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Navigating the Minefield: What Employment Litigators Should Know When Their Clients or Clients' Adversaries File Bankruptcy

By Theodore A. Cohen, Esq.

I. INTRODUCTION

A bankruptcy filing by either party[1] significantly impacts an employment discrimination lawsuit, thrusting counsel into unknown territory on the litigation battlefield. The number of employment cases affected by bankruptcy filings is likely to increase in the near future given the recent collapse of the subprime mortgage market.[2] Employment counsel unaware of the issues can stumble upon and detonate the bankruptcy mines laid by Congress.[3] Therefore, knowledge of bankruptcy basics is likely to prove useful to employment litigators.

This article (1) identifies typical issues that arise when an employee or employer in an employment discrimination lawsuit files bankruptcy,[4] and (2) offers tips and suggestions to plaintiff and defense counsel. The article should enable counsel to address routine bankruptcy issues when either party files bankruptcy and to identify issues that require consultation with a bankruptcy specialist.

II. GENERAL CONCEPTS AND TIPS

A. Employee or Employer Files Bankruptcy

1. *Interplay Between Bankruptcy Law and Substantive Law*

Bankruptcy law generally does not confer or address substantive rights and issues. The Bankruptcy Code is a procedural overlay that enables a debtor to reorganize its business, or alternatively, liquidate its assets, and distribute proceeds pro rata to creditors.[5]

2. *Information Gathering*

Bankruptcy affords creditors information concerning debtors not available in general litigation. A debtor is required to file schedules and a statement of financial affairs detailing the debtor's assets and liabilities,[6] contracts and leases with third parties, the identities of the debtor's owners, the debtor's income, and payments made by the debtor within two years preceding the bankruptcy. Through the "Pacer" electronic filing system, counsel can access these and other pleadings over the Internet, avoiding the cost and delay of sending a messenger to court.[7] Counsel can also file a "Request for Special Notice," requesting other parties in the case to serve the filing party with all pleadings filed in the case.

Bankruptcy also affords broad discovery rights. At the outset of a bankruptcy, the United States Trustee or Chapter 7 Trustee[8] will conduct an examination of the debtor.[9] Creditors may

continued on page 37

— Inside the Review —

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MCLE Self-Study

New FEHC Regulations Interpret Sexual Harassment Training Law

By Ann M. Noel

Ann M. Noel is the Executive and Legal Affairs Secretary for the Fair Employment and Housing Commission.

AB 1825—LANDMARK LEGISLATION

In 2004, the California Legislature passed landmark legislation, Assembly Bill (AB) 1825 (Reyes–Fresno; Stats.2004, c. 933, § 1), mandating that all California employers with fifty or more employees provide a minimum of two hours of sexual harassment prevention training and education to their supervisors and managers. Although Maine and Connecticut had previously passed similar mandates, in 1991[1] and 1993,[2] respectively, and other states also have training provisions,[3] California's law distinguishes itself by the specificity of the requirements of the anti-harassment training, mandating the training's length, content, and when employees must be retrained.

Now, California's adjudicatory civil rights agency, the Fair Employment and Housing Commission (FEHC), has issued regulations giving further guidance to employers mandated to train their supervisory employees about AB 1825, codified in the Fair Employment and Housing Act (FEHA, Gov't Code § 12900 et seq.) at section 12950.1. Those regulations, at California Code of Regulations, title 2, section 7288.0 et seq., (and available on the FEHC's website at www.fehc.ca.gov) went into effect August 17, 2007.

WHICH EMPLOYERS ARE COVERED BY GOVERNMENT CODE SECTION 12950.1?

All employers doing business in California with a combination of fifty or more employees and/or contractors are covered by the statute.[4] For employees or contractors to be counted, they must have worked each day in any twenty consecutive weeks in the current calendar year or the preceding calendar year.[5] These employees/contractors need not work at the same location or all work or reside in California.[6]

In addition, all state entities and municipalities are covered, regardless of the number of employees.[7] Boards, commissions, local agencies and special districts are considered "political subdivisions" of the state, and thus are covered by Government Code section 12950.1.[8]

WHO IS CONSIDERED A "SUPERVISOR" TO BE TRAINED UNDER GOVERNMENT CODE SECTION 12950.1?

The FEHC's regulations utilize the term "supervisor" as defined elsewhere in the FEHA at Government Code section 12926, subdivision (r).[9] The FEHA's expansive definition makes a "supervisor" anyone with the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, so long as the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[10]

The regulations provide that receiving sexual harassment prevention training does not create an inference that an employee is a supervisor or that a contractor is an employee or a supervisor.[11]

Although early drafts of FEHC regulations mandated that any supervisor who supervised a California employee must receive training, regardless of where the supervisor was located, 2006 legislation[12] clarified that only those supervisors located in California must be trained. The FEHC's final regulations reflect this statutory change.[13]

WHO IS A QUALIFIED "TRAINER" OR "EDUCATOR"?

The regulations provide that qualified trainers must, through a combination of training and experience, have the ability to train supervisors about:

(1) unlawful harassment, discrimination and retaliation under both California and federal law;
(2) steps to take when harassing behavior occurs in the workplace;
(3) reporting harassment complaints;
(4) responding to a harassment complaint;
(5) the employer's obligation to conduct a workplace investigation of a harassment complaint;
(6) retaliation and how to prevent it;
(7) essential components of an anti-harassment policy; and
(8) the effect of harassment on harassed employees, co-workers, harassers and employers.[14]

The regulations provide three categories of persons qualified to deliver training:

- Attorneys,
- Professors or instructors, and
- Human Resource Professionals or Harassment Prevention Consultants.[15]

For each category, the FEHC has stated that the trainers need to have two years' experience in their respective fields relevant to providing sexual harassment prevention training.

Attorneys are qualified trainers if they have been admitted to practice law for two or more years in any state in the United States and their practice includes employment law under the FEHA and/or Title VII of the federal Civil Rights Act of 1964.[16]

Qualified trainer "professors" or "instructors" are educators teaching in law schools, colleges or universities who have a post-graduate degree or a California teaching credential and either twenty instruction hours or at least two years' experience in a law school, college or university teaching about employment law under the FEHA or Title VII.[17]

The final category, "human resource professionals" and "harassment prevention consultants," is designed to qualify in-house Human Resources and Equal

continued on page 16

San Francisco's Paid Sick Leave Ordinance

By Nancy G. Berner

Nancy Berner is an associate with Carlton DiSante & Freudenberger, a California firm specializing in employment defense. Ms. Berner has defended class action wage and hour claims as well as individual harassment and discrimination claims.

San Francisco has a habit and a history of implementing laws and regulations that distinguish the local legal landscape from the rest of California. The only California city with its own minimum wage, San Francisco is also unique among American municipalities for its Paid Sick Leave Ordinance (PSL), passed by voters in the November 2006 elections.[1] This new law, requiring employers throughout the nation—and presumptively the world—who have any workers stationed in San Francisco to provide them with paid time off, left employers scrambling to comply, and has raised two distinct but related questions. First, what do employers have to do to comply with the law? Second, is the PSL law vulnerable to a legal challenge?

OVERVIEW OF BASIC REQUIREMENTS

Any employer, be it a single individual with a full-time nanny or a multi-national corporation, who employs a person within the coterminous city and county limits of San Francisco, part-time, full-time, or temporarily, must provide that person with paid sick leave, accrued at a rate of one hour of sick time for every thirty hours worked. Companies with thousands of employees and a parent with a nanny are both subject to the PSL requirements, but the company's employees' accrual is capped at seventy-two hours of paid time off, while the parent (and all other small businesses with less than ten employees) can cap the nanny's accrual at forty hours of paid time off per annum.[2]

The PSL law allows employees to use their accrued time to care for themselves or their family members, broadly defined to include immediate family members (parents, children and spouses), as well as grandparents, grandchildren, siblings, foster children, "step" relatives and registered domestic partners. Unmarried employees who are not part of a registered domestic partnership may also use their accrued time to care for a person selected by the employee as a "designated person."

Paid sick leave does not expire annually, and the cap is absolute rather than annual.[3] So an employee who ends the year with seventy-two paid sick leave hours begins the next year with the same number, and does not accrue additional hours beyond the seventy-two already accumulated until some of the time has been spent. An employee may actually be paid for more than seventy-two hours of sick time in one year since the time accrues continuously. Unlike accrued vacation time, PSL is not a vested benefit, and employers are not required to pay employees for unused time, upon termination or otherwise.[4]

Employers may require that employees seeking to use their accrued time provide "reasonable" notice. "Reasonable" is the term of art also used to describe the steps that an employer can take to monitor lawful use of sick time. The Office of Labor Standards Enforcement (OLSE), the local agency charged with implementing the law, states only that what is considered "reasonable" depends on the specific situation.[5] Rules promulgated by the OLSE clarify, however, that a policy that requires a doctor's note for absences of less than four days is presumptively unreasonable, while requirement of a doctor's note to verify absences of four or more days is presumptively reasonable.[6] A useful guiding principle, oft repeated by the OLSE, is that a policy that deters *legitimate* use of paid sick leave is not reasonable.[7]

Compliance with the PSL requirements can be met by employers who offer a sick leave policy that is "as generous" as that provided by the PSL. A relatively simple solution for employers is to provide a paid time off (PTO) bank in which employees accumulate time off (at no less than the rate required by the PSL law) that can be used for *any* purpose, including medical care of the employee, the employee's family members, or any person the employee needs to take to the doctor during hours when he or she would normally be working. The downside for employers is that time accumulated pursuant to a PTO policy becomes a vested right of the employee, and upon termination, the employee must be paid for unused time.[8] What is more, employers must be careful to extend PTO plans to *all* employees working in San Francisco in order to provide a sick leave policy that is as generous as San Francisco's PSL.

A non-exhaustive list of the PSL rules and requirements includes:

- Accumulation of sick leave is based on the *total* number of the company employees, not the total number located in San Francisco.[9]
- "Small businesses" are those that average fewer than ten employees per week during the preceding calendar year.[10]
- Accrual begins ninety days after the employee's first day of work *if* he or she was hired after February 5, 2007, but begins *on* February 5, 2007 for employees hired on or before that date.[11]
- Employers must take affirmative steps to provide qualified employees with the opportunity to list a "designated person," i.e., someone the employee can utilize his or her time off to care for.[12]
- Employers can require employees to provide "reasonable" advance notification of foreseeable absences, such as a doctor's appointment. For unforeseeable absences (such as a sudden illness) advance notifications greater than two hours are presumptively unreasonable.[13]
- Employers must post a notice informing employees of their paid sick leave rights *and* must retain records documenting the hours worked and the sick leave used for four years, records that must be made accessible to the OLSE.[14]

continued on page 20

Grievance Mediation 101

By Paul D. Roose

Paul Roose has served as the Supervisor and program chief of the California State Mediation and Conciliation Service (CSMCS) since December 2005. Prior to that, he was a mediator with CSMCS, mediating labor-management disputes since 1998. Paul has helped public employers and unions reach contract agreements in hundreds of school districts, cities, counties, transit districts, special districts, community colleges, and in public higher education. He has also served as a grievance mediator in hundreds of private and public sector cases.

