code provides two alternatives when an employer fails to pay overtime compensation: the employee can file a civil action (Labor Code Section 1194) or pursue an administrative remedy by filing a complaint with the Labor Commissioner (Labor Code Section 98 et seq.). An employee who files a complaint with the Labor Commissioner, which decision is later appealed (de novo) to the trial court, has filed an administrative action, not a civil action, and may only recover those attorneys’ fees that were incurred on appeal from the Commissioner’s decision, as stated by Labor Code Section 98.2(c).


Employee who was hired for a one-day assignment, but not paid for more than two months thereafter, cannot claim penalties under Labor Code Section 203 for “waiting time.” The completion of the one-day assignment was not a “discharge” as defined in Labor Code Section 201 and therefore there was no Labor Code violation.

Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003)

Employees of a meat production plant brought a class action under the Fair Labor Standards Act (FLSA) and related provisions of Washington’s Minimum Wage Act, alleging that their employer was required to compensate them for the time required to change into specialized protective clothing and safety gear. On appeal, the threshold question was whether the activities cited by plaintiffs, including “donning and doffing, waiting and walking,” constituted “work” under the FLSA. The Ninth Circuit held that such activities were integral and indispensable to their employer’s principal activity, and were thus compensable under the FLSA. The Ninth Circuit also held that the “changing clothes” exception to compensable work under the FLSA does not cover time employees spent putting on and taking off company-required personal protective equipment, and any time that employees spent walking to and from plant stations after donning or doffing personal protective equipment was also compensable. Last, the Ninth Circuit held that
the employer recklessly disregarded the possibility that it was violating the FLSA, and awarded liquidated damages under the FLSA as well as back pay.

**Chao v. A-One Medical Svcs., Inc.**, 346 F.3d 908 (9th Cir. 2003)

The Secretary of Labor brought an action for unpaid overtime wages on behalf of eight former employees of two in-home medical services companies: A-One Medical Services, Inc. (“A-One”) and Alternative Rehabilitation Home Healthcare, Inc. (“Alternative”). A-One and Alternative were owned and operated by two separate individuals, who entered into negotiations whereby the owner of A-One would purchase Alternative. The two companies merged and coordinated certain operations, and informally shared employees. Additionally, over the course of two years, the owner of A-One became responsible for nearly all of the day-to-day operations of the two entities. The district court awarded the Secretary the claimed overtime wages and an equal amount in liquidated damages, and defendants appealed.

The Ninth Circuit held the two purportedly separate entities were “joint employers,” and were each liable for the overtime and violations of the other. Further some employees worked for both entities during the same week: all hours worked at either entity would be aggregated for purposes of the 40-hour overtime standard. A-One and Alternative constituted a single enterprise for purposes of the FLSA because they engaged in related activities, possessed unified operation or common control, and demonstrated a common business purpose. Accordingly, the revenue bases of the two entities were aggregated for purposes of determining coverage under the Act, and defendants were therefore subject to its provisions. Second, the court held that defendants were responsible for overtime pay as “joint employers” of the nurses at issue in the litigation. Where employment by one employer cannot be completely disassociated from employment by a second employer, the court stated, all of the employee’s work for the joint employers during the workweek is considered as one employment for purposes of the FLSA, and all joint employers are individually and jointly responsible for ensuring compliance with its overtime provisions. The court found there was no disassociation between the nurses’ employment by A-One and Alternative, and that one employer (the owner of A-One) controlled the employees. Therefore, A-One and Alternative were joint employers, and work performed for both employers during the workweek would count toward determining the nurses’ overtime pay. The court affirmed the trial court’s determination of liability, as well as its finding that the violation was willful and its imposition of liquidated damages.


Plaintiff server sued defendant restaurant for violation of Labor Code Section 351, which prohibits an “employer” or “agent” from collecting, taking, or receiving any gratuity given to an employee by a patron. During plaintiff’s employment, the restaurant maintained a policy requiring servers to give 10 percent of their nightly tips to the floor manager. In addition to hosting and greeting duties, the floor managers were responsible for scheduling servers’ stations, disciplining servers, hiring employees, and recommending the discharge of employees. The court issued a permanent injunction prohibiting defendant from engaging in, *inter alia*, a tip-sharing policy in violation of
Section 351. The appellate court held that the floor managers were “agents” of the employer and therefore prohibited by Section 351 from sharing tips. The court rejected defendant’s argument that floor managers limited service work entitled them to a portion of the servers’ tips, holding that the Labor Code provision does not require an agent’s duties to consist exclusively of hiring, discharging, and supervising employees. The court also rejected defendant’s reliance on federal case law authorizing tip pooling, stating that California law contains an express prohibition on the practice not found in the FLSA.


An employee may remove to federal court a lawsuit seeking unpaid wages under the FLSA. While plaintiff may file a FLSA case in either state or federal court, the employer has the right to remove the case to federal court.


The employee alleged that her employer failed to pay her equal pay for equal work as required by Labor Code Section 1197.5. The appellate court affirmed the trial court’s judgment for the employer, stating that employee had not demonstrated that the pay differential was a pretext for gender discrimination. Although a male employee with the same duties was paid more than the female plaintiff, it was undisputed that the male had significantly greater previous work experience. The appellate court applied the burden-shifting test used in federal Equal Pay Act actions to a Labor Code Section 1197.5 action for equal pay: (1) the plaintiff must show that the employer pays workers of one sex more than the workers of the opposite sex for equal work, (2) if the plaintiff does so, the employer then has the burden of showing that one of the exceptions listed in 1197.5 is applicable, and (3) if the employer does so, the employee may show that the employer’s stated reasons are pretextual.

**Falkowski v. Imation Corp.**, 309 F.3d 1123, amended 320 F.3d 905 (9th Cir. 2003)

Stock options are not “wages” under the California Labor Code.

**Norita v. Commonwealth of Northern Mariana Islands.**, 331 F.3d 690 (9th Cir. 2003)

Improper deductions from wages can destroy exempt status. Even a policy or practice of such improper deductions can destroy exempt status where the employee believes he/she could be subject to improper deductions. All that the plaintiff must establish to destroy exempt status is a “significant likelihood of improper deductions,” not that such deductions actually were made.
V.
WRONGFUL TERMINATION/CONSTRUCTIVE TERMINATION


An emergency-credentialed teacher hired for a limited term was not renewed by the school district based on her refusal to cooperate with random weapon searches of students. She sued the school district for wrongful termination in violation of public policy. The Court of Appeal found that mere nonrenewal of a contract did not constitute an adverse employment action, and the former teacher could not amend her complaint to allege a new cause of action for tortious nonrenewal of her employment contract in violation of public policy, because no such cause of action is recognized.


Former employee alleged termination in violation of public policy based on his complaint to management about Aramark’s alleged practice of overcharging and defrauding customers, and his refusal to participate in the fraud. The Court of Appeal reversed the lower court’s grant of summary adjudication to Aramark, which was based on a finding of federal preemption. The Court of Appeal concluded that the former employee’s allegation that he was terminated for complaining about and refusing to engage in fraudulent billing practices was sufficient to state a claim for retaliatory discharge in violation of public policy.


At-will employee can sue employer for fraud or misrepresentation based on alleged misrepresentations regarding compensation or other terms of employment. “An at-will employer does not have carte blanche to lie to an employee about any matter whatsoever to trick him or her into accepting employment.”


Labor Code provision prohibiting retaliation for filing OSHA complaints applies where the employer allegedly terminated an employee because it feared she would make an OSHA complaint. Employer admitted at trial that it terminated the employee in part because it was afraid she would file an OSHA complaint, after a co-worker also did so. It is unclear whether the “pre-emptive retaliatory firing” theory would be adopted under the Fair Employment and Housing Act or other employment statutes.


Plaintiff claimed that defendants targeted her in retaliation for whistleblowing. She alleged that the employer’s wrongful acts were designed to harass her, defame her employment reputation, and create an abusive and hostile work environment, for the purpose of causing her an inordinate amount of stress. She further alleged that these efforts were designed to exacerbate her medical condition so that she would be forced to
leave her job. Her performance reviews rated her commendable to outstanding, and she received progressive salary increases. Plaintiff’s evidence highlighted the difference between how her job skills were characterized by her fellow employees and her written evaluations, and a supervisor’s apparently negative vision of her future at the university. A supervisor allegedly unsuccessfully solicited other employees to document plaintiff’s behavior, stripped her of many of her duties, and assigned her work that could not be completed in her medically mandated four-hour workday.

The Court of Appeal held that a genuine issue of fact existed as to whether a reasonable person would have felt compelled to resign and that a genuine issue of fact existed as to whether plaintiff was targeted for termination in retaliation for whistleblowing, precluding summary judgment. This case gives a broader reading to the constructive termination theory than some other reported cases.

**Rivera v. National Railroad Passenger Corp.**, 331 F.3d 1074 (9th Cir. 2003)

A former employee sued Amtrak in state court, alleging wrongful termination, defamation, and other causes of action. Plaintiff had reported to company management his co-employees’ alleged illegal practices of using and selling drugs on job. However, as the Ninth Circuit noted, “reporting on-going criminal conduct to an employer’s management does not necessarily implicate a public interest.” There was no report of the alleged criminal conduct to the police or other authorities. Plaintiff therefore failed to establish wrongful termination in violation of public policy. However, plaintiff could nonetheless sue the employer for defamation, based on alleged statements by co-workers, made during an investigation, that plaintiff had falsified timecards and threatened co-workers. The court did not address whether these statements were privileged and therefore not actionable.