INTRODUCTION

Many books and articles have been written about labor-management grievance arbitration. But there are far fewer treatments of grievance mediation, perhaps due to the relatively smaller number of disputes that are brought to mediation. Or perhaps grievance mediation is seen as more loosely defined and subject to greater variations in its practice.

Nonetheless, many employers and unions in both the private and public sectors use grievance mediation on an occasional or regular basis. A growing number of collective bargaining agreements have mediation written in as a voluntary step prior to arbitration. Other parties agree to mediate on an ad hoc basis. While style and approach vary from mediator to mediator, there are many traits common to most grievance mediations. The purpose of this article is to give union and management advocates suggestions on how to better prepare for grievance mediation and how to make better use of the process.

CASE SELECTION

While just about any grievance can be successfully mediated, there are some that lend themselves to the process more readily.

A. Exhaust the steps of the grievance procedure (except arbitration) prior to attempting mediation

A grievance mediator will be most helpful when the parties have gone through the initial steps of the grievance process and have been unable to settle. This will ensure that the mediator's and the parties' time is not spent on frivolous or obvious cases. And it will guarantee that multiple layers of the organizations, on both sides of the table, have had an opportunity to review the issue. Finally, it allows for the development of a case file that can be helpful in resolving the issue if it goes to mediation.

B. Bring cases that lend themselves to settlement

This may seem like a fine distinction to make, and often it is. But in many cases, one side or the other knows that for internal political reasons, arbitration will be necessary. The grievant, the union leadership, the management team, or even the governing board may not be able to voluntarily compromise. In these cases, the parties may as well proceed directly to arbitration, or, in the case of a contract without arbitration, the parties may proceed directly to the final step of the grievance procedure.

C. Focus on grievances in which a creative solution may be possible or necessary

Arbitrators are generally confined as to the remedies available to them. In a grievance mediation, the parties can get more inventive about solutions. For example, the parties may arrange for the transfer of a grievant to another worksite, whereas that would be beyond the bounds of an arbitrator's authority as an imposed solution. Also, an arbitrator cannot rewrite the contract in his/her award. However, the parties, with the assistance of a mediator, can even rewrite the contract by mutual agreement if it helps settle a major grievance or series of grievances.

PICKING A MEDIATOR

Securing the services of a knowledgeable and reputable mediator is an important first step.

A. The State and Federal Mediation Services both offer grievance mediation

Under their statutory mandates to promote labor-management harmony, neither organization charges a fee for this service. The grievance mediators assigned are generally the same ones who assist the parties in their contract negotiations mediation. They are generally knowledgeable individuals with many years of experience as advocates prior to becoming neutrals.

B. Most private arbitrators also offer mediation services

Arbitrators are another good choice to mediate a grievance dispute, due to their extensive knowledge of labor contracts and their personal experience with how cases play out in arbitration. Many arbitrators charge a higher fee for mediation than arbitration, presumably because the work is even more demanding than arbitration. Sometimes, the parties retain an arbitrator to arbitrate the case. Then, at some point during the hearing, they ask the arbitrator to act as a mediator. My personal view is that it is better to have a separate mediator and arbitrator. Parties generally feel more able to open up to a mediator about their underlying interests and settlement ideas if they are not later asking that same person to rule on the case.

PREPARING FOR GRIEVANCE MEDIATION

Getting ready for grievance mediation is similar to preparing for arbitration, although less rigorous. Here are some steps for advocates to follow.

A. Prepare a well-organized case file

Collect all of the relevant contract provisions, grievance moving papers, witness statements, and documents. Have your notes of all settlement discussions. Be prepared to give the mediator copies of all pertinent documents. Have a copy of the contract to give (or loan) to the mediator. He/she may want to peruse other sections of the agreement that the parties may not have considered in their arguments.

continued on page 22

Introducing

THE LABOR AND EMPLOYMENT LAW SECTION'S

New Executive Committee Members

Carol Koenig is a non-equity partner at Wylie, McBride, Jesinger, Platten & Renner. Her primary area of practice is labor law, representing both private and public sector unions in multiple areas, including contract negotiations, contract enforcement, disciplinary matters, grievance processing, administrative hearings, arbitrations, and the training of union leadership. She also practices wage and hour law, representing union and non-union employees. Koenig is a member of the Executive Committee for the Labor and Employment Section of the Santa Clara County Bar Association. Before entering the legal profession, Koenig worked for sixteen years in news writing and photography, including nine years at a community college district where she became active in the labor movement. After serving as a chapter president, negotiator and steward for the classified staff union, Koenig decided to quit her job, enroll in law school and practice labor and employment law. She taught full time at UC Berkeley's Boalt Hall School of Law for one year after graduating from law school and then switched to part-time teaching at Santa Clara University Law School so she could join the law firm. Koenig volunteers as a supervising attorney for the Worker's Rights Clinic at Santa Clara University's Katherine & George Alexander Community Law Center, and she teaches worker's rights in the Labor Studies Program at San Jose City College. Koenig received her undergraduate and law degrees from Santa Clara University.

Leonid "Lonny" Zilberman is a partner with Wilson Petty Kosmo & Turner in San Diego. He counsels, trains, and defends employers throughout California. Zilberman routinely advises clients on a broad range of employment issues, such as complying with anti-discrimination laws, the Americans with Disabilities Act, Family Medical Leave Act, wage and hour compliance, and enforcement of agreements to protect trade secrets. Zilberman's practice is equally split between litigation and counseling, and he regularly drafts and analyzes employment agreements; develops and implements personnel policies and procedures; advises on hiring, firing, and managing employees; and conducts internal harassment, whistleblower, and misconduct investigations as well as management trainings. Zilberman is a frequent invited lecturer and trainer on many employment law topics, and is a faculty member in UCSD Extension's Leadership and Management Program. He is also a regular columnist and contributor to the *Los Angeles Daily Journal* and sits on the Board of the San Diego Chamber Orchestra, for which he serves as Pro Bono Counsel. In September 2007, Zilberman was named by *San Diego Metropolitan Magazine* in its annual list of "Top 40 Under 40" in San Diego, in recognition of his professional and volunteer accomplishments. Zilberman earned his J.D. from Santa Clara University School of Law, where he was a member of the Moot Court Board. He received his B.A. in Political Science and International Relations from the University of California, Santa Barbara.

Theodora R. Lee is a senior shareholder/ partner in the San Francisco office of Littler Mendelson, P.C. She represents employers in employment and labor relations law, defending employers in complex wage and hour and discrimination class action cases. Lee also counsels employers on the Americans with Disabilities Act, the Family and Medical Leave Act, federal and state wage and hour issues, pre-employment screening, litigation avoidance, reductions in force, workplace violence, employee terminations, employment agreements, and drug and alcohol testing. Lee has been recognized as a Northern California "Super Lawyer" from 2004 through 2006, by Law & Politics and San Francisco Magazine, and was named as one of the Top 20 Lawyers Under 40 in California by California Law Business in 2001. She is an active member of the State Bar of California, the American Bar Association, the National Bar Association, the Charles Houston Bar Association, the San Francisco Bar Association, and the Alameda County Bar Association. Lee currently serves as the Vice President of the Board of Directors of Yerba Buena Center for the Arts, and on the boards of Bay Area Legal Aid, the UNCF Advisory Board, and SF Works Advisory Board. She is Past President of the Barristers Club of the Alameda County Bar Association, Past Chair of the Alameda County Community Food Bank, Past Chair of the Bay Area Black United Fund and Board Member of Leadership California. Lee chaired the Practicing Law Institute's Annual Institute on Employment Law from 2003 through 2006. She is a frequent speaker on labor and employment law topics. She recently authored two articles for The Practical Litigator, *Can You Use HR Experts in Employment Cases* and *Preserving A Record For Appeal While Keeping The Jury On Your Side.* Lee is a graduate of Spelman College and the University of Texas School of Law. Prior to the practice of law, Ms. Lee was a senate intern in Washington, D.C., for Senator Sam Nunn.

Noah D. Lebowitz is a partner at the San Francisco law firm Duckworth Peters Lebowitz LLP. With an employee-oriented practice, Lebowitz has particular expertise in disability discrimination and medical leave related issues. He also represents employees in all types of workplace issues, including other forms of discrimination, wrongful termination, and wage and hour claims. Lebowitz regularly speaks at continuing education events on disability, privacy, medical leave, and general litigation strategies. He is a member of the California, New York, and New Jersey bars. Prior to becoming a partner with Duckworth · Peters · Lebowitz LLP, Lebowitz served for one year as a law clerk to Judges Benjamin Cohen and Michael Petrolle of the Essex County Superior Court (Criminal Division) in Newark, New Jersey, was an associate for three years with the law firm of Schneider, McCormac & Wallace (currently Schneider & Wallace), and was an associate for six years with the law firm of McGuinn, Hillsman & Palefsky. In addition to his work as an advocate for employees, Lebowitz serves as a mediator on the Bar Association of San Francisco's Early Settlement Program. Lebowitz is Chair of the California Employment Lawyers Association's Mentor Committee. He regularly volunteers his services in the legal community, acting as an advising attorney for law students participating in the Workers' Rights Clinic run by the Legal Aid Society of San Francisco—Employment Law Center and serving as a mentor for students in San Francisco's Mission High School's Law Academy. Lebowitz received his undergraduate degree from the University of Wisconsin—Madison and his law degree from the University of San Francisco School of Law where he served on the editorial board of the Law Review.

Michael E. Whitaker is a Supervising Deputy Attorney General in the Employment, Regulation and Administration (ERA) Section of the California Department of Justice (DOJ). He has been in the ERA Section since 1998. Whitaker was the lead attorney in *Thomas v. Department of Corrections,* the first appellate opinion defining "Adverse Employment Action" under the Fair Employment and Housing Act, and in the recent peace officer privacy rights case before the California Supreme Court (*California Commission on Peace Officer Standards & Training v. Superior Court*). Before joining the DOJ, Whitaker was in private practice with Bronson, Bronson & McKinnon and the Law Offices of Richard S. Kim. He also was a staff attorney of the Federal Deposit Insurance Corporation in San Francisco and Los Angeles. A native of Hawaii, Whitaker received his B.A. with Distinction in Political Science from the University of Hawaii. He earned his J.D. from the University of Oregon where he was a Managing Editor for the Oregon Law Review.

Public Sector Case Notes

By Stewart Weinberg

Stewart Weinberg, a 1960 graduate of Boalt Hall, is a partner in Weinberg, Rogers and Rosenfeld in Oakland, a union-side labor firm. Mr. Weinberg specializes in the representation of unions and employees in the public sector.