See discussion in Section IX, infra. Employee who is fired for refusing to sign illegal non-compete agreement may sue for wrongful termination in violation of public policy.


Gores Technology Group (“GTG”) entered into a stock purchase agreement with Hewlett-Packard Company to purchase all capital stock of VeriFone, Inc. The agreement and amendment to the agreement provided generally that no rights or remedies exist to third persons under the contract. However, the amendment to the agreement also expressly prohibited GTG from terminating VeriFone employees during the first 60 days after closing the stock sale, and required certain severance benefits for employees terminated for a period thereafter. In violation of this provision, GTG terminated plaintiff employees within one week of closing the sale. The terminated employees sued, seeking declaratory relief and damages for breach of contract, claiming that they were intended third party beneficiaries of the amended agreement.

The Court of Appeal reversed summary judgment for GTG, and found that the plaintiff employees were third party beneficiaries of the agreement as a matter of law and could
enforce it against GTG. In so doing, the Court of Appeal stated that although the provisions of the agreement were in conflict, where a general and specific provision are inconsistent, the specific provision—here, conferring third party beneficiary rights to the employees—would govern.
VI.
PRIVACY/DEFAMATION


Former employee was terminated from employment, allegedly because of her membership in an illegal investment group. The former employee sued the employer for wrongful termination in violation of public policy, based in part on Labor Code Sections 96(k) and 98.6. The Court of Appeal affirmed the lower court’s dismissal of her claims. In so doing, the Court of Appeal held that Labor Code Section 96(k)—which allows the Labor Commissioner to take assignment of claims for discharge from employment for lawful off-duty conduct—only provides a procedure for exercise of jurisdiction, not an independent public policy creating a private right of action. The court also held that although Labor Code Section 98.6 prohibits termination for lawful off-duty conduct, this prohibition is limited to conduct protected by the Labor Code.

**Catholic Charities of Sacramento, Inc. v. Dep't of Managed Health Care, et al.**, 32 Cal. 4th 527 (2004)

The California Supreme Court rejected the church-affiliated employer’s constitutional challenges to the Women’s Contraception Equity Act (“WCEA”), under which certain health and disability insurance contracts must cover contraceptives if they cover prescription drugs. The WCEA exempts qualifying “religious employers” (mostly churches) from complying with the provisions for contraceptives coverage. The plaintiff, however, as a social service organization that employs persons of all faiths and serves persons of all religious beliefs, did not qualify for the exemption. In so deciding, the court rejected all of the employer’s arguments under the free exercise and establishment clauses of the United States and California Constitutions.


A job applicant sued his former employer for defamation based on false information provided to a prospective employer. The court found that an employer who makes a good faith mistake and provides erroneous information regarding a former employee in a reference check is not liable for defamation. The employer inadvertently gave incorrect information regarding the former employee, and the court found that no reasonable jury could find malice was a motivating cause of the statements. The evidence showed that the former employer made an unintentional error by paying insufficient attention to the employer’s inquiry. The court stated: “[i]t is well established that a former employer may properly respond to an inquiry from a potential employer concerning an individual’s fitness for employment, and if it is not done maliciously, such response is privileged.”


Former manager filed action against company where he had worked, alleging invasion of privacy and wrongful termination after he was terminated for dating a subordinate. The court held that termination of plaintiff’s employment for dating a subordinate did not invade plaintiff’s right to privacy guaranteed by Art. I, Sec. 1 of the California
Constitution, because individuals do not have a legally protected interest in pursuing sexual relationships. Likewise, plaintiff did not have a cause of action under Labor Code Section 96 because he could not establish that his employment was terminated due to the fact that he asserted rights guaranteed under the California Constitution (Section 96 does not establish public policy but merely provides a remedy for violation of rights guaranteed by other provisions of law). Additionally, plaintiff had a diminished expectation of privacy in pursuing an intimate relationship with his subordinate because the company had an express policy regarding dating subordinates. The court also recognized that employers have legitimate interests in avoiding conflicts of interest between work and family-related obligations.

Note: This case arose prior to the enactment of Labor Code Section 98.6, which prohibits employers from refusing to hire, discriminating against or discharging employees who engage in lawful conduct away from the place of employment. Query whether the result would be different if the case had arisen after the effective date of Labor Code Section 98.6.

Also note: The issue of “paramour preference” is before the California Supreme Court in Mackey v. Dept. of Corrections, see Section II, supra.


In a four-three decision, the California Supreme Court refused to uphold an injunction granted to Intel Corporation against clearly abusive and disruptive email use by a former Intel employee. The former employee was able to access Intel’s email system and to send thousands of disruptive email messages. The Supreme Court held that an injunction was improper, in part because the employer’s email system could be accessed externally by non-employees, and no actual damage was shown to the system or the computer hardware or software.


Edwards had made generalized threats of violence against his employer, USS-Posco Industries. The Court of Appeal upheld the trial court’s three-year injunction in the name of the supervisor who had initiated disciplinary action against Edwards. Edwards had never directly threatened that particular supervisor. The court denied Edwards’ arguments to modify the injunction, based on claims that he should not have been taken seriously, and that he had never directed any threats toward the supervisor in whose name the injunction was issued. The court stated: “an employer may seek relief on behalf of any employee who is credibly threatened with unlawful violence, whether or not that employee is identified by the defendant.”


Plaintiff’s supervisor had publicly reprimanded her and disseminated the nature of the reprimand to other employees with no interest in the matter. The court held that workers’ compensation was not the exclusive remedy for the alleged slander, permitting a claim for invasion of privacy. The court determined that plaintiff’s supervisor’s behavior in
intentionally disseminating the nature of plaintiff’s reprimand went beyond the “compensation bargain.” As such, the exclusivity provisions of the Act did not apply. This case is troubling because it seems inconsistent with other cases finding workers’ compensation is the exclusive remedy for many non-statutory workplace torts.


Former employee sued his employer and the employer’s workers’ compensation carrier after he was reported to the District Attorney for suspected workers’ compensation fraud. The defamation claim against the employer was barred by the exclusive remedy provisions of the Workers’ Compensation Act. However, the workers’ compensation carrier is not an “employer” and not entitled to the protection of the exclusive remedy rule. Former employee’s defamation claim could proceed against the workers’ compensation carrier.

**Rivera v. National Railroad Passenger Corp.**, supra, 331 F.3d 1074 (9th Cir. 2003)

See description in Section V, above. Statements by co-employees made during internal investigations can form basis of defamation claim against employer. Issue of privilege for such statements is not addressed in the decision.

**Fraser v. Nationwide Mutual Insurance Co.**, 352 F.3d 107 (3d Cir. 2003)

Plaintiff, an independent insurance agent for defendant, was terminated after the company searched its main file server (on which all of plaintiff’s emails were lodged) for evidence of improper conduct on plaintiff’s part. The Company’s review of emails did not violate either Title I or II of the Electronic Communications Privacy Act (“ECPA”), or the Pennsylvania state law counterparts. To constitute a violation of the ECPA, the emails must have been intercepted during their transmission and before they were reviewed by their intended recipients. Because the emails in question had already been received by their intended recipients and were stored on defendant’s system, they were no longer in transit, and thus, no longer protected.


No expectation of privacy in computer that company provided to employee. Employee had signed a written agreement acknowledging the company’s right to inspect the computer. The statement the employee signed also acknowledged the company could monitor the computer. The employee allegedly accessed pornographic websites while at work. Additionally, the company had issued the employee two computers: one for home use and one for office use. During the lawsuit, the employee refused to produce the home computer, citing his right of privacy. The court rejected the privacy claim and found that the employee had consented to monitoring both computers and had no reasonable expectation in the home computer when used for personal matters. It ordered the home computer produced in discovery.
VII.

IMMIGRATION STATUS

Note: Effective January 1, 2003, Senate Bill 1818 became effective and, if constitutional, will strictly limit the discovery and use of evidence of a plaintiff’s immigration status. Whether SB 1818 is preempted by federal immigration law is an unresolved issue.


The United States Supreme Court held that federal immigration policy precluded the NLRB from awarding back pay to an undocumented alien who had never been legally authorized to work in the United States. The employer hired a worker on the basis of documents appearing to verify his authorization to work in the US. The worker and others were laid off after they supported a union-organizing campaign at petitioner’s plant. The NLRB found that the lay-offs violated the NLRA and ordered back pay and other relief. At a subsequent compliance hearing, the employee testified to not having authorization to work in the United States. The court held that to allow an award of back pay would run counter to immigration policy, citing various provisions of the Immigration Reform Control Act of 1986.

**Ribera v. Nibco, Inc.**, 364 F.3d 1057 (9th Cir. 2004), en banc denied 384 F.3d 822 (9th Cir. 2004)

This Ninth Circuit decision addresses the controversial issue of whether immigration status is relevant where a former employee seeks back pay for alleged employment discrimination. The United States Supreme Court held, in Hoffman Plastics v. NLRB, 535 U.S. 137 (2002), Section VII, infra, that the NLRB lacks authority under the National Labor Relations Act to award back pay to undocumented workers. The Ninth Circuit held that, despite the Hoffman Plastics rule barring back pay, the employer was not permitted to ask questions during depositions to determine whether an employee was or was not lawfully entitled to work in the United States. The court held that the Hoffman rule would not apply to Title VII claims. In the dissent to the en banc petition, four judges strongly dissented. The case does not address California Labor Code Section 1171.5, discussed supra, which purports to make immigration status irrelevant in determining damages under California labor and employment statutes.

**Sanango v. 200 East 16th Street Housing Corporation**, BNA Daily Labor Report No. 02 (January 4, 2005)

In two cases decided December 28, 2004, the New York Court of Appeals held that undocumented workers could recover back pay based on earnings they would have earned in their country of origin (as opposed to earnings they would have earned in the United States). Sanango and Balbuena v. IDR Realty, both reported at BNA Daily Labor Report No. 02 (January 4, 2005). The New York Court of Appeals held that providing a damage remedy based on wages the plaintiff might have unlawfully earned in the United States.
States court “unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA…”


An illegal alien brought a medical malpractice action against a workers compensation physician who treated him for injuries he sustained while working at a food packaging plant in the United States. The trial court denied the plaintiff’s motion in limine to exclude evidence referencing his residency status, holding that his residency status was relevant to his credibility. The court of appeal reversed, holding that evidence regarding the plaintiff’s residency status should have been barred as irrelevant because the plaintiff was not claiming loss of future earnings.
VIII.
WORKERS’ COMPENSATION

**Claxton v. Waters**, 34 Cal. 4th 367 (2004)

Plaintiff filed two workers’ compensation claims against her former employer – one alleging injuries that she suffered from a slip and fall at work and another alleging injury “to psyche due to sexual harassment.” She later filed a civil action, alleging sexual harassment under the FEHA. Shortly thereafter, plaintiff settled the workers’ compensation claims and, as part of that settlement, executed a preprinted compromise and release (C&R) form supplied by the Workers’ Compensation Appeals Board. The C&R contained language releasing and forever discharging the employer “from all claims and causes of action, whether now known or ascertained...” Plaintiff’s former employers then moved for summary judgment in the civil action on the ground that it was barred by the C&R. The Supreme Court held that the standard language of the C&R “releases only those claims that are within the scope of the workers’ compensation system, and does not apply to claims asserted in separate civil action.” The Court further held that its decision would only apply prospectively since it was changing existing law on the admissibility of extrinsic evidence to show that a C&R was intended by the parties to include a cause of action outside the workers’ compensation system.


“Exclusive remedy” rule for workers’ compensation injuries precludes discrimination claim for a bodily injury suffered after an allegedly discriminatory demotion. Plaintiff claimed he was demoted to a sales position because of his age and thereafter sustained a knee injury in the new job. The injury claim was barred by the workers’ compensation exclusive remedy rule, because the requirements of the job itself, not the discriminatory motivation, caused the injury.

See Operating Engineers Local 3, supra, 110 Cal. App. 4th 180 (2003), discussed in Section VI, supra, re workers’ compensation preemption.


Once an injured employee returns to work, or is deemed able to do so, or when his/her medical condition becomes “permanent and stationary,” there is no further right to temporary disability payments. Further, an employer may, without violating Labor Code Section 132a, require an employee to use vacation and sick leave while on workers’ compensation leaves, so long as it makes the same requirement of other employees on non-workers’ compensation leaves. “By prohibiting ‘discrimination’ in Section 132a, we assume the Legislature meant to prohibit treating injured employees differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim.”

An employee who suffers a routine physical injury, which also allegedly causes a psychiatric injury, must have worked for the employer at least six months prior to becoming eligible for disability benefits as a result of the psychiatric injury. Labor Code Section 3208.3, which imposes the six-month limitation, applies to both purely mental injuries and “physical/mental injuries.”


Workers’ compensation is the exclusive remedy for a claim that an employee suffered an illness as a result of exposure to toxic mold in the workplace. No evidence that the employer concealed the connection between the illness and employment.


Employee was administered a hearing test by his employer, and the employer’s testing service failed to diagnosis a brain tumor which should have been discovered by a properly-administered hearing test. The employee’s sole remedy, however, is workers’ compensation, not a tort for a negligence claim. The court holds that negligent diagnostic treatment voluntarily provided by an employer is compensable only under the workers’ compensation act.


Plaintiff had been off work for over three months due to industrial injuries. Pursuant to plan provisions, the employer terminated its contributions to an ERISA group health benefits plan after a certain time period elapsed. Plaintiff sued for unlawful discrimination against an industrially-injured worker, in violation of Labor Code Section 132a. The court held that where an injured employee’s Section 132a claim is premised upon the employer’s termination of (or refusal to provide) group health plan benefits to the employee pursuant to the terms of an ERISA plan, the employee’s Section 132a claim “relates to” the ERISA plan and, therefore, is preempted by ERISA.
IX. INTELLECTUAL PROPERTY/NON-COMPETITION PROVISIONS


Former employees who left a law firm and started a competing firm can be liable for interfering with the at-will employment relationships between their former firm and other employees. The California Supreme Court refused to hold that “raiding” of at-will employees could never give rise to a claim for unfair competition or interference with contractual relations, despite the fact that the at-will employees were not obligated to remain employed with the law firm and could have left for any reason or no reason. However, the former employer must show “wrongful conduct” independent of simply offering employment to an at-will employee. In this case, the “wrongful conduct” included misuse of the firm’s computer system (before the defendants left the firm), damaging the computer system, making misleading statements to the firm’s clients to induce them to terminate or change their attorney-client relationships, and refusal to cooperate with the former firm regarding client issues post-resignation. The California Supreme Court limited the damages recoverable to economic loss caused by the unlawful interference, such as the costs to recruit replacement employees. In order to recover, the plaintiff must show, in addition to the hiring of an at-will employee, that the defendant engaged in an act “proscribed by some constitutional, statutory, regulatory, common law or other determinable legal standard.”


In this important case, the California Supreme Court decided that a California court should only in extreme circumstances enjoin court proceedings in another state, even where those proceedings might result in a California resident being compelled to adhere to a non-competition agreement which is unlawful in California. An employee of Medtronic, Inc. signed a non-competition agreement with Medtronic in Minnesota. The agreement was lawful under Minnesota law. Later, the employee quit, relocated to California and accepted a position with Advanced Bionics Corp., a competitor. Advanced Bionics immediately filed an action in California seeking a declaratory judgment that the Minnesota non-competition agreement was unlawful. Medtronic filed a second action in Minnesota, seeking to enforce the non-competition agreement. The California Court of Appeal upheld a trial court injunction prohibiting Medtronic from attempting to enforce its non-competition agreement in Minnesota and ordering that the matter be litigated in California.

This case is decided on the very narrow ground that injunctions should not normally be issued by California courts to enjoin out-of-state litigation. It does not address the more important issue whether a covenant to compete, signed in another state where it is lawful, can be enforced against an employee who has relocated to California, where the covenant not to compete would be unlawful.

It is unresolved whether, if the Minnesota court ever enters a judgment enforcing the non-competition agreement, a California court would give effect to that judgment.

Plaintiff was terminated for refusing to sign a nonsolicitation agreement which provided that he would not call on his employer’s customers or potential customers with whom he had any dealings as a result of his employment for a period of one year following his termination. He brought suit for wrongful termination, alleging that he was fired for refusal to sign an unenforceable covenant not to compete. He alleged that the agreement he refused to sign violated public policy, and that the identity of the employer’s customers was not trade secret because the employer made no effort to keep them secret. The court of appeal held that “[a]ntisolicitation covenants are void as unlawful business restraints except where their enforcement is necessary to protect trade secrets.”


In a trade secret case, the defendant often claims it did not misuse a trade secret, but instead developed its product or process through independent means or through reverse engineering of the plaintiff’s product. Where the defendant makes such a claim (independent development or reverse engineering), it does not bear the burden of proof on the claim. The burden of proof to prove trade secret misappropriation always remains with the plaintiff alleging the misappropriation. However, the defendant who claims it independently developed the product/process, or reverse engineered it, may be required to produce evidence of independent development or reverse engineering. Bearing the burden of producing evidence, however, is not the same as bearing the ultimate burden of persuasion that trade secret misappropriation occurred. In Sargent Fletcher, the defendant successfully showed it independently developed a product very similar to that manufactured by the plaintiff, and escaped liability.


A trade association which licensed encryption and decryption technology to DVD hardware and software manufacturers obtained a preliminary injunction, preventing the operators of certain websites from posting the source code for a DVD decrypting program containing the association’s trade secrets. The California Supreme Court unanimously ruled that enjoining the website operators from posting the plaintiff’s source code does not violate the First Amendment of the U.S. Constitution or the California Constitution. In other words, the First Amendment is not a license for trade secret misappropriation.

The Court held that although computer code is language that deserves First Amendment protection, the trial court’s injunction was content neutral, and passed muster because it did not burden more speech than necessary to serve a significant government interest -- preserving the plaintiff’s property interest in its trade secret information and preventing website operators who have reason to know that trade secrets were improperly acquired from disclosing them.