PUBLIC EMPLOYEES' PRIVACY

Newspapers May Publish Names and Salaries of Public Employees Earning $100,000 Per Year

Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21, AFL-CIO v. Superior Court (Contra Costa Newspapers, Inc.), 42 Ca1.4th 319 (2007)

On August 27, 2007, the California Supreme Court filed two important decisions concerning the privacy rights of California public employees. In one of those cases, the Contra Costa Newspapers, Inc. submitted a demand to the city of Oakland (under the California Public Records Act, Government Code section 6250, et seq.) for the names, job titles, and gross salaries of all city employees who earned $100,000 or more in fiscal year 2003–2004. The demand included both those whose base salary exceeded $100,000, and those whose base salary was less than $100,000, but who earned more than that because of overtime. Although the city was willing to disclose salary and overtime information linked to job classifications, it refused to provide salary information linked to individual employees. When the city refused, the newspaper publishing company filed a petition for writ of mandate. Two unions intervened. The superior court granted the petition, both as to non-peace officers and peace officers. Peace officers claimed that they were entitled to a different result under Penal Code sections 832.7 and 832.8, which cloak personnel records of peace officers with confidentiality. The city chose not to appeal, and the unions unsuccessfully petitioned the court of appeal. The California Supreme Court granted review.

The majority opinion was authored by Chief Justice George. The Chief Justice noted that as a result of an initiative in 2004, the principle of "openness in government" is enshrined in the California Constitution, article 1, section 3(b)(1). The court acknowledged the concerns of public employees, but stated that "[t]o the extent some public employees may expect their salaries to remain a private matter, that expectation is not a reasonable one. . . ." The court held that since both sides agreed that the records which were sought met the definition of public records, unless one of the statutory exceptions applied, the records must be disclosed. The party seeking to withhold public records bears the burden of demonstrating that an exception applied. The court assumed for the sake of argument that the records were personnel records, but nonetheless held the disclosure was not an unwarranted invasion of personal privacy. The court applied a balancing test under Government Code section 6254(c) and determined that the public's interest in disclosure was not outweighed by the individual's interest in personal privacy. In a footnote the court distinguished cases which held that private sector employees' salaries which were paid with public funds were privileged from disclosure on the ground that those cases did not involve public employees. The court noted that under open meeting laws, although personnel matters may be discussed in private, salary matters must be discussed in public by government agencies.

One of the unions argued for the privacy of this information under article 1, section 1 of the California Constitution, urging that publication of this information could lead to exploitation of public employees by commercial interests. That interest in privacy was outweighed by the public's interest in knowing the amount of salary paid to public employees. The court was also dismissive of the arguments offered on behalf of peace officers. "Personnel records" as defined under Penal Code section 832.8 did not include salary information since it was not in fact "personal." The court rejected the argument that peace officers have any greater privacy interest in the amount of their salaries than that possessed by other public employees.

It must be noted that although this case involved employees who made $100,000 or more during the year in question, the rationale could be applied to any public employee.

PEACE OFFICERS

Peace Officer Names, Employing Departments and Hiring and Termination Dates Are Not Exempt From Disclosure Under the California Public Records Act

Comm'n on Peace Officer Standards & Training v. Superior Court (Los Angeles Times Comm'n), 42 Ca1.4th 278 (2007)

On the same day as the case reported above, the California Supreme Court issued its decision in a case involving peace officer names, employing departments, and hiring and termination dates. The Commission of Peace Officer Standards and Training, commonly known as POST, is an agency of the California Department of Justice. It develops programs to increase the effectiveness of law enforcement and provides education and training for peace officers. It also collects information from all law enforcement departments in California which participate in its programs. That information includes the names, employers, and hiring and termination dates of California peace officers. The Los Angeles Times requested information from POST concerning peace officer names and birth dates, employing department, employment dates and termination dates, and reasons for termination. When POST refused to comply, a petition for writ of mandate was filed. POST's denial of the request was based upon Penal Code sections 832.7 and 832.8, which, it asserted, rendered the information sought privileged from disclosure as peace officer personnel records. POST claimed that the information at issue was obtained from peace officer personnel records. During

continued on page 24

Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is 310.284.5690 and his e-mail address is aoncidi@proskauer.com.

Employment Law Case Notes

By Anthony J. Oncidi

Operating Expenses May Be Deducted From Revenues in Supplemental Compensation Plan

Prachasaisoradej v. Ralphs Grocery Co., 42 Ca1.4th 217 (2007)

Eddy Prachasaisoradej, a produce manager for Ralphs, challenged the calculation of bonuses he received under a written incentive compensation plan, which included deductions for expenses and losses due to cash and merchandise shortages and shrinkage, workers' compensation, tort claims and other losses beyond his control. After unsuccessfully removing the case to federal court, Ralphs demurred to the complaint on the ground that all claims were preempted by section 301 of the Labor Management Relations Act. Although the trial court sustained the demurrer without leave to amend, the court of appeal reversed, holding that Prachasaisoradej's claims involved non-negotiable rights not subject to preemption. The court further held that Prachasaisoradej had stated valid claims under California law, relying upon *Ralphs Grocery Co. v. Superior Court,* 112 Cal.App.4th 1090 (2003). However, in a 4-to-3 decision, the California Supreme Court reversed the appellate court and held that the incentive compensation plan did not violate California Labor Code sections 221 and 3751, or other provisions of California law that prohibit deductions from employee wages for business losses and expenses. The court distinguished between illegal deductions from employees' individual bonuses, commissions and other compensation and supplementary incentive compensation based on store profitability such as existed in this case.

Disabled Employee Bears Burden of Proving Ability to Perform Essential Duties of the Job

Green v. State of California, 42 Ca1.4th 254 (2007)

Dwight Green worked as a stationary engineer for the Department of Corrections at the California Institute for Men in Chino. Seven years after contracting hepatitis C (presumably from the sewer pipes at the Institute), Green began taking the drug interferon, which caused him to feel fatigued, to have trouble sleeping and to suffer headaches and body aches. Green asserted that his ongoing medical condition prevented him from being punctual and occasionally required that he be put on "light duty." Eventually, Green was informed that unless he could be cleared for full duty by his doctor, he could not return to his position as a stationary engineer. Following a trial on his disability discrimination claim, a jury awarded Green $2.6 million in compensatory damages. The court of appeal affirmed the judgment, holding that the Fair Employment and Housing Act does not require plaintiff to prove that he is a qualified individual—rather, it is the employer's burden to prove that the employee is incapable of performing the essential duties of the position with reasonable accommodation. In a 4-to-3 ruling, the California Supreme Court reversed the court of appeal and held, consistent with the federal Americans with Disabilities Act, that it is the employee's burden to prove that he or she can perform the essential functions of the job with or without reasonable accommodation.

CEO Could Proceed With Malicious Prosecution Action Against Former Employee's Attorneys

Siebel v. Mittlesteadt, 41 Ca1.4th 735 (2007)

Thomas M. Siebel, the CEO of Siebel Systems, Inc. (SSI), sued Carol L. Mittlesteadt and E. Rick Buell, II (the Lawyers), for malicious prosecution based on their representation of Debra Christoffers, a former SSI employee. Through the Lawyers, Christoffers sued Siebel (individually) as well as SSI for wrongful termination, fraud, unpaid compensation and discrimination. Most of Christoffers' claims were dismissed before trial, but she did obtain a verdict against SSI in the amount of $193,000 for unpaid commissions and was awarded costs and attorneys' fees attributable to that portion of the action. Because Christoffers had failed to recover from Siebel personally, he was awarded his litigation costs. In the settlement agreement that followed, Siebel expressly preserved any claims that he might have against the Lawyers. In this malicious prosecution action, Siebel alleged that the Lawyers "willfully and purposely prosecuted" baseless discrimination claims against him in order to coerce a settlement. Among other things, Siebel argued that he was immune to many of Christoffers' claims because SSI, not Siebel, was her employer. Although the trial court granted the Lawyers' motion for summary judgment, the court of appeal reversed, holding that Siebel could establish a "favorable termination" because the parties had not agreed to modify the underlying judgment, which encompassed a disposition entirely in Siebel's favor. The California Supreme Court affirmed the judgment of the court of appeal.

Employer Required to Give Retirement Credit for Pregnancy Leaves Taken Before 1979

Hulteen v. AT&T Corp., 2007 WL 2332071 (9th Cir. Aug. 17, 2007) (*en banc*)

The federal Pregnancy Discrimination Act of 1978 (PDA) became effective in 1979. Prior to the PDA, an AT&T employee who was on pregnancy leave was not awarded service credit for the period of her pregnancy leave, whereas employees who were on other temporary disability leaves received full credit for such absences. Four female employees and their union, the Communications Workers of America, challenged AT&T's pre-PDA policy as a violation of Title VII. In an earlier three-judge panel decision, the Ninth Circuit Court of Appeals held the PDA could not be applied retroactive-

continued on page 27

NLRA Case Notes

By Jean Shin

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The author wishes to thank Richa Amar and Jonathan Cohen for their contributions to these notes.

Health Care Employees' Decision Not to Volunteer for Optional Overtime Constitutes Concerted Refusal to Work

SEIU United Healthcare Workers-West, 350 NLRB No. 34 (July 23, 2007)

A Board majority found that a union violated Section 8(g) of the Act by failing to give California Pacific Medical Center, an acute-care hospital, ten days' notice that housekeepers and linen aids were going to engage in a concerted refusal to volunteer for overtime.

On June 1, 2006, in protest of the employer's alleged violation of the subcontracting clause of the parties' collective bargaining agreement, a union representative presented a petition to the employer that was signed by over 100 employees. The petition authorized union shop stewards to "call for [a] one week, no overtime no extra shift policy." The union representative told the employer that he was giving official notice that the employees intended not to work overtime. Beginning on June 5, the employer's operations manager attempted to secure volunteers for overtime on at least ten separate shifts, and was unsuccessful. Employees resumed volunteering for overtime on June 12. Other than the petition, the union had given no notice that employees intended to engage in a concerted refusal to work overtime.

The employer filed an unfair labor practice charge, alleging that the union failed to comply with the notice requirement of Section 8(g) of the Act, which states, "[a] labor organization before engaging in any . . . concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . ."

The Board held that the union violated Section 8(g) and agreed with the administrative law judge that the employees' concerted refusal to volunteer for overtime falls within the statute's notice requirement for "other concerted refusals to work." Relying on the Board's earlier decision in *New York State Nurses Ass'n (Mt. Sinai Hospital),* 334 NLRB 798 (2001), the administrative law judge (ALJ) concluded that the collective bargaining agreement between the parties, which prohibited the mandatory assignment of overtime, was not a defense to the unfair practice charge. The ALJ found that the issue presented was "not whether the Union had a contractual or statutory right to refuse to work overtime but rather whether the Union was required to give the notice required by Section 8(g)."

Member Liebman dissented, adhering to the views expressed in her dissent in *Mt. Sinai Hospital,* in which she concluded that a refusal to volunteer for overtime did not constitute a "concerted refusal to work" within the meaning of Section 8(g). Member Liebman emphasized the difficulty of giving an employer precise notice in this context, noting, "[t]he employer exercises complete control over when employees will be asked to work overtime, and the union has no way of knowing when the employer might make that request."