The inevitable disclosure doctrine, under which a plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant’s new employment will inevitably lead him or her to rely on the plaintiff’s trade secrets, is not the law in California and will not bar an employee from working for a competitor.
X.
DISCOVERY


This case addresses the recurring issue of how much discovery will be permitted into the personnel records of non-involved employers or former employees.

Plaintiff sought to introduce personnel records of 65 fellow employees in an effort to prove her disparate treatment/race discrimination/retaliation case. The County maintained that disclosing personnel records of 65 uninvolved employees would be an unwarranted invasion of privacy. Some of the uninvolved employees had objected to disclosure of their record. The trial court suggested that interrogatory answers would be sufficient, but plaintiff insisted on the actual personnel records.

The appellate court held that it was not an abuse of discretion to deny access to the actual personnel records. The County was, however, required to identify, in interrogatory answers, the type and number of disciplinary acts involving other, unidentified employees, and to do so by the race of the applicable employees.


An injunction was properly issued to compel the defendants to preserve or “freeze” electronically stored data so that it would be available for future discovery and use as evidence. The defendants were accused of improperly using customer and other data from their former employer to establish a competing business.


No evidentiary privilege for discussions between a union member and his union business agent.
XI.
DAMAGE ISSUES


Although not an employment case, this decision by the United States Supreme Court will have substantial effect on employment litigation throughout the nation. The Supreme Court held in State Farm that punitive damages can rarely if ever exceed a multiple of ten times the compensatory damages, and in most cases may not constitutionally exceed four times the compensatory damages. Because in many employment cases the compensatory damages award will be relatively low, the State Farm opinion will correspondingly limit any punitive damages awards.

The Supreme Court also made several other important holdings in State Farm:

• If the plaintiff, to prove “malice” (and therefore support a punitive damages award), offers evidence of conduct toward persons other than the plaintiff, the conduct toward others must be similar to the conduct sued upon.
• As a general rule, conduct occurring in a state other than where the case arose cannot be considered in awarding punitive damages.
• Where there is a large compensatory damage award (and the compensatory award of $1 million in State Farm was considered “substantial” by the Supreme Court), a smaller ratio between the compensatory damage award and the punitive damage award is appropriate.
• Where some or most of the compensatory damage award is emotional distress or humiliation, there is a danger of “double recovery” in permitting a large punitive damage award as well.
• In assessing the propriety of punitive damage awards, courts should look to civil penalties created by statute, which may provide a guidepost for appropriate levels of punitive damages for similar conduct.

All or almost all of the foregoing points can be argued as limitations on punitive damages in employment cases. Because State Farm rests on the Due Process Clause of the United States Constitution, it will limit punitive damage awards in all types of cases in all states.


This is the first published opinion from a California Appellate Court addressing the issues raised in State Farm, supra. Although not an employment case, it demonstrates the substantial limitations State Farm has imposed on punitive damages awards.

The Court of Appeal reduced a punitive damage award from $290 million to $23.7 million, following the State Farm factors.
In reviewing the State Farm decision, the Court of Appeal noted that the standard jury instructions used in California for punitive damages are probably not appropriate or accurate after State Farm. After reviewing all of the State Farm factors, the Court of Appeal awarded punitive damages of approximately five times the total compensatory damages.


A four-to-one ratio of punitive damages to compensatory damages is the outer constitutional limit on punitive damages in “a case in which the compensatory damages are neither exceptionally high nor low and the defendant’s conduct is neither exceptionally extreme nor trivial.” (Non-employment case).

Whether a jury may or may not consider a defendant’s wealth in determining punitive damages has generated conflicting decisions from the courts of appeal. The California Supreme Court is excepted to decide the decision in Simon v. San Paolo U.S. Holding Co., Inc., 113 Cal. App. 4th 1137 (2003), review granted, 11 Cal. Rptr. 3d 510 and Johnson v. Ford Motor Company, 2003 WL 22794432 (2004), review granted.

Bell v. Clackamas County, 341 F.3d 858 (9th Cir. 2003)

One of the Ninth Circuit’s first employment decisions addressing punitive damages after the Supreme Court’s decision in State Farm, supra. The Ninth Circuit, purporting to follow State Farm, reversed a trial court order which had reduced a jury’s punitive damages award. The trial court had reduced the individual defendants’ punitive damages to $10,000 from $50,000. The Ninth Circuit stated that the trial court should “evaluate the degree of reprehensibility of each of the defendant’s misconduct individually as opposed to in grosse.” Although the retaliation was proven by circumstantial evidence, this did not warrant a reduction of punitive damages. Finally, if the trial court deems it appropriate to reduce punitive damage awards as grossly excessive on the basis of individual defendants’ ability to pay, it may do so only to the extent the record substantiates their wealth, and any indemnification on the part of the employer may be taken into account.


Plaintiff was promised employment and quit a different at-will position in reliance on the promise. The prospective employer then withdrew the offer, leaving plaintiff with no job. The court held that “expectancy” damages, meaning damages based on what the plaintiff would have earned at the position he quit, are recoverable in such a case, despite the fact that the previous employment was at-will. However, the plaintiff’s evidence of damages was too speculative to recover “lost wage” damages based on the prior employment. In order to recover, the plaintiff would have to prove it was reasonably certain that he would have maintained his previous at-will employment.

The Ninth Circuit affirmed a jury verdict which held an employer liable for discrimination under federal law and found the corporate defendants and an individual defendant liable for breach of contract.

The Ninth Circuit affirmed the $360,000 compensatory damages award. Although the employer claimed that it was excessive compensation for the employee’s emotional distress, the court stated that the law does not require that “emotional distress . . . be demonstrable, genuine and adequately explained . . . .” In this case, the employee’s testimony to the damage to his dignity and reputation was sufficient to support a substantial compensatory award for emotional distress. The employers had sent letters to his suppliers, including those in his hometown in China, stating that he had been terminated.

The Ninth Circuit also affirmed the $2.6 million punitive damages award. The employer claimed that it was not supported by substantial evidence, but the federal standard allows punitive damages against “an employer who discriminates in the face of a perceived risk that its actions will violate federal law.” Egregious conduct is not required to establish punitive damages liability, and the evidence supporting liability for discrimination would be “nearly identical” to that supporting punitive damages.

In addition, the Ninth Circuit found that the punitive damages award was not constitutionally excessive, under the Supreme Court’s recent *State Farm* ruling, which examined the (1) degree of reprehensibility of the defendant’s conduct, (2) ratio of punitive to compensatory damages and (3) difference between the award and the civil penalties authorized or imposed in comparable cases. First, the reprehensibility of intentional discrimination on the basis of race or ethnicity is more serious than the “purely economic” harms caused by fraudulent business practices. Second, although no precise mathematical guideline exists for the constitutionally appropriate ratio of punitive to compensatory damages, the Supreme Court has stated that the permissible ratio was not more than 10 to 1. In this case, the ratio was roughly 7 to 1, which likely comports with due process.


See discussion in Section X, supra. A plaintiff who loses a FEHA case must pay the “costs” of the employer (i.e., filing fees, deposition fees and several other minor items) even if the case was not frivolous or unreasonable.


Wrongfully terminated investigative reporter was not required to seek a job outside the geographic area in which he had historically worked.
Fine v. Ryan International Airlines, 305 F.3d 746 (7th Cir. 2002)

Wrongfully terminated employee obtained subsequent employment but then resigned from the new job. Resignation from the new position cuts off the right to further “front pay” or reinstatement.
XII.
MANDATORY ARBITRATION

Summary:
Since the California Supreme Court’s Armendariz decision on July 27, 2000, California courts have generally continued to enforce employer-imposed arbitration agreements, if the agreement contains procedural and substantive protections to ensure fairness, and if the agreement is not one-sided. Employers who use or are considering using arbitration agreements won a victory from the United States Supreme Court on March 21, 2001, when the Supreme Court decided Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). See Armendariz v. Foundation Health Psychcare Services, 24 Cal. 4th 83 (2000).

Notwithstanding the United States Supreme Court’s extremely pro-arbitration rulings, several recent California Court of Appeal decisions have given an expansive reading to Armendariz, supra, and have invalidated arbitration agreements that contain various allegedly offensive provisions. It remains to be seen whether the United States Supreme Court decisions in Circuit City, supra, and Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000), undermined the basic premise of Armendariz.

The California Supreme Court in 2003 extended the Armendariz rules and limitations to common law wrongful termination claims. Little v. Auto Stiegler, 29 Cal. 4th 1064 (2003). In the Little opinion, which was decided by a four-three vote, three of the seven Justices expressed concern that the Armendariz holding conflicts with the United States Supreme Court ruling in Green Tree, supra.

The Circuit City Decision:
In Circuit City, the United States Supreme Court held, in a 5-4 opinion, that federal law, not state law, governs issues of arbitrability in employment contracts where the employer is engaged in interstate commerce. The Supreme Court held that the Federal Arbitration Act governs such employment agreements and preempts any state law inconsistent with the pro-arbitration federal statute. The effect of the Circuit City decision is to limit a state’s ability to invalidate most mandatory arbitration agreements. All but the smallest employers are “engaged in interstate commerce,” and therefore the Federal Arbitration Act will apply to arbitration agreements between those employers and their employees.

Circuit City is also important because it will limit the ability of states, such as California, to enact new legislation to undermine most mandatory employment arbitration agreements.