Research Assistants Working for Educational Corporations That Exclusively Serve Universities Are Employees Entitled to Protection Under the Act

The Research Found. of the State Univ. of New York Office of Sponsored Programs, 350 NLRB No. 18 (June 29, 2007); *The Research Found. of the City Univ. of New York,* 350 NLRB No. 19 (June 29, 2007)

The Board ruled in two companion cases involving the State University of New York (SUNY) and the City University of New York (CUNY) that research assistants working for private, not-for-profit "educational corporations" established solely to serve universities are employees within the meaning of Section 2 of the Act.

The Board held that its decision in *Brown University,* 342 NLRB 483 (2004) was inapplicable in both the SUNY and CUNY cases. In *Brown University,* the Board majority found that graduate student assistants were not statutory employees because their relationship with the university was fundamentally educational rather than fundamentally economic. Unlike Brown University, the employers in these cases were not academic institutions, did not admit students, and did not issue academic degrees. The research assistants received compensation, including benefits, from the employers rather than the universities. Thus, the Board found that the research assistants had fundamentally economic relationships with the employers.

Chairman Battista dissented in the case involving the employer serving SUNY. He concluded that the relationship between the research assistants and the employer was primarily educational rather than economic because the research assistants received stipends for their work, were required to enroll as full-time students at SUNY, had to conduct research that related to their dissertations and were expected to end their careers as research assistants upon graduation from SUNY. Furthermore, the supervisors in their funded research often served simultaneously as their SUNY dissertation advisers.

Chairman Battista concurred in the case involving the employer serving CUNY, finding that the relationship between the research assistants and the university was primarily economic rather than educational. The research assistants in this case were not required to be CUNY students, they performed administrative and editorial work that was unrelated to their studies, they were paid at an hourly rate rather than a stipend, and their supervisors did not act as their dissertation advisers. These facts were, in

continued on page 30

ADR Case Notes

By Michael S. Kalt

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Wage and Hour Class Action Waivers In Arbitration Agreements to Be Strictly Construed to Prevent De Facto Waiver of Non-Waivable Statutory Rights

Gentry v. Superior Court (ex rel Circuit City Stores, Inc.), 42 Ca1.4th 443 (2007)

Plaintiff, a salaried customer service manager, filed a class action lawsuit in superior court alleging his employer, Circuit City, had violated California's Labor Code and Business and Professions Code by misclassifying him and others as exempt and by not paying overtime. Circuit City moved to compel arbitration under its dispute resolution procedures, which included a class arbitration waiver. The trial court severed several provisions but otherwise enforced the arbitration agreement, including the class action waiver, and ordered plaintiff to arbitrate his claim on an individual basis.

The appellate court initially denied plaintiff's petition for writ of mandate, but the California Supreme Court granted review and ultimately remanded back to the appellate court for reconsideration in light of *Discover Bank v. Superior Court,* 36 Ca1.4th 148 (2005) (noting that "at least under some circumstances" class action waivers in consumer contracts of adhesion are unconscionable). On remand, the appellate court again denied plaintiff's writ of mandate finding the class action waiver enforceable under *Discover Bank,* and finding that the agreement's thirty-day "opt out" provision precluded it from being procedurally unconscionable.

In a 4–3 decision, the California Supreme Court reversed and remanded the matter back to the trial court for further consideration. On the one hand, the supreme court refused to "categorically" state that class action arbitration waivers in overtime cases are always invalid. On the other hand, the court held that "at least in some cases" class action waivers would "undermine the vindication of the employees' unwaiveable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws."

The court noted overtime claims are premised upon non-waivable statutory rights thus requiring additional judicial scrutiny to ensure the arbitration agreement, and a class action waiver did not "accomplish a de facto waiver of these rights" through an inferior forum for resolution. (*Armendariz v. Found. Health Psychcare Services, Inc.,* 24 Ca1.4th 83, 103 (2000) (enumerating "minimum requirements" for pre-dispute arbitration agreements for unwaiveable statutory rights under the Fair Employment and Housing Act).)

The court concluded a pre-dispute class action waiver could potentially diminish the likelihood of employee enforcement, thereby constituting a de facto waiver of overtime rights for several reasons. First, wage and hour claims are typically brought by workers at the lower end of the pay scale resulting in generally "modest" individual awards. Second, employees who individually sue their employers are at a greater risk of retaliation. Third, class actions might be needed because individual employees are less likely to understand their legal rights have been violated.

Despite these concerns, the court declined to categorically invalidate all class action waivers in overtime cases, observing employees may prefer individual actions and individual enforcement may also be superior in some instances. However, the court also concluded that when evaluating arbitration agreements involving class action waivers for unwaivable statutory overtime claims, the trial court must consider "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill-informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration." If, after doing so, the trial court concludes class action would more effectively vindicate employee rights than individual actions, the trial court must invalidate the class action waiver and permit class action provided other class action prerequisites (e.g., numerosity, community of interest, etc.) are met.

The court also addressed whether a thirty-day "opt out" provision precluded a finding of procedural unconscionability. The court observed by failing to opt-out, plaintiff had assented to the agreement, but that this narrow initial finding did not preclude a determination the agreement itself was procedurally unconscionable. The court found the arbitration agreement to be procedurally unconscionable because it failed to specifically identify the potential disadvantages of arbitration versus judicial resolution. Although Circuit City had identified some advantages and disadvantages, the court remained concerned "only a legally sophisticated party" would have understood these effects, and it noted the unlikelihood a worker would have retained an attorney to explain these results. The court concluded this lack of material information coupled with the likelihood employees felt some pressure not to opt out compelled the conclusion the agreement was "not entirely free from procedural unconscionability."

Accordingly, the court remanded the matter to the trial court to determine whether the arbitration agreement was invalid on public policy grounds. If not, the trial court was directed to determine whether the agreement contained substantively unconscionable provisions and, if so, whether these provisions could be severed or whether the entire agreement needed to be invalidated. Notably, the court observed that inclusion of a class action waiver generally would not by itself justify invalidation of the entire agreement on substantive unconscionability grounds since such waivers

continued on page 32

Wage & Hour Update

By Donna Ryu, Sara Beard, and Matthew Goldberg

Prof. Donna Ryu (left) serves on the clinical faculty of the University of California, Hastings College of the Law. Sarah Beard (middle) is an associate with Siegel and LeWitter, a plaintiff's labor and employment firm in Oakland. Matthew Goldberg (right) is a Staff Attorney at the Legal Aid Society - Employment Law Center, where he directs the Wage Claims Project.

Software Company Consultant Not Covered by Administrative Exemption

Eicher v. Advanced Business Integrators, Inc., 151 Cal.App.4th 1363 (2007)

Plaintiff Eicher worked for Advanced Business Integrators (ABI), a software company. ABI paid Eicher $60,000 per year as a senior consultant. Because ABI considered him to be an exempt employee, Eicher did not receive overtime compensation. Eicher spent half of his time in the office and the other half out in the field with customers. He did not hire or fire employees, negotiate contracts, or consult with ABI regarding development of business policies or practices.

Eicher filed an administrative wage claim with the California Labor Commissioner for unpaid overtime compensation. After losing his claim, Eicher exercised his right under Labor Code section 98.2 to a trial de novo in superior court. The trial court held that ABI had failed to meet its burden of establishing that Eicher was an exempt employee, finding that Eicher had spent the majority of his time providing customer service and training to clients and troubleshooting software problems.

The court of appeal affirmed, agreeing that ABI had failed to meet its burden of establishing all elements of the administrative exemption. In particular, the court focused on the requirement that the employee perform "office or non-manual work directly related to management policies or general business operations." The court found that Eicher's job was more in the nature of a non-exempt production worker, since he regularly engaged in the core day-to-day business of ABI—implementing its software product, and supporting its customers.

The court also held that because Eicher prevailed on his overtime claim, he was entitled to recover attorneys' fees and costs pursuant to Labor Code section 1194. The court rejected ABI's argument that Eicher was precluded from asserting section 1194, because he had raised the claim in the context of a section 98.2 de novo proceeding. ABI argued that fees and costs should be exclusively controlled by section 98.2(c), which would have barred Eicher from recovery, since that provision only awards fees to successful non-appealing parties. The court also found that Eicher was entitled to fees on appeal.

Labor Commissioner's Issuance of Precedent Decision Amounted to Invalid Circumvention of Administrative Rulemaking Process

Corrales v. Bradstreet, 153 Cal.App.4th 33 (2007)

In this writ proceeding, appellants alleged that the Labor Commissioner had implemented an illegal "underground regulation" when she designated a particular administrative hearing opinion as a "precedent decision" that governed all other wage hearings. The opinion in question held that meal and rest payments were penalties, and not wages. While the appeal in this case was pending, the California Supreme Court decided that meal and rest payments were wages and not penalties in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Ca1.4th 1094 (2007), effectively invalidating the precedent decision. The court nevertheless went on to hold as a general matter that, because administrative wage claim hearings are not required by statute or the constitution, a resulting opinion cannot properly be designated as a precedent decision under the Administrative Procedure Act.

Appellants also charged that the Labor Commissioner had refused to process claims for missed meal and rest periods, and had implemented a policy to hold such claims in abeyance, thereby violating the statutory time requirements under section 98. The court found that appellants' challenge to the abeyance policy was moot, since the policy was no longer in effect, and the workers had not suffered any resulting harm.

LMRA Does Not Preempt Travel Time Claim

Burnside v. Kiewit Pacific Corp., 491 F.3d 1053 (9th Cir. 2007)

Plaintiff Robert Burnside and a class of employees sued their employer seeking compensation for time spent traveling to and from job sites, alleging that their employer required them to travel to job sites in company vehicles and did not compensate them for the approximately two and a half hours they spent traveling each day. Plaintiffs' employment was governed by collective bargaining agreements ("CBAs"), and defendant removed the case to federal court on the basis that it arose under section 301 of the Labor Management Relations Act, 29 U.S.C. section 185(a) ("LMRA"). The district court denied plaintiffs' request to remand the matter to state court for lack of jurisdiction, concluding that plaintiffs' claims were preempted by section 301 because they required interpretation of the CBAs. The court subsequently granted defendant's motion for summary judgment on the grounds that plaintiffs had not exhausted their contractual grievance procedures, or in the alternative, had not filed suit within the LMRA's six-month statute of limitations.

The Ninth Circuit Court of Appeals reversed. The court held that under *Morillion v. Royal Packing Co.*, 22 Ca1.4th 575, 578 (2000), as well as Wage Order 16–2001, the right to be compensated for employer-mandated travel time is conferred by state law, independent of the CBAs; therefore, plaintiffs' claims were not preempted by section 301. The court also held that the basic legal issue presented by the case—whether the time spent traveling to and from job sites is compensable—could be resolved without

continued on page 34

Cases Pending Before the California Supreme Court

By Phyllis W. Cheng

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ARBITRATION

Massie v. Ralphs Grocery, decision without published opinion (2007), *review granted,* 2007 Cal. LEXIS 8307 (2007). S153059/ B187844/B187854. Petition for review after affirmance denying petitions to compel class arbitration in a civil action. The court ordered briefing deferred pending decision in *Gentry v. Superior Court,* 42 Cal.4th 442 (2007), which held that class arbitration waivers in employment agreements could not be enforced if the court determined that class arbitration would be significantly more effective way of vindicating rights.

CLASS ACTION

Konig v. U-Haul Co. of California, 145 Cal. App. 4th 1243 (2006), *review granted,* 2007 Cal. LEXIS 1900 (2007). S149883/ B190547. Petition for review after affirmance of order compelling arbitration and dismissing class action claims. The court ordered briefing deferred pending decision in *Gentry v. Superior, supra.*

COMPENSATION

Gattuso v. Harte-Hanks, 133 Cal. App. 4th 985 (2005), *review granted,* 2006 Cal. LEXIS 2545 (2006). S139555/B172647. Petition for review after affirmance of order denying class certification. May an employer comply with its duty under Cal. Lab. Code § 2802 to indemnify its employees for expenses they necessarily incur in the discharge of their duties by paying the employees increased wages or commissions instead of reimbursing them for their actual expenses? Argued September 6, 2007.

EMPLOYMENT DISCRIMINATION

Williams v. Genentech, Inc., 139 Cal. App. 4th 357 (2006), *review granted,* 2006 Cal. LEXIS 9457 (2006). S144327/A110611. Petition for review after affirmance of judgment. The court ordered briefing deferred pending decision in *Green v. State of Cal.,* 42 Cal.4th 254 (2007), which held that in order to establish a prima facie case under the Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) for discrimination in employment based on disability, the plaintiff bears the burden of proving that he or she is capable of performing the essential duties of the job.

McDonald v. Antelope Valley Community College Dist., 151 Cal.App.4th 961 (2007), *review granted,* 2007 Cal. LEXIS 8911 (2007). S152934/ B188077. Petition for review after part affirmance and part reversal of summary judgment. In an employment discrimination action, is the one year statute of limitations for filing an administrative complaint with the Department of Fair Employment and Housing set forth in Cal. Gov't Code § 12960 subject to equitable tolling while the employee pursues an internal administrative remedy, such as a complaint with the community college chancellor filed pursuant to Cal. Code Regs., tit. 5, § 59300 et seq.?

GOVERNMENT EMPLOYMENT

Mays v. City of Los Angeles, 145 Cal. App. 4th 932 (2006), *review granted,* 2007 Cal. LEXIS 2049 (2007). S149455/B188527. Petition for review granted after reversal of denial of writ of mandate. Does the Public Safety Officers Procedural Bill of Rights Act (Cal. Gov't Code § 3300 et seq.) require that an officer facing discipline be provided with notice of both the alleged offense of which he or she is accused and the potential punishment within one year of discovery of the alleged misconduct? Fully briefed.

Miklosky v. U.C. Regents, decision without published opinion (2005), *review granted,* 2006 Cal. LEXIS 6 (2006). S139133/ A107711. Petition for review after affirmance sustaining demurrer. Does the requirement of the Whistleblower Protection Act (Cal. Gov't Code §§ 8547–8547.12) that an employee of the University of California have "filed a complaint with the [designated] university officer" and that the university have "failed to reach a decision regarding that complaint within [specified] time limits" before an action for damages can be brought (Cal. Gov't Code § 8547.10(c)) merely require the exhaustion of the internal remedy as a condition of bringing the action, or does it bar an action for damages if the university timely renders any decision on the complaint? Fully briefed.

HARASSMENT AND DAMAGES

Roby v. McKesson HBOC, 146 Cal. App. 4th 63 (2006), *review granted,* 2007 Cal. LEXIS 4012 (2007). S149752/ C047617, C048799. Petition for review after reversal, modification and affirmance in part of judgment. (1) In an action for employment discrimination and harassment by hostile work environment, does *Reno v. Baird,* 18 Cal. 4th 640 (1998) require that the claim for harassment be established entirely by reference to a supervisor's acts that have no connection with matters of business and personnel management, or may such management-related acts be considered as part of the totality of the circumstances allegedly creating a hostile work environment? (2) May an appellate court determine the maximum constitutionally permissible award of punitive damages when it has reduced the accompanying award of compensatory damages, or should the court remand for a new determination of punitive damages in light of the reduced award of compensatory damages? Review granted/brief due.

LEAVES

Lonicki v. Sutter Health Central, 124 Cal. App. 4th 1139 (2004), *review granted,* 2005 Cal. LEXIS 2778 (2005). S130839/C039617. Petition for review

after affirmance of judgment. (1) Under the provisions of the Moore-Brown-Roberti Family Rights Act (Cal. Gov't Code § 12945.2) that grant an employee the right to a leave of absence when the employee has a serious health condition that makes the employee "unable to perform the functions of the position of that employee," is an employee entitled to a leave of absence where the employee's serious health condition prevents him or her from working for a specific employer, but the employee is able to perform a similar job for a different employer? (2) Did defendant's failure to invoke the statutory procedure for contesting the medical certificate presented by plaintiff preclude it from later contesting the validity of that certificate? Fully briefed.

LITIGATION AND PROCEDURE

Lockheed Litigation Cases, 126 Cal. App. 4th 271 (2005), *review granted,* 2005 Cal. LEXIS 3888 (2005). S132167/B166347. Petition for review after affirmance of judgment. On a claim of workplace chemical exposure, does Cal. Evid. Code § 801(b) permit a trial court to review the evidence an expert relied upon in reaching his or her conclusions in order to determine whether that evidence provides a reasonable basis for the expert's opinion? Fully briefed.

May v. Trustees of the California State University, decision without published opinion (2005), *review granted,* 2005 Cal. LEXIS 5971 (2005). S132946/H024624. Petition for review after affirmance of order for a new trial. Briefing deferred pending decision in *Oakland Raiders Football Club v. Nat'l Football League,* 41 Cal. 4th 624 (2007), which held that if the trial court fails to specify its reasons for granting a new trial (Cal. Code Civ. Proc. § 657), the trial court's order granting a new trial reviewed is subject to independent review.

NONCOMPETE AGREEMENTS

Edwards v. Arthur Anderson, LLP, 142 Cal. App. 4th 603 (2006), *review granted,* 2006 Cal. LEXIS 14181 (2006). S147190/B178246. Petition for review after affirmance sustaining demurrer. (1) Is a noncompetition agreement between an employer and an employee that prohibits the employee from performing services for former clients invalid under Cal. Bus. & Prof. Code § 6600, unless it falls within the statutory or judicially-created trade secrets exceptions to the statute? (2) Does a contract provision releasing "any and all" claims the employee might have against the employer encompass non-waivable statutory protections, such as the employee indemnity protection of Cal. Lab. Code § 2802? Fully briefed.

PRIVACY

Hernandez v. Hillsides, Inc., 142 Cal. App. 4th 1377 (2006), *review granted,* 2007 Daily Journal DAR 201 (2007). S147552/B183713. Petition for review after reversal and remand on grant of summary judgment. May employees assert a cause of action for invasion of privacy when their employer installed a hidden surveillance camera in the office to investigate whether someone was using an office computer for improper purposes, only operated the camera after normal working hours, and did not actually capture any video of the employees who worked in the office? Fully briefed.

PROPOSITION 209

Coral Construction, Inc. v. City and County of San Francisco, 149 Cal. App. 4th (2007), *review granted,* 2007 Cal. LEXIS 8911 (2007). S152934/A107803. Petition for review after part affirmance and part reversal of grant of summary judgment. (1) Does article I, section 31 of the California Constitution, which prohibits government entities from discrimination or preference on the basis of race, sex, or color in public contracting, improperly disadvantage minority groups and violate equal protection principles by making it more difficult to enact legislation on their behalf? (See *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457 (1982); *Hunter v. Erickson,* 393 U.S. 385 (1969).) (2) Is section 31 preempted by the International Convention on the

continued on page 36

Sexual Harassment

continued from page 3

Employment Opportunity staff in addition to professional sexual harassment trainers or compliance consultants. These individuals can work either as employees or independent contractors of the employer. Under this category, individuals must have a minimum of two years' practical experience in one or more of the following:

(1) designing or conducting discrimination, retaliation and sexual harassment prevention training;
(2) responding to sexual harassment complaints or other discrimination complaints;
(3) conducting investigations of sexual harassment complaints; or
(4) advising employers or employees regarding discrimination, retaliation and sexual harassment prevention.[18]

Significantly, "human resource professionals" and "harassment prevention consultants" need not have experience in *all* of the activities listed above, as long as they have at least two years' experience in at least *one* of the activities.

Individuals who do not meet the qualifications of a trainer because they lack the requisite two years' experience may team teach with a trainer in classroom or webinar trainings provided that the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees.[19]

WHAT ARE ACCEPTABLE TYPES OF TRAINING?

The FEHC's regulations provide that there are three types of acceptable training:

- classroom training,
- online, computer-based training, called "e-learning," and
- web-based seminars, called "webinars."[20]

The FEHC's regulations define "classroom training" as in-person, trainer-instruction, the content of which is both created and provided to supervisors by a trainer. To avoid distractions, the regulations require the training to be in a setting removed from the supervisor's daily duties.[21]

"E-learning" training is individualized, interactive, computer-based training created by a trainer and an instructional designer. The training must provide a hyperlink or directions on how to contact a live trainer available to answer questions not covered in the training within two business days.[22]

"Webinar" training is an Internet-based seminar whose content is created and taught by a trainer and transmitted over the Internet or intranet in real time. Each supervisor who was not in the same room as the trainer must attend the entire training and actively participate in the training's interactive content. The webinar must provide the supervisors an opportunity to ask questions about the training. The burden is on the employer to document that its supervisors participated in the webinar.[23]

MEASURING "TWO HOURS"

The regulations specify that for each modality of training, the instruction must be at a minimum two hours.[24] For classroom training and webinars, time is easy to measure; it is the actual time instructors spend training, excluding breaks.

For e-learning training, the online training must total a minimum of two hours to complete the course. Although this interpretation was an unpopular provision for online providers, who wanted more flexibility for course completion for "rapid learners," the FEHC sought to avoid the possibility that poorly designed e-learning programs could allow learners to "click through" the course in far less than two hours, thwarting the purpose of the statute. In addition, the FEHC believed that the statute mandates sufficient content that it is challenging to complete it in two hours, whichever modality of training is used.

TRACKING TRAINING

Government Code section 12950.1 mandates that employers must provide training to their supervisory employees every two years.[25] The regulations specify that an employer can use either an "individual" or a "training year" method to track its employees' training.[26]

For the individual tracking method, the employer keeps a record that the supervisor has received training on a particular date, for example, August 23, 2007. That supervisor would need to be retrained again by August 22, 2009. This tracking method is most useful when an employer trains its supervisors using online training because the computer can track the training.[27]

For the tracking year method, the employer tracks its supervisors by providing training to its supervisors in a particular year. The employer then re-trains all these supervisors in the next training year, two years hence.[28] For example, if an employer trains its supervisors in 2007, it would next retrain these supervisors in 2009.