Many issues, however, remain unresolved even after Circuit City. For example, what issues are preempted? Once a contract to arbitrate exists, and the employer is engaged in interstate commerce, are states absolutely barred from restricting the content of arbitration agreements, as the California Supreme Court in Armendariz attempted to do? Or, is the Armendariz decision still valid, because the California Supreme Court has decided that certain provisions in arbitration agreements are so inherently unfair or one-sided that there is no agreement to arbitrate at all?
**EEOC v. Luce Forward Hamilton & Scripps -- Duffield Overruled**

The United States Court of Appeals for the Ninth Circuit has been extraordinarily hostile to mandatory arbitration agreements. In 1998, a three-judge panel of the Ninth Circuit ruled that mandatory arbitration agreements could not be used to compel arbitration of a claim under either Title VII of the Federal Civil Rights Act of 1964, or under the California Fair Employment and Housing Act. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). However, eight other federal Circuits, as well as the Supreme Courts of California and Nevada, rejected the Duffield decision.

In September 2003, the Ninth Circuit, in an *en banc* eleven-judge opinion, overruled Duffield. *Equal Employment Opportunity Commission v. Luce Forward Hamilton and Scripps*, 345 F.3d 742 (9th Cir. 2003) (*en banc*). After the *en banc* decision in Luce Forward, the Ninth Circuit no longer follows Duffield. However, employers will wish to avoid the federal courts in California when litigating issues regarding arbitration agreements, as there are several Ninth Circuit judges whose anti-arbitration views are well known.

**Armendariz Applies to Contract and Tort Claims**


The most important holding in *Little* is that the Armendariz rules regarding “unconscionable” agreements apply to common law wrongful termination claims as well as to claims under the FEHA. Significantly, however, three of the seven Justices wrote that they believe Armendariz itself may conflict with the United States Supreme Court’s holding in *Green Tree* or *Circuit City*, *supra*. In light of the holding by the California Supreme Court in *Little*, a prudent employer will again review its mandatory arbitration provision to ensure that it complies with the Armendariz factors.

**Practical Effect and Recommendations**

While state courts profess to follow the long-standing precedent that arbitration agreements are favored, the most recent cases from the California Courts of Appeal are distinctly hostile to arbitration agreements. These cases have generally refused to “sever,” or eliminate, offensive provisions from arbitration agreements, despite the statutory and case law basis to interpret a contract in order to enforce it rather than invalidate it. Nevertheless, we advise employers not to abandon arbitration programs in place. Instead, the employer should review the existing arbitration agreements to make sure the comply with the Armendariz standard and the post-Armendariz Court of Appeal rulings.

One approach is to incorporate by reference in the arbitration agreement the arbitration rules of a recognized arbitration provider, such as the Judicial Arbitration and Mediation Service, or the American Arbitration Association Employment Dispute Resolution rules. Before using the rules of such providers, however, the employer must investigate the costs of national ADR providers, as the employer must bear those costs under the Armendariz holding.
If the arbitration agreement does not contain reference to a set of arbitration rules, it should provide for pre-hearing discovery in the discretion of the arbitrator, a written arbitration award, and procedural protections such as the right to counsel at the hearing, the right to confront and cross-exam witnesses, the right to produce documentary evidence and to submit written or oral argument at the conclusion of the hearing.

The agreement should provide for a neutral arbitrator, including pre-appointment disclosure of any possible conflicts of interest the arbitrator may have. This topic is also covered in the American Arbitration Association Rules.

The arbitration clause must not impose on the employee any costs associated specifically with the arbitration, such as arbitrator’s fees or fee of the arbitration provider. It is probably permissible to require the employee/plaintiff to pay fees up to an amount that would be required to file a civil action in California Superior Court. Cases from elsewhere in the country have reached conflicting results whether the arbitration agreement can impose more significant fees if the employee loses the arbitration.

(i) Under no circumstances should the arbitration agreement attempt to limit any remedy or damage element that the employee could recover if the case were in court.

(ii) Under no circumstances should the agreement impose any “statute of limitations” other than the applicable statute of limitations if the case were in court.

(iii) Several courts have disapproved of “carve outs” by which the employer (or even both parties) retain the right to litigate intellectual property disputes in court.

(iv) At least one court has approved the carving out of intellectual property claims from an arbitration agreement, as long as both the employer and the employee were free to bring trade secret claims or similar intellectual property claims in court.

(v) It is advisable to specifically list the various common types of employment claims as being arbitrable under the clause.

(vi) We recommend that the clause state that the issue of arbitrability shall be governed by the Federal Arbitration Act if the employer is engaged in interstate commerce.

Post-Armendariz Cases

After the California Supreme Court’s ruling in Armendariz, supra, 24 Cal. 4th 83, the following significant cases have been published:

1. Several cases have addressed “cost sharing” provisions in arbitration agreements. Many older agreements provide that each party will bear one-half of the arbitration costs (including arbitrator’s fees). Such provisions are improper under Armendariz. However, several courts have “severed” such provisions and have enforced the underlying agreement to arbitrate. See, e.g. McMannus v. CIBC World Market Corp., 109 Cal. App. 4th 76 (2003) (unlawful “cost
sharing” provisions did not taint entire agreement to arbitrate); Spinetti v. Service Corp. Int’l, 324 F.3d 212 (3d Cir. 2003) (severing a “cost sharing” provision).

2. Other courts have severed similar problematic provisions. In Fittante v. Palm Springs Motors Inc., 105 Cal. App. 4th 708 (2003) the Court of Appeal voided a provision which permitted an appeal from an arbitration award if there were a large judgment by the arbitrator. Obviously, the risk of a large judgment is overwhelmingly on the employer – so this provision unduly benefits the employer. However, the court severed the appeal provision and enforced the agreement to arbitrate.

3. Several of the most recent arbitration cases have refused to “sever” or eliminate unlawful provisions. See, e.g., Martinez v. Master Protection Corporation, 118 Cal. App. 4th 107 (2004) (arbitration agreement contained exception allowing employer to sue in court for trade secret or unfair competition claims; arbitration agreement required employee to pay half the costs of the arbitration and to post arbitrator’s fees in advance; arbitration agreement contained shortened, six-month statute of limitations); Fitz v. NCR Corporation, 118 Cal. App. 4th 702 (2004) (arbitration agreement contained exclusion by which employer or employee could bring intellectual property or trade secret case in court; this clause was held unlawful, even though bilateral, because the court felt that an employee would only rarely assert a trade secret claim; agreement also contained a restriction on discovery to two depositions unless a “compelling need” was shown for additional depositions). See also Abramson v. Juniper Networks, 115 Cal. App. 4th 638 (2004) (court refuses to sever unconscionable provisions, including exclusion of “claims relating to or arising out of the misuse or appropriation of the company’s trade secret or confidential or proprietary information;” agreement also impermissibly required the employee to pay half the costs of arbitration); O’Hare v. Municipal Resource Consultants, 107 Cal. App. 4th 267 (2003) (agreement was expressly unilateral – employee was forced to arbitrate his claims but employer reserved right to file a lawsuit for trade secret and intellectual property issues; agreement contained unlawful cost sharing provision; court suggests that lack of mutuality in the arbitration agreement, alone, may be enough to invalidate the entire agreement and refuses to sever offending provision). These cases indicate that the presence of multiple “unconscionable” provisions weighs heavily against severing those provisions, and therefore the court may refuse to enforce the agreement entirely.

4. However, the Third Circuit in Philadelphia has held “the existence of multiple unconscionable provisions will not always evidence ‘serious moral turpitude’ or serious misconduct, precluding enforcement of the agreement. That will depend upon whether the number of such provisions and the degree of unfairness support the inference that the employer was not seeking a bona fide mechanism for dispute resolution, but rather sought to impose a scheme that it knew or should have known, would provide it with an impermissible advantage.” Parilla v. IAP Worldwide Services, Inc., 368 F.3d 269 (3rd Cir. 2004). The Supreme Court of Washington on December 23, 2004 struck what we believe is the proper balance where an arbitration agreement included an unconscionable “confidentiality” provision and a provision that restricted awards of punitive damages. Zuver v. Airtouch Communication, __ P.3d __, 2004 WL 3016484 (2004) and Adler v. Fred Lind Manor, __ P.3d __, 2004 WL 3016302 (2004). The court simply severed the invalid provisions, stating “courts are loath to upset the terms of an agreement and strive to give effect to the intent of the parties . . . we can easily excuse the confidentiality and remedies provisions, but enforce the remainder.”
5. Even where the arbitration agreement is signed as part of a settlement of a previous employment case, and where the employee had the advice of counsel, one Court of Appeal has applied the Armendariz standards and invalidated the arbitration agreement. Nyulassy v. Lockheed Martin Corp., 120 Cal. App. 4th 1267 (2004) (employee was hired by Lockheed as part of a settlement involving a previous claims against a predecessor employer; as part of the settlement, he was required to sign a standard Lockheed arbitration agreement; court found that exclusion for claims against the employee by the employer was unconscionable, arbitration agreement also required pre-arbitration disclosure by employee of his claims, and a shortened statute of limitations).