Newly hired supervisors or individuals who are promoted to be supervisors need to be trained within six months of obtaining supervisory status.[29] The employer can utilize thereafter either of the above two tracking methods to track these new supervisors' training.[30]

DUPLICATE TRAINING

Many supervisors may have received training from another employer within the last two years. If the current employer is satisfied that the new supervisor's last training complied with the statute and the FEHC's regulations, then retraining is not required. This new supervisor would nonetheless be required to read and acknowledge receipt of the current employer's anti-harassment policy within six months. That supervisor shall otherwise be put on a two-year tracking schedule based on the supervisor's last training. The burden of establishing that the prior training was legally compliant is on the current employer.[31]

TRAINING CONTENT

The learning objectives of section 12950.1 training are to assist California employers to change or modify workplace behaviors that create or contribute to sexual harassment; and to develop, foster and encourage a set of values in supervisory employees who complete mandated training that will assist them to prevent and effectively respond to sexual harassment incidents.[32] Towards that end, the

mandated training content training must include:

- A definition of sexual harassment under the FEHA and Title VII of the federal Civil Rights Act of 1964.
- FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.
- The types of conduct that constitute sexual harassment.
- Remedies available for sexual harassment.
- Strategies to prevent sexual harassment in the workplace.
- "Practical examples," such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources which illustrate sexual harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions.
- The limited confidentiality of the complaint process.
- Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.
- The employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- Training on what to do if the supervisor is personally accused of harassment.
- The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer's policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.[33]

The training may (but is not required to) provide a definition of and train about other forms of harassment covered by the FEHA and discuss how harassment of an employee can cover more than one basis.[34]

DOCUMENTING TRAINING

An employer is required to keep documentation of training provided to its employees to track compliance, including the name of the supervisory employee trained, the date of training, the type of training, and the name of the training provider. The employer should retain these records for a minimum of two years.[35] For litigation purposes, employers would be wise to have each supervisory employee sign a certification of completion or some similar document, acknowledging that the employee took the course for the entire two hours, understood the content and had all of his or her questions answered by the trainer. That certificate should thereafter be placed in the employee's personnel file.

"California's legislature has provided state employers with clear guidance on four steps to take to prevent sexual harassment."

MINIMUM STEPS FOR EMPLOYERS TO PREVENT SEXUAL HARASSMENT AND THE CONSEQUENCES FOR IGNORING THESE MANDATES

California's legislature has provided state employers with clear guidance on four steps to take to prevent sexual harassment. And, the FEHA and case law establish clear consequences for ignoring these mandates. Advise your clients that the state now mandates, at a minimum, four steps for California employers to prevent sexual harassment.

- First, for employers with fifty or more employees, provide sexual harassment prevention training for supervisory employees.[36]
- Second, employers, regardless of size, should create an anti-harassment policy and train all employees about that policy, either as part of a section 12950.1 training or separately.[37]
- Third, employers should distribute an information sheet to all employees about sexual harassment. Employers can use the information sheet developed by the Department of Fair Employment and Housing (DFEH), numbered DFEH-185, and available on its website, at http://www.dfeh.ca.gov/Publications/DFEH%20185.pdf, or develop a comparable sheet of their own.[38]
- Fourth, employers should post a copy of the DFEH's anti-harassment poster, DFEH-162, which can be downloaded from DFEH's website, at http://www.dfeh.ca.gov/Publications/DFEH%20162.pdf.[39]

AB 1825 TRAINING PRE-FEHC REGULATIONS

Many employers have already provided their employees with AB 1825-mandated sexual harassment prevention training before the effective date of the FEHC's regulations. If that training differs from the requirements in the FEHC's regulations, must the employer retrain its supervisors? The regulations, anticipating these issues, provide that an employer who has made a substantial, good-faith effort to comply with AB 1825 by completing supervisor training prior to August 17, 2007, is deemed to be in compliance with AB 1825-required training as though it had been done under the FEHC's regulations.[40] Training provided after August 17, 2007, however, must comply with the FEHC's regulations.

Consequences for Failure to Train

AB 1825 provides no separate awards of damages for failure to provide two hours of sexual harassment training to supervisors and managers.[41] However, there are potentially expensive and disruptive consequences for employers who fail to train their supervisors as required by law.

- ***Consequence #1: Liability***

The FEHA provides not once, but twice, that an employer has a duty to

"take all reasonable steps to prevent harassment from occurring."[42] This duty, for employers with fifty or more employees, includes providing sexual harassment prevention training. Further, the DFEH, the state's prosecutorial civil rights agency, asks all employers covered by section 12950.1 as its first discovery question, regardless of whether the complaint covers sexual harassment, whether the employer has provided its supervisors sexual harassment training.

- ***Consequence # 2: Increased Damages***

The California Supreme Court provided that an employer could limit damages in a sexual harassment lawsuit, utilizing the tort principle of "avoidable consequences," *if* the employer could show that it had developed an anti-harassment policy and provided anti-harassment training and that the employee seeking damages for sexual harassment unreasonably failed to utilize the policy and notify the employer about the harassment. Had the employee done so, the employer could have stopped the harassment and need not pay for damages that could have been avoided.[43]

Thus, establishing an effective anti-harassment policy and providing effective sexual harassment training is critical for limiting potentially costly awards in sexual harassment cases.

Benefits of Training

Finally, paying now for compliance, rather than later for litigation, makes good business sense for your client. Effective training can:

- Reduce incidents of sexual harassment.
- Give supervisors skills to prevent harassment, to identify inappropriate behavior early before it escalates to sexual harassment, and to identify incidents of sexual harassment.
- Permit informal resolution of sexual harassment complaints, thus avoiding costly, disruptive litigation.
- Create a climate of respect in the workplace, a goal for which we all should strive.

ENDNOTES

1. Me. Rev. Stat. § 807(3).
2. Conn. Gen. Stat. §§ 46a-54(15)(B).
3. For a list of other states' requirements for sexual harassment prevention training, see Brightline Compliance's list, http://www.brightlinecompliance.com/training/sexual-harassment-training.html.
4. Gov't Code § 12950.1(a), (c); Cal. Code Regs. tit. 2, § 7288.0(a)(4).
5. Cal. Code Regs. tit. 2, § 7288.0(a)(5).
6. *Id.*
7. Gov't Code § 12950.1(c); Cal. Code Regs. tit. 2, § 7288.0(a)(4).
8. Cal. Code Regs. tit. 2, § 7288.0(a)(4).
9. Cal. Code Regs. tit. 2, § 7288.0(a)(8).
10. Gov't Code § 12926(r).
11. Cal. Code Regs. tit. 2, § 7288.0(a)(8).
12. Stats.2006, c. 737 (A.B.2095), § 1.
13. Cal. Code Regs. tit. 2, § 7288.0(a)(8).
14. Cal. Code Regs. tit. 2, § 7288.0(a)(9).
15. Cal. Code Regs. tit. 2, § 7288.0(a)(9).)
16. Cal. Code Regs. tit. 2, § 7288.0(a)(9)(A)(1).
17. Cal. Code Regs. tit. 2, § 7288.0(a)(9)(A)(3).
18. Cal. Code Regs. tit. 2, § 7288.0(a)(9)(A)(2).
19. Cal. Code Regs. tit. 2, § 7288.0(a)(9)(B).
20. Cal. Code Regs. tit. 2, § 7288.0(a)(2).
21. Cal. Code Regs. tit. 2, § 7288.0(a)(2)(A).
22. Cal. Code Regs. tit. 2, § 7288.0(a)(2)(B).
23. Cal. Code Regs. tit. 2, § 7288.0(a)(2)(C).
24. Cal. Code Regs. tit. 2, § 7288.0(a)(11).
25. Gov't Code § 12950.1(a).
26. Cal. Code Regs. tit. 2, § 7288.0 (b)(1)(A), (B).
27. Cal. Code Regs. tit. 2, § 7288.0(b)(1)(A).
28. Cal. Code Regs. tit. 2, § 7288.0(b)(1)(B).
29. Gov't Code § 12950.1(a); Cal. Code Regs. tit. 2, § 7288.0(b)(4).
30. *Id.*
31. Cal. Code Regs. tit. 2, § 7288.0(b)(5).
32. Cal. Code Regs. tit. 2, § 7288.0(c).
33. Gov't Code § 12950.1(a); Cal. Code Regs. tit. 2, § 7288.0(c).
34. Gov't Code § 12950.1(f); Cal. Code Regs. tit. 2, § 7288.0(c)(1).
35. Cal. Code Regs. tit. 2, § 7288.0(b)(2).
36. Gov't Code § 12950.1.
37. Gov't Code § 12950(b); Cal. Code Regs. tit. 2, § 7288.0(b)(5).
38. Gov't Code § 12950(b).
39. Gov't Code § 12950(a).
40. Cal. Code Regs. tit. 2, § 7288.0(e).
41. Gov't Code § 12950.1(e).
42. Gov't Code § 12940(j), (k).
43. *State Dep't of Health Serv. v. Superior Court (McGinnis)*, 31 Ca1.4th 1026 (2003).

MCLE Self-Assessment Test

MCLE CREDIT
Earn one hour of general MCLE credit by reading ***"New FEHC Regulations Interpret Sexual Harassment Training Law"*** and answering the questions that follow, choosing the one best answer to each question. Mail your answers and a $25 processing fee ($20 for Labor and Employment Law Section members) to:

Labor and Employment Law Section • State Bar of California
180 Howard Street
San Francisco, CA 94105

Make checks payable to The State Bar of California. You will receive the correct answers with explanations and an MCLE certificate within six weeks. ***Please include your bar number and e-mail.***

CERTIFICATION
The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing education. This activity has been approved for minimum education credit in the amount of one hour.

Name _____ **Bar Number** _____ **E-mail** _____

1. In 2004, the California Legislature passed Assembly Bill (AB) 1825, codified later in Government Code section 12950.1, requiring state employers with fifty or more employees to provide a minimum amount of sexual harassment prevention training to their supervisors and managers.
❑ True ❑ False

2. The Fair Employment and Housing Commission (FEHC) issued regulations on AB 1825 that went into effect the same year that this legislation passed.
❑ True ❑ False

3. Private sector employers are not subject to the sexual harassment prevention training law unless they have at least fifty employees.
❑ True ❑ False

4. All government entities, including federal governmental entities, are subject to the requirements of Government Code section 12950.1.
❑ True ❑ False

5. A "supervisor" required to undergo sexual harassment prevention training is anyone who comes under the expansive definition set forth in Government Code section 12926.
❑ True ❑ False

6. All supervisors must receive sexual harassment prevention training pursuant to Government Code section 12950.1, regardless of whether or not the supervisors are located in California.
❑ True ❑ False

7. The three categories of people qualified to provide sexual harassment prevention training are: (1) attorneys admitted to practice law for at least two years and whose practice includes employment law under the California Fair Employment and Housing Act (FEHA) and/or Title VII of the federal Civil Rights Act (Title VII), (2) "professors" or "instructors" with a certain minimum amount of FEHA or Title VII teaching experience, and (3) "human resource professionals" and "harassment prevention consultants" with at least two years' practical experience in certain types of work.
❑ True ❑ False

8. There are three types of acceptable training, (1) classroom, (2) online, computer-based called "e-learning" and (3) web-based seminars called "webinars."
❑ True ❑ False

9. Regardless of the type of training, instruction must be at least three hours.
❑ True ❑ False

10. Employers must provide sexual harassment prevention training to their supervisory employees every three years.
❑ True ❑ False

11. Employers can use either an "individual" or a "training year" tracking method to track their supervisory employees' training.
❑ True ❑ False

12. New supervisors must receive sexual harassment prevention training within six months of becoming supervisors.
❑ True ❑ False

13. If a new supervisor received training from a former employer within two years of becoming a new supervisor and if the current employer is satisfied that the new supervisor's last training complied with Government Code section 12950.1 and the FEHC's regulations, then the new supervisor need not be retrained.
❑ True ❑ False

14. The new supervisor has the burden of proving that his or her prior training complies with Government Code section 12950.1 and the FEHC's regulations.
❑ True ❑ False

15. The goals of sexual harassment prevention training are to help employers change workplace conduct that creates or contributes to sexual harassment, and to help supervisory employees prevent and respond to sexual harassment incidents.
❑ True ❑ False

16. Employers must keep records of the training provided, including the date and type of training, and the names of the supervisory employee trained and the training provider.
❑ True ❑ False

17. Employers must keep their training records for at least three years.
❑ True ❑ False

18. Government Code section 12950.1 provides for separate damages recoverable against an employer for failure to provide the minimum hours of sexual harassment prevention training to supervisors and managers.
❑ True ❑ False

19. Government Code section 12940 requires employers to take all reasonable steps to prevent sexual harassment.
❑ True ❑ False

20. Case law holds that an employer can limit damages in an employee's sexual harassment lawsuit if the employer can demonstrate that it has an anti-harassment policy and provides training, and that the employee used the policy and notified the employer about the harassment.
❑ True ❑ False

Sick Leave

continued from page 4

WHAT'S AN EMPLOYER TO DO?

The outcry from employers faced with complying with the PSL law was predictable and understandable. A number of issues were not addressed by the voter-passed ordinance, including the application of the PSL law to employees who are only intermittently stationed in San Francisco, or those whose jobs take them within the city, and the reaches of the law, but only incidentally. For example, as the original ordinance was written, a delivery driver traveling across the Golden Gate Bridge and through the city on her way to Oakland accrued sick time as she drove through the crowded streets of San Francisco. More frequent are the "intermittent" San Francisco employees. Imagine, for example, a construction company based in San Mateo County that bids on and is awarded a remodel job in San Francisco. The company carpenter may spend ten days in San Francisco, and the remainder of his work time on jobs outside the city. Are the delivery driver and the carpenter owed paid sick time?

The OLSE, not surprisingly, was inundated with questions such as these, and responded by publishing both a list of Frequently Asked Questions (FAQs) and a series of implementation rules responsive to many of the concerns expressed by employers.[15] For the delivery driver, the answer is simple. If she does not stop in San Francisco, she is not working there and is not entitled to accumulate paid sick leave. The carpenter's situation, however, is more difficult. The OLSE has determined that all workers who spend fifty-six or more hours working in San Francisco in a calendar year are entitled to accumulate paid sick leave.[16] The rule is simple to understand, but difficult to implement. Employers of intermittent San Francisco employees must track not only the time spent working, but the location of the work. Employers are also placed in the unenviable position of applying different sick leave policies to different employees based on the geography of the worksite. Further, employees are allowed to use the sick time they accumulate in San Francisco *only* when they work in San Francisco. The San Mateo carpenter may never be permitted to use any sick time he accumulated if he is not sent back to San Francisco to work.

MUST EMPLOYERS PROVIDE PSL?

A less pragmatic, but more provocative question is what authority San Francisco has to regulate employer-provided benefits already regulated by the California Legislature. A strong argument can be made that the answer is none. The preemption doctrine provides that, in a given field, state regulation has precedence over local regulation.[17] For example, in 2005, the California Supreme Court found that an Oakland ordinance prohibiting predatory lending was preempted by state law because "the Legislature has seen fit to adopt a general scheme for the regulation of [this] particular subject."[18] The supreme court reasoned that under the California Constitution, a county or city may enforce "ordinances and regulations not in conflict with general laws."[19] Charter cities, such as San Francisco, may adopt and enforce ordinances that conflict with state law, but only if the subject of the regulation is a municipal affair, rather than an issue of statewide concern. In a similar vein, an appellate decision protected the right of Berkeley citizens to seek electroshock therapy because the therapy was a matter of statewide concern, and the voter-passed ordinance prohibiting electroshock treatments directly conflicted with state law in the area.[20]

So, any group challenging San Francisco's right to impose a paid sick leave law will have to show first that the California Legislature has occupied the field of employee sick leave benefits, and second, that San Francisco's law conflicts with what the state has done.

The Legislature or the City?

Well over fifty years ago, the California Supreme Court noted "it is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute."[21] In the absence of an express legislative intent to fully occupy a field, the legislature has impliedly done so if: (1) the subject matter has been so thoroughly covered by general law as to clearly indicate a desire to occupy the field; (2) the subject matter has been partially covered by general law couched in terms clearly indicating that a state concern will not tolerate additional local action; or (3) the subject matter has been partially covered by general law, and the subject matter is such that the adverse effect of a local ordinance on the transient citizens of the state outweighs the local benefit.[22]

Here, the Labor Code, the Industrial Welfare Commission Wage Orders and a number of Division of Labor Standards Enforcement (DLSE) opinion letters raise a strong implication that the high degree of state involvement in regulation of employee hours and time off demonstrates that employee leave law is state law.[23] By way of only a single example, Labor Code section 233 (referred to as the Kin Care law) requires merely that employers who *choose* to offer paid sick time provide half of the accumulated time for the care of a family member, although the legislature certainly had the option of requiring that sick time be provided in the first place.

San Francisco's Law Contradicts the Legislature

Arguably, the legislature has already spoken on the topic of employee sick leave and what it said differs from the San Francisco PSL requirements. The broad sweep of the PSL ordinance may very well include a subject matter (wage and hour law) that has been partially covered by general law, and has an adverse impact on transient citizens of the state that outweighs the local benefit.

California has, more than any other state, regulated the relationship between employer and employee. For example, the Industrial Welfare Commission's (IWC) Wage Orders regulate generally wages, reporting time pay, and meal and rest breaks.[24] More specifically, the California Legislature has regulated provision of time off in California,[25] and what it said differs from the San Francisco PSL requirements. As the Orange County Lawyer noted shortly after the Kin Care law went into effect in 2000, "[t]his law does not require employers to create a sick leave policy where there is none."[26] More important from a legal point of view is the DLSE's opinion letter, stating that "[i]n the opinion of the Labor Commissioner, the legislative intent of Section 233 was to insure that *in the event an employer had a sick leave policy in effect,* time for caring for family members was provided in the

same manner as sick leave time which arises as a result of the employee himself being ill."[27] Further, the San Francisco PSL law specifically *conflicts* with provisions of the Kin Care law, because it requires that an employee be allowed to use *all* accrued sick time to provide care to a family member, rather than half of the accrued yearly time provided by Labor Code section 233. Nor does the Labor Code contain the same broad definition of covered family members provided by the San Francisco law. Consequently, PSL conflicts with state law, a situation permissible only "if a matter is considered a 'municipal affair.'"[28] Because the state has chosen to regulate time off policies, PSL may well be considered a matter of statewide concern, rather than a more local municipal affair.

Importantly, the broad reach of the San Francisco PSL ordinance, stretching outside the city and county borders to regulate time-off policies of employers who may only employ people in San Francisco on an intermittent basis, has a serious impact on the transient citizens of the state. Consider again the adverse impact of San Francisco's PSL ordinance on the San Mateo construction company. In order to assign a worker to a job site in San Francisco, the company will be required to track not only the time the worker spends on the job, but the time spent at a given location, the amount of sick time accumulated, and must keep such detailed records for four years, but only for those employees assigned to work in San Francisco. In short, California employers anywhere in the state must either make sure that their sick leave policies comply with San Francisco's PSL, or must maintain policies and records that apply only to workers in San Francisco. A strong argument can be made that the burden imposed on Californians with only intermittent contact with San Francisco outweighs the benefit of the local PSL ordinance and is thus impermissible.[29]

CONCLUSION

While employers may be shaking their collective heads at this recent San Francisco regulation, the law appears vulnerable to a legal challenge, along the same lines as the current ERISA challenge to Healthy San Francisco brought by the Golden Gate Restaurant Association.[30] Further, numerous states are considering implementation of statewide regulation of sick leave.[31] Until state or federal legislators say otherwise, paid sick leave as implemented by the San Francisco voters is the law of the land in the "City by the Bay," and employers would do well to review their current sick leave policies for compliance with that law.