6. The Ninth Circuit remains hostile to arbitration agreements despite the repeated decisions from the United States Supreme Court. For example, in Circuit City Stores v. Mantor, 335 F.3d 1101 (9th Cir. 2003), the Ninth Circuit rejected claims that the Federal Arbitration Act preempts California’s “unconscionability” doctrine as applied to arbitration agreements. In fairness, the Circuit City arbitration agreement examined by the Ninth Circuit in Mantor still contains several objectionable features. In light of the Ninth Circuit’s later en banc decision in EEOC v. Luce Forward, supra, it will be interesting to see how the Ninth Circuit approaches subsequent arbitration decisions.

7. Where there is a claim for attorneys’ fees, it should be submitted to the arbitrator along with the other issues. Unless the arbitration provision explicitly reserves jurisdiction to the court, the claim for attorneys’ fees must be submitted to the arbitrator. Corona v. Amherst Partners, 107 Cal. App. 4th 701 (2003).

8. The Eighth Circuit in Bailey v. Ameriquest Mortgage, 346 F.3d 821 (8th Cir. 2003) required arbitration of a claim for overtime pay under the Fair Labor Standards Act, finding overtime claims are susceptible to arbitration. Any issues of arbitratability were referred to the arbitrator for decision.

9. Even where the arbitrator makes a probable error in law in interpretation of a contract’s attorneys’ fee provision, courts will generally not overturn the arbitration award. The parties bargained for the arbitration award and gave up the right to court review. Moshonov v. Walsh, 22 Cal. 4th 771 (2000) (not an employment case).

10. The duty to arbitrate is established by the terms of the contract. Where an employment agency’s contract with applicants stated that the applicants are not considered “employed” until they have been assigned to a job, the arbitration clause was not applicable. The arbitration provision stated that claims to be arbitrated included “any disputes arising out of my employment . . .” Since the contract as stated that the applicant was not employed until assigned to a specific provision, applicants who were never assigned to specific positions were not required to arbitrate. They were never “employed” within the definition in the contract. Balandran v. Labor Ready, Inc., __ Cal. App. 4th __, 2004 WL 2915014 (2004).

11. Although not an employment case, one case addresses the doctrine of waiver as applied to arbitration agreements. The defendant was held to have waived the right to arbitrate by filing an answer (which did not allege an arbitration agreement as an affirmative defense) and

12. Employee is bound to an arbitration agreement where there is substantial evidence that he received a memorandum and brochure containing the arbitration agreement and continued to work for four years thereafter, even though there is no signed acknowledgment. *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416 (2000).

13. Employee bound to arbitrate despite refusal to sign acknowledgment to updated employee handbook. Employee continued to work after receiving the handbook, which contained an arbitration agreement. Prior handbook, which did not contain such an agreement, was superseded. *Martinez v. Scott Specialty Gases, Inc.*, *supra*, 83 Cal. App. 4th 1236 (2000).

14. Arbitration agreement which is silent regarding costs and fees is nonetheless enforceable; the party claiming that arbitration would be prohibitively expensive must bear the burden of showing the same. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000).

15. Several cases have addressed whether an adverse arbitration decision under a union agreement bars the plaintiff from a “second bite at the apple” via a statutory discrimination claim. Generally, the courts have not given preclusive effect to arbitration results under union agreements, when the employee brings a subsequent civil discrimination claim – even where the discrimination claim is based on the same facts as the prior grievance. See, for example, *Taylor v. Lockheed Martin Corp.*, 113 Cal. App. 4th 380 (2003); *Camargo v. California Portland Cement Co.*, 86 Cal. App. 4th 995 (2001); *Vasquez v. Superior Court*, 80 Cal. App. 4th 430 (2000).

**Conclusion**

The *Armendariz* case and its progeny teaches us some lessons, many of which were apparent even before the decision:

- Arbitration agreements, if imposed as a condition of employment, are lawful so long as they are fair and not overly harsh.

- We continue to believe that arbitration in most cases is a preferable means to resolve employment disputes, from both the employer and employee point of view, than court litigation.

- If you currently use a mandatory arbitration agreement, review the agreement to insure it complies with the *Armendariz* standards.

- In drafting an arbitration agreement, the employer should avoid attempting to overreach. The point of the agreement should be simply to change the forum from a court or jury trial to an arbitrator.

- The agreement should contain provisions to ensure fairness and neutrality. Reference to the rules of a recognized arbitration tribunal, such as the American Arbitration Association, is one of the easiest ways to accomplish this goal.
The agreement should not impose on the employee any costs unique to the arbitration.

The agreement should not attempt in any way to limit the scope of remedies that the employee (or employer) may recover in arbitration as opposed to in court.

The agreement should not attempt to shorten any statute of limitations that would otherwise apply.

The clause should bind both parties to arbitrate claims within its scope.

When imposing arbitration agreements on existing employees, care must be taken to avoid creating morale problems or a situation where the agreement could be attacked for lack of consideration.

Many larger companies have developed very sophisticated programs. Some of these programs do not require binding arbitration but simply a non-binding fact-finding hearing. The experience with these programs is that they resolve the great majority of claims, even if the final fact-finding hearing is not binding. The Armendariz decision does not address such non-binding programs; but we see nothing in the Armendariz decision that would invalidate such programs as long as the employee is not burdened with their cost.

Arbitration is not without its detractors. The chief arguments against arbitration are that (1) it can result in one-sided decisions which cannot be reviewed by an appeals court; and (2) it may in some cases encourage marginal claims. An employer considering adopting a program should discuss the pros and cons of the decision with its labor counsel.
XIII.
CLASS ACTIONS AND REPRESENTATIVE CLAIMS


Please see discussion in Section IV above.


The Court of Appeal held that an appellate court must review a trial court’s administration of a complex case with deference, and that it was within the trial court’s discretion, in a class action, to use statistical methodology of random sampling and extrapolation for the determination of aggregate class wide damages. Moreover, this method did not violate defendant’s due process rights because the statistical sampling and extrapolation methods reflected a level of accuracy consistent with due process requirements. The court further reasoned that defendant insurance company was afforded the opportunity to offer rebuttal evidence relating to the hours worked by individual employees and to negate the reasonableness of the inference to be drawn from claims representatives’ evidence.


Federal district court certifies a class of more than one million women alleging gender discrimination based on pay discrepancies and failures to promote. The Ninth Circuit has accepted this case for review. Wal-Mart contended that “common” issues did not predominate over individual issues, because decisions regarding pay and promotions were made store-by-store, and therefore were not centralized or subject to “common” proof. Plaintiffs assert among other things that the “excessive subjectivity” of the decision-making is itself indicative of discrimination. According to Wal-Mart, the uncontradicted statistical evidence is that women actually are paid the same or more than comparable males at many stores; yet the court included all stores in the class. This case presents many important issues for class actions in the employment discrimination field that will probably take years to resolve and give rise to additional large class claims.


The Court of Appeal approved class certification for essentially an industry-wide class of all older television writers who were victims of an alleged industry-wide practice of age discrimination. Even “deterred applicants,” meaning those who claim they did not apply for jobs because of the well-known age discrimination policy, may be included in the class.

Proposition 64

See discussion in Section I, above. Proposition 64 will reduce, and may eliminate, the use of the California Unfair Competition Law (Business & Professions Code Section 17200) and Wage Hour cases. In particular, plaintiffs in an unfair competition/Section...
17200 case must now have suffered an actual injury, and the cases must proceed either as an individual damage claim or a class action.


A demurrer (legal challenge to the sufficiency of the complaint) is not a proper method for an employer to challenge a class action. The plaintiff should be permitted the opportunity to file a motion for class certification, supported by affidavits or other evidence demonstrating why the class should be certified. The employer can then respond with its own evidence.


In *Herr*, the Court of Appeal affirmed a five million dollar jury verdict in favor of an employee who brought an age discrimination action against his employer. The court also held that the trial court properly enjoined the employer from discriminating against employees age 40 and over under the California Unfair Competition Law (UCL). In so holding, the court confirmed that the UCL’s remedies are cumulative to those available under the FEHA, and concluded that age discrimination in violation of the FEHA is an unlawful employment practice which may be enjoined under the UCL. The court ruled that “[a]n employer which practices age discrimination has an unfair competitive advantage over employers who comply with the FEHA because older workers frequently are more highly compensated than their younger colleagues.” The court also affirmed the trial court’s award of attorneys’ fees of nearly two million dollars pursuant to the FEHA and Code of Civil Procedure Section 1021.5, the private attorney general statute.


After unsuccessfully bidding on a military contract with the Republic of Korea, a manufacturer’s broker brought an action under the UCL, against the successful bidder, seeking disgorgement of the profits earned. The California Supreme Court rejected the plaintiff’s attempt to characterize the “disgorgement” remedy sought as “restitution,” and confirmed its prior holding in *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 137 (2000). “[U]nder the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest.” The Court also held that attorneys’ fees are not available under the UCL.

**Note:** Some commentators believe that Proposition 64 may limit or prohibit wage/hour claims under the UCL, as plaintiffs seeking unpaid overtime do not allege a “competitive” injury.
XIV.
CONCERTED ACTIVITY

**Note:** This paper does not attempt to summarize the many important recent developments in union/management relations law. However, the following case is very significant:


The National Labor Relations Board reversed its own four-year old precedent and held that “Weingarten” rights are not available to employees in a non-union company. Weingarten rights, named after a 1975 United States Supreme Court decision, permit an employee who is interviewed in a disciplinary setting to request that a union representative or fellow employee attend the investigatory interview.

In 2000, a 3-2 majority of the Board overturned fifteen years of precedent and held, in Epilepsy Foundation of Northeast Ohio v. Borg and Hasan, 331 NLRB 676 (2000), that Weingarten rights are available in a non-union company. In so doing, the Epilepsy Foundation decision overturned several previous Board rulings going back to 1985. However, after the composition of the Board changed as a result of the election of President Bush in 2000, a new 3-2 Board majority, on June 9, 2004, overruled Epilepsy Foundation, in the IBM Corporation decision.

As a result, the Board, at least for the foreseeable future, will not require employers to provide Weingarten rights to employees in a non-union company.

In unionized companies, if an employee facing an investigative interview requests the presence of a union steward or co-worker, the employer has three options: (1) wait for the representative to arrive; (2) dispense with the interview altogether; or (3) inform the employee that he/she can elect between proceeding without a representative or foregoing the interview (and any benefit the employee might derive from the interview). The employee in question must have a reasonable expectation that discipline may be imposed as the result of the interview, before Weingarten rights exist.

As part of its Epilepsy Foundation decision, the Board indicated it would not overrule precedents holding an employer may decide to forego the investigative interview, if the employee requests a union steward or fellow employee be present.

Employers in unionized companies need not advise the employee of his/her Weingarten rights. The employer simply must honor those rights if the employee invokes them.
XV. 

ADMINISTRATIVE DEVELOPMENTS

A. The Schwarzenegger Administration

1. Victoria Bradshaw and Jose Millan Appointed to Top Posts Within the Labor and Workforce Development Agency

   Governor Schwarzenegger has appointed Victoria Bradshaw and Jose Millan, both of whom held high-level positions in the administration of former Governor Pete Wilson, to senior positions within the California Labor and Workforce Development Agency (“LWDA”). Both Ms. Bradshaw and Mr. Millan are veteran human resource professionals. We expect the regulatory environment to be more favorable to employers under the Schwarzenegger administration, as compared to the Davis administration.

2. California Labor Commissioner Proposes Clarification to California Meal and Break Period Rules

   The California Labor Commissioner, on December 10, 2004, issued proposed regulations which clarify and provide guidance regarding meal and break period obligations imposed on California employers. Initially, the Labor Commissioner proposed these regulations as “emergency” regulations, which would have taken effect in mid-December. However, on December 20, the Labor Commissioner withdrew the “emergency” character of the regulations and resubmitted the proposal under the normal Administrative Procedure Act Rule Making Process. The regulations will now undergo a 120-day comment period, during which public hearings will be held. The regulations ultimately adopted may or may not be the same as the version issued on December 10, 2004.

   The new proposed regulations present a more measured, and reasonable approach from the administration of Governor Arnold Schwarzenegger, than existed under previous Labor Commissioner interpretations of the same statute and administrative Wage Order.

   (a) “Providing” a Meal Period.

   Labor Code Section 512 requires that an employer “provide” an off duty meal period of no less than thirty minutes, within five hours of the commencement of work. Labor Code Section 226.7(b) imposes a penalty of one-hour’s pay, at the employee’s current rate of pay, if an employee is not provided with a meal on any given day.

   The regulations clarify the meaning of the term “provide.” Under the regulations, an employer is deemed to have “provided” a meal period, and therefore to be immune from claims for penalties if it:

   • Makes the meal period available to the employee and affords the employee the opportunity to take it;

   • Post the applicable order of the Industrial Welfare Commission;
• Maintains accurate time records for covered employees as required by the Wage Order.

(b) Timing of the Meal Period.

The regulation provides the employee more freedom to select the time at which the meal period will be taken. Under the previous interpretation of the statute by the Labor Commissioner, the employer was obligated to provide the meal period no later than the fifth hour of employment. The employee had no freedom to extend the time on which the meal was taken. Even if the employee voluntarily delayed the meal, under the prior interpretation, the employer was liable for penalties. The new regulations clarify that an employee may delay the beginning of the meal period until the beginning of the sixth hour of work, as long as the employee does so voluntarily, and without compulsion by the employer.

The new regulation states that “an employer shall not be prohibited from allowing an employee to commence a meal period after the start of the sixth hour of work so long as the employee was provided a meal period before the sixth hour of work begins.” This language permits the employee freedom to delay the meal period as long as the employee had the opportunity to take it within the first five hours of employment.

(c) Record Keeping.

Administrative orders issued by the California Industrial Welfare Commission (“IWC”) have long specified rules for meal and rest periods. One long-standing rule has required employers to keep permanent records of the beginning and end of each meal period (records need not be kept to establish the beginning and end of each rest period). One of the most common forms of employer non-compliance is failure to record the beginning and end of meal periods for non-exempt employees.

The new regulations state that an employer shall have “provided” a meal period if it, among other things, has kept the legally-required records for the commencement and end of the meal period. All employers should make sure their payroll systems track the beginning and end of meal periods for non-exempt employees, and that these records are being kept in practice.

(d) Penalty Claims.

One of the most hotly-contested employment law issues in California over the past year has been the statute of limitations for penalty claims under Labor Code Section 226.7(b). The legislative history of the statute clearly indicated the one-hour pay provision was a penalty. The one-hour pay requirement is not “wages” because if there is no direct relationship to any time the employee worked. Immediately after the one-hour pay requirement went into effect, the chief counsel of the Labor Commission referred to it in writing as a “penalty.” However, soon thereafter, the Labor Commissioner made an internal determination that the one-hour pay requirement was in fact a form of wages.

Under California law, claims for penalties must be brought within one year of the event giving rise to the penalties. By contrast, claims for wages, or for other liabilities created by statute, are
subject to a three-year statute of limitations. The two-year difference in many lawsuits amounts to hundreds of thousands, if not millions of dollars.

The proposed regulations state that the one-hour pay requirement for a missed meal or rest period is a penalty, not a form of wages. Therefore, the one-year statute of limitations will apply.

(e) Regulations Are Not Yet Effective.

As previously mentioned, the regulations were initially issued as “emergency” regulations and would have gone into effect on December 20, 2004. However, the Labor Commissioner, apparently responding to objections from organized labor and employee advocates, withdrew the emergency regulations. The Labor Commissioner resubmitted the same proposal under the normal Administrative Procedure Act process. As a result, the regulations are not yet effective. Public hearings will be held on the regulations and written comments will be received by the Labor Commissioner from employers, organized labor, employee advocates and others. We expect objections to these regulations from organized labor and employee advocates. Numerous cases have been filed around the state on the meal/break period compliance issue and the associated penalties. Many of these cases have been certified as class-actions. Where there is widespread non-compliance and a large workforce, the exposure for penalties is extremely high. Therefore, plaintiff’s attorneys have an economic incentive to fight even these reasonable and long-overdue regulations.

(f) Rest Period Rules

California law with respect to rest periods requires that the employer “authorize and permit” non-exempt employees to take a ten-minute rest period in every work period of four hours (or a major fraction thereof). There is no requirement that time records be kept documenting the rest period. In practice, the Labor Commissioner has required that the employer post the appropriate IWC Wage Order and refrain from discouraging employees from taking rest periods. Prudent employers will also train supervisors in the rest period rules and post a notice or include the rest period rules in the employee handbook. Routine “bathroom breaks” are not sufficient to constitute a rest period, according to the Labor Commissioner.

If the new regulations become effective, claims for penalties for failure to provide a rest period would be subject to the one-year statute of limitations. Rest periods have always been considered “working time” and therefore are paid time.

3. Regulations issued by Economic Development Department concerning Paid Family Leave.

In mid-2004, the California Economic Development Department (“EDD”) issued regulations implementing the California Paid Family Leave (“PFL”) program. Beginning July 1, 2004, most private-sector employees became eligible for PFL.

The most significant item in the EDD regulations is the statement that there is no guarantee of reinstatement to an employee taking PFL. The EDD regulations indicate that the program is a “wage replacement” program, not a leave entitlement program. Further, the EDD regulations
state that PFL is unavailable when the employee is receiving vacation pay, sick leave, workers’
compensation benefits, or state disability insurance benefits. Receipt of these additional benefits
will delay, or even preclude, the employee’s entitlement to PFL.

Employees who are eligible for California state or federal Family and Medical Leave Act may
have the right to reinstatement under those statutes. Where an employee is both FMLA-eligible,
and applies for PFL, the two types of leaves will run concurrently.

The EDD regulations also describe the claims procedure by which an employee applies for PFL.
Unlike FMLA/CFRA leave, the employee must complete an application and submit the
application to the EDD. Medical information concerning the basis for the PFL request is
transmitted to the EDD, in a manner similar to a state disability insurance claim. If the EDD
approves an employee’s application for PFL benefits, the employee is entitled for up to six
weeks’ benefits in a twelve month period. These benefits are payable from the PFL fund which
has been created and funded since January 1, 2004 with employee contributions.

PFL forms are available on the EDD’s website:  www.edd.ca.gov. Employers who maintain
voluntary self-funded disability plans, and therefore do not participate in the California state
disability insurance program, must develop their own forms.

Additionally, EDD has issued a poster regarding PFL which must be posted in most work places
(DE Form 1857a). Employers are also required to distribute a PFL pamphlet, EDD Form
DE2511, to all new employees hired on January 1, 2004 or after, and to all employees who are
absent beginning on or after July 1, 2004, if the reason for the absence is one that might qualify
for PFL benefits.

See description of PFL statutes, Senate Bills 1661 and 1727, at Section I.H and I.I, supra. See,
also, Pillsbury Winthrop LLP Client Bulletin on PFL attached as Item 5.


Shortly after taking office, Governor Schwarzenegger issued Executive Order No. 2, to compel
the review of all informal regulations issued by numerous agencies of divisions of the State of
California. Many agencies, including the DLSE, have issued informal rulings, opinions, or
pronouncements, which are then cited by courts or otherwise used by advocates in litigation or
administrative proceedings.

One of the principal areas of this review involves the DLSE, which in July 2002 issued an
extensive, comprehensive Manual, containing hundreds of pages of analysis, interpretation and
advice on virtually all wage and hour issues in the labor code. This Manual was not promulgated
after public hearing pursuant to the Administrative Procedure Act. The California Supreme
Court in Tidewater Marine Co., Inc. v. Bradshaw, 14 Cal. 4th 557 (1996), was critical of an
earlier version of this Manual and held that the previous Manual was entitled to no weight
whatsoever as precedent in court litigation. However, the DLSE continued to assert that its
opinion letters were entitled to deference from the courts. The DLSE has issued hundreds of
such letters, many of which are not widely available to the public.
The California Office of Administrative Law is reviewing the “underground” regulations of numerous state agencies, including the DLSE. As of late December 2004, the Office of Administrative Law had not yet taken any action with respect to the DLSE opinion letters or Manual.

In early December 2003, the DLSE removed the Manual and opinion letters from its website, but then re-posted those items a few days later. When the Manual and other items were removed, there was extensive public comment (most of it negative), particularly from the plaintiff’s bar and other employee advocates. Employers can expect a significant battle over the fate of the DLSE Manual and its practice of issuing opinion letters.

B. United States Department of Labor Final “White Collar” Regulations

After great debate and some last-minute revisions, the United States Department of Labor issued its revised white-collar regulations, effective August 23, 2004. These regulations have somewhat limited effect upon California employers, due to California’s more stringent wage and hour laws. However, they may apply to California employers in at least two respects: (1) the DOL regulations apply to employees of California employers who work in states other than California; and (2) the DOL regulations would apply to any audit of a California employer initiated by the United States Department of Labor.

The following are the most significant changes in an extremely complex set of new regulations:

- Creation of a “safe harbor” for “highly compensated employees” of $100,000 per year. Persons earning at least $100,000 per year on a salary basis would be exempt from overtime if the employee performs office or non-manual work and customarily and regularly performs one or more of the duties required of an exempt executive, administrative or professional employee.

- The “sole charge” exemption for executive employees who are in charge of an establishment is eliminated (this exemption has not been recognized under California state law).

- Clarification of the meaning of the term “independent judgment and discretion,” which is particularly important for the administrative exemption. The regulations now give examples of tasks which demonstrate the exercise of independent judgment and discretion.

- Liberalization of the ability of an employer to “dock” the salary of an exempt employee. Docking is now permitted for “violations of written workplace conduct policies that are applied to all employees” such as rules against sexual harassment and workplace violence.

- Increase in the weekly minimum salary necessary to support an exemption for executive, administrative or professional employees, from $425 to $455 per week.
C. **DOL Clarification Regarding Medical Certification and Recertification for Suspicious FMLA Leaves**

Responding to employer concerns regarding abuse of FMLA leave, the United States Department of Labor in May 2004 opined that an employer may request recertification of the need for FMLA leave, more often than ever thirty (30) days, where the employer has “information that casts doubt upon the employee’s stated reason for the absence.” This information could include a suspicious pattern of absences, such as absences on Fridays or Mondays. The DOL ruling also stated that the employer could note the suspicious pattern of absence on a form sent to the employee’s health care provider, inquiring whether the absence pattern is consistent with the employee’s serious health condition.

D. **EEOC Guidance Regarding Disability Issues in Restaurants and Food Services Firms**

In October 2004 the Equal Employment Opportunity Commission issued a detailed guidance regarding disabilities issues common in the restaurant and food service industry. In particular, EEOC attempted to address the interface between public health rules regarding contagious or food-borne illnesses and the protection against individuals with disabilities. The EEOC guidance states that, after a conditional job offer is made, a food-service employer may ask the offeree regarding the applicant’s health, if all applicants in the same job category are treated equally and if the questions are job related. Additionally, the EEOC acknowledged that food service employers may require employees to complete forms required by the federal Food and Drug Administration, and to comply with FDA reporting requirements when an employee has been diagnosed with specific illness or medical conditions. Under the FDA rules, an employee diagnosed with specific illnesses must be excluded from the food establishment. If an employee with such a condition is “disabled” within the meaning of the ADA, the employer must consider forms of reasonable accommodation, including possibly assigning the employee to a vacant equivalent position which would not involve health risks, or holding the employee’s current position open for the period of disability (if undue hardship would not result).

When an employee is diagnosed with a food-related disease, EEOC states that the employer may inform other employees that they may have been similarly exposed, and may have to be tested; but it may not identify by name the employee who may have caused the exposure, unless disclosing the name is required by another federal law.

E. **EEOC Again Delays Changes In EEO-1 Form**

In July 2004 the Equal Employment Opportunity Commission delayed for a second time proposed changes to the EEO-1 Form, the most common reporting form for larger employers. Disputes over the changes to the form focused on whether a person could claim to be of two or more races, and another change involved whether Hispanic or Latino individuals would have to
further identify themselves by race. Private employer of one hundred or more employees and some federal government contractors must file the EEO-1 form annually. One of the principal concerns was that the changes could have the effect of misrepresenting the numbers of employees reported as African-American or Hispanic.

F. SARS

In early to mid-2003 the Center for Disease Control issued three guidelines regarding the SARS outbreak and proposed responses for employers. Generally speaking, the CDC did not recommend automatic quarantine for employees returning from the Far East or other areas where SARS was (and still is) prevalent. The CDC also did not recommend cancellation of business travel to such areas. The CDC material is available at www.cdc.gov.

G. Administrative Filings with U.S. Department of Labor Under the Sarbanes-Oxley Act

The DOL announced in December 2003, that whistleblower claims under the Sarbanes-Oxley Act have become the largest single source of such claims filed with the DOL, except for OSHA claims.

Under Sarbanes-Oxley, whistleblower claims are filed with and heard by the Occupational Safety and Health Administration. 169 whistleblower claims under Sarbanes-Oxley were filed between July 2002 and December 2003, according to the DOL. Under Sarbanes-Oxley, the employee can “opt-out” of the administrative process before DOL if the DOL filing does not produce a final result within 180 days. However, the DOL reported that only in a very few cases did the claimant opt-out and file in federal court. A DOL official acknowledged that the 180-day time limit would be virtually impossible for the DOL to meet. However, the administrative process within DOL is generally favorable to claimants/employees. The DOL even has power to order interim reinstatement of a claimant pending the resolution of the charge. See discussion of Sarbanes-Oxley whistleblower provisions at Section I(R) above. Interestingly, of the 77 claims which have been finally resolved by the DOL under Sarbanes-Oxley, most of the cases which have gone to an administrative hearing have resulted in a ruling in the employer’s favor.

H. U.S. Department of Labor to Seek Back Pay Under FLSA For Undocumented Workers

Despite the U.S. Supreme Court’s decision in Hoffman Plastic Compounds, supra, 535 U.S. 137, the U.S. Department of Labor has publicly stated it will pursue back pay for undocumented workers for hours actually worked. The DOL distinguished Hoffman Plastic from the situation where an employee, even one illegally in the country, actually worked hours and was not paid for the work. The DOL focused on language in the Hoffman case to the effect that the employee in Hoffman was seeking back pay for hours that were not performed and for which wages could not lawfully have been earned. However, even where the employee actually worked and was not paid, the wages “could not lawfully have been earned” if the employee was undocumented and had no right to work in this country in the first place.
The federal courts will have to determine whether Hoffman Plastic precludes any type of back pay for an undocumented worker, even where that worker actually worked hours which were not properly paid. See discussion of recent New York Court of Appeals decisions (Sanango and Balbuena) in Section VII, supra.
Attachment A

Employees' Rights and Responsibilities Under California Labor Code Whistleblower laws

Under California Labor Code Section 1102.5 et seq., employees have the following rights and responsibilities:

1. Employers may not make, adopt, or enforce any rule, regulation, or policy preventing employees from disclosing information to a government or law enforcement agency, if the employees have reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

2. Employers may not retaliate against employees for disclosing information to a government or law enforcement agency, if the employees have reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

3. Employers may not retaliate against employees for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

4. Employers may not retaliate against employees for having exercised their rights under the above paragraphs in any former employment.

5. The provisions set forth above do not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege, physician-patient privilege, or trade secret information.

The Attorney General's hotline to receive calls from persons who have information regarding possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company to its shareholders, investors, or employees is (800) 952-5225.

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1 To be valid, the lettering in the poster must be larger than 14 pica type.
2 A specified whistleblower hotline number has not been created by the Attorney General’s office. Until such a number is provided, the above number to the Attorney General’s office should suffice.
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