ENDNOTES

1. Ordinance Adding Chapter 12W to the Administrative Code of San Francisco; http://www.sfgov.org/site/uploadedfiles/olse/Paid_Sick_Leave_Ordinance,_Administrative_Code_Chapter_12W.pdf.
2. As written, however, the PSL law includes a sizeable exception: government employers. Arguably, government entities are *not* subject to the PSL law, because the law defines the word "employer" by reference to the definition of "person" in Labor Code section 18, a definition that includes "any person, association, organization, partnership, business trust, limited liability company, or corporation" but makes no mention of governmental bodies. *See* http://www.sfgov.org/site/uploadedfiles/olse/PSL_FAQ.pdf, and http://www.sfgov.org/site/uploadedfiles/olse/PSL_RulesImp.pdf, Rule No. 2, PSL, 12W.3(c).
3. http://www.sfgov.org/site/uploadedfiles/olse/PSL_FAQ.pdf, Questions 21, 22.
4. *See,* e.g., Lab. Code § 227.3 (vesting of accrued vacation); http://www.sfgov.org/site/uploadedfiles/olse/PSL_RulesImp.pdf, Rule 4.
5. OLSE postings can be found at http://www.sfgov.org/site/olse_index.asp?id=49389.
6. Note that a number of the rules and requirements, particularly concerning what is and is not reasonable, are presumptively reasonable if approved by a collective bargaining agreement.
7. *See,* e.g., http://www.sfgov.org/site/uploadedfiles/olse/PSL_RulesImp.pdf, Rule 1.
8. Lab. Code § 227.3.
9. http://www.sfgov.org/site/uploadedfiles/olse/PSL_FAQ.pdf, Question 4.
10. http://www.sfgov.org/site/uploadedfiles/olse/PSL_FAQ.pdf, Question 6.
11. http://www.sfgov.org/site/uploadedfiles/olse/PSL_RulesImp.pdf, Rule 4.
12. http://www.sfgov.org/site/uploadedfiles/olse/PSL_FAQ.pdf, Question 36.
13. http://www.sfgov.org/site/uploadedfiles/olse/PSL_RulesImp.pdf, Rule 1.4.
14. http://www.sfgov.org/site/uploadedfiles/olse/PSL_FAQ.pdf, Rules 55, 56.
15. http://www.sfgov.org/site/uploadedfiles/olse/PSL_FAQ.pdf; http://www.sfgov.org/site/uploadedfiles/olse/PSL_RulesImp.pdf.
16. http://www.sfgov.org/site/uploadedfiles/olse/PSL_RulesImp.pdf, Rule No. 6.
17. *Jane Doe v. City and County of San Francisco,* 136 Cal.App.3d 509 (1982).
18. *American Fin. Services Ass'n. v. City of Oakland,* 34 Ca1.4th 1239, 1253 (2005).
19. Cal. Const. art. XI, § 7.
20. *Northern Cal. Psychiatric Soc'y v. City of Berkeley,* 178 Cal.App.3d 90 (1986).
21. *Tolman v. Underhill,* 39 Ca1.2d 708, 712 (1952).
22. *See Sherwin-Williams Co. v. City of Los Angeles,* 4 Ca1.4th 893, 897 (1993); *Fisher v. City of Berkeley,* 37 Ca1.3d 644, 708 (1984).
23. Lab. Code § 233; *DLSE Enforcement Policies and Interpretations Manual, Section 15.1.12.*
24. *See e.g., Industrial Welfare Commission Wage Order 1–2001,* http://www.dir.ca.gov/IWC/IWCArticle1.pdf.
25. Lab. Code § 233.
26. Michael R. Kirschbaum, *New (and Improved?) Labor Laws,* Orange County Lawyer (March 2000), p. 30.
27. DLSE Opinion Letter June 24, 2002, emphasis added.
28. *Jane Doe v. City and County of San Francisco,* 136 Cal.App.3d 509, 512 (1982).
29. *See Sherwin-Williams Co. v. City of Los Angeles,* 4 Ca1.4th 893, 897 (1993); *Fisher v. City of Berkeley,* 37 Ca1.3d 644, 708 (1984).
30. *Golden Gate Rest. Ass'n v. City and County of San Francisco,* No. C 06–06997 JSW, 2007 WL 1052820 (N.D. Cal. Apr. 5, 2007) (challenging San Francisco regulations implementing the employer spending requirement of the San Francisco Health Care Security Ordinance § 4.2 pursuant to Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2000)).
31. For example, Connecticut (CT SB 601), Maine (ME HB 1024), Maryland (MD HB 832, MD SB 828), Massachusetts (MA HB 1803, MA SB 1073) and Minnesota (MN HB 1334, MN HB 1334) are all considering legislation regulating sick time.

Grievance Mediation 101

continued from page 5

B. Have the people available who must be present for the mediation

Generally, this includes the grievant and union shop steward on the labor side, and the grievant's supervisor on the management side. Make sure that any key decision-makers, who will have to approve of any settlement, are available for consultation. The mediator will probably not be interested in hearing from witnesses, except to the extent that witness credibility is a pivotal issue in the dispute. Written statements, and/or representations by the advocate that "were so and so here, he/she would testify to xyz" generally suffice for the purposes of grievance mediation. If you are the employer, make sure that the appropriate people requested by the union will be released from their regular duties for the meeting.

C. Explore possible settlement directions with decision-makers ahead of time

Test financial parameters and interests of organizational representatives prior to mediation.

THE MEDIATION

Grievance mediation has many advantages over arbitration. Here are some basics of the process.

A. The process is informal

There are no court reporters or tape recorders. The mediator will not swear in witnesses. While attorneys often present cases in mediation, it has a much less legalistic tone than arbitration. Arbitrations are generally scheduled for all day. Usually, a half day will suffice for grievance mediation. An individual grievant should be present, as should a representative member(s) of a class of grievants.

B. The proceedings are confidential and off the record

The mediator generally points out to the parties at the outset the confidential nature of the mediation. Even if he or she does not do so, the established practice in labor-management dispute resolution is that mediation is confidential. This has the important effect of freeing the parties to make disclosures to the mediator and/or to the other side that cannot be cited in arbitration. Any settlement offers made or discussed in mediation are strictly off the record. No arbitrator in the business will admit into evidence any information from a mediation session.

C. The process usually includes face-to-face meetings and separate caucuses

Most grievance mediators like to start with the parties together. At this opening session, the mediator explains the mediation process, and will often inquire as to whether the parties have any particular agreement as to how a grievance mediation is to be conducted. Then the mediator will often want an oral summary of the parties' positions. Personally, I prefer to proceed in the same order as arbitration, with the moving party proceeding first. In a discipline case, that would be the employer. And in an allegation of a non-disciplinary contract violation, the union would start. Usually, witness testimony is not necessary, but the mediator may want to hear from a particular individual if he/she feels that the witness' credibility could make or break the outcome. The mediator will often inquire as to whether the parties have exchanged any settlement offers to date, and will want to know what those offers were. At this junction, the mediator will begin meeting separately with both sides to explore settlement options.

D. In a grievance mediation that is a step in a process that concludes in arbitration, the mediator plays a dual role in the caucus

Not only is the mediator a settlement broker, carrying offers and coaxing the parties to move their positions, but the mediator also gives the parties a preview of how an arbitrator might rule. By informing the party of how that party's case might be viewed in arbitration, the mediator tries to nudge the party toward a compromise. Most grievance mediators are far from passive messengers. They will often make suggestions to both sides, based on their experience with other similar grievances, arbitration precedent and their reading of the contract.

REACHING AGREEMENT—OR NOT

The goal of the mediator and the parties in a grievance mediation is a signed agreement. Here are items to consider in closing a grievance mediation.

A. If the parties reach an agreement through the mediator, there should be a final face-to-face session

It is usually best to have one side or the other type up a settlement document for the parties to sign. In an individual grievance, the grievant will often sign as well. The mediator does not need to sign the agreement. If for any reason it is not practical to sign off, then at the least the parties should state to each other the terms of the agreement, or have the mediator recite the points of the settlement while both sides are present.

B. No ratification is necessary

Unlike collective bargaining agreements, grievance agreements are not generally subject to union membership ratification or governing board adoption. The principals have generally delegated this responsibility to their authorized representatives.

C. Once there is a signed agreement, then that agreement is binding on the parties

The parties often want to include as a settlement term that the agreement does or does not set precedent for other grievances.

D. The mediator may be asked to render an off-the-record opinion in case the parties do not settle

In many cases, the parties do not settle but believe that it still may be possible to settle short of arbitration. In that case, they may need a mediator's opinion on how an arbitrator might rule in order to influence their decision-makers to modify their positions. Most mediators will give such an opinion. Some mediators will agree to give a brief written opinion. In the latter case, the mediator should put

a caveat on the document that it may not be cited in arbitration. There are even a few contracts that state that the parties agree to abide by the recommendation of the mediator in such cases.

THE VALUE OF GRIEVANCE MEDIATION

Grievances are an expression of the relationship between parties to a collective bargaining agreement. They can be effective problem-solving tools—or they can be steps down a road toward disharmony and strife. Grievance mediation—because of its emphasis on inquiry and settlement—can help promote a mutually beneficial partnership between management and labor.

The parties sometimes need an outside neutral to step into a dispute. Unlike an arbitrator, the mediator does not play the role of decider. The mediator acts as a facilitator of better communication between the parties. The mediator injects new ideas into a stale argument. Successful grievance mediation is a cost-effective method of resolving workplace conflicts. Many union and management advocates use it regularly as a valuable component of the grievance procedure.

the trial of this matter at the superior court level, the Times withdrew its request for birth dates. The trial court entered a judgment ordering the release of names, the employing agencies, the dates of appointment, and termination dates. The court of appeal directed the superior court to vacate its judgment and deny the petition in its entirety. But Chief Justice George, writing for the majority, disagreed. The supreme court held that unless a statutory exception to the disclosure applied, the information must be disclosed. In this case the exception claimed was under Government Code section 6254(k) relating to the privilege allegedly contained in Penal Code section 832.7. However, peace officers' names, employing agency, and employment dates are not among the items specifically enumerated in Penal Code section 832.7 as components of a peace officer's personnel record. Thus, information sought by the Los Angeles Times was not protected from disclosure. In distinguishing this case from its decision in *Copley Press, Inc. v. Superior Court,* 39 Ca1.4th 1272 (2006), the court noted that the information involved would not identify a peace officer as an officer involved in any particular incidents or investigations. Although the safety of peace officers and their families constitutes a legitimate concern, the court was unwilling to agree that such safety would be threatened by the release of the information in question.

PUBLIC SCHOOLS

Use of Mail Boxes for Distribution of Political Literature

San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist., 154 Cal.App.4th 866 (2007)

The Educational Employment Relations Act provides, in Government Code section 4543.1(b), "Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mail boxes, and other means of communication, subject to reasonable regulation. . . ." California Education Code section 7054(a) provides, "No school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district." The San Leandro Teachers Association placed two newsletters in internal faculty mailboxes maintained by the San Leandro Unified School District at various school locations. Both newsletters elicited support from the recipients for candidates endorsed by that union. The district's policy regarding the use of mailboxes provided that literature could not be placed in mailboxes without the district's prior approval regardless whether the materials come from a union or any other "non-school" organization. The district rejected the materials and threatened denial of future access "if any future distributions contain impermissible political endorsements." The union filed an unfair practice charge with the Public Employment Relations Board (PERB). The PERB dismissed the charge, relying upon its own precedents. The union then filed a petition for a writ of mandate, which was granted by the trial court. The court of appeal reversed. The appellate court viewed section 7054 as "unambiguously" decreeing that school district resources may not be used in furtherance of political activities. Thus, the issue was whether or not the mailboxes constituted use of district "funds, services, supplies or equipment." The internal mailbox system was deemed by the court of appeal to be a service, distinguishable from a "table in a faculty lunchroom." Mailboxes are "equipment" in that they are tangible, specially constructed receptacles that, while not unduly expensive, are created and maintained solely by the district. Unlike tables which can serve "many functions, mailboxes are solely dedicated to the task of distributing information to individual recipients." The court rejected the argument that section 7054 applied only to the activities of the school districts themselves, and not to outside organizations seeking to use school district facilities. Education Code section 7054 was, in the court's opinion, a reasonable regulation regarding the use of mailboxes. Finally, regarding constitutional claims to free speech, these school mailboxes were deemed to be a "non-public forum" which had not been opened to unlimited public discussion.

PUBLIC EMPLOYEES

Wrongfully Demoted Employee Is Not Entitled to Back Pay for Periods When the Employee Was Not Available for Work

Davis v. Los Angeles Unified Sch. Dist. Pers. Comm'n, 152 Cal.App.4th 1122 (2007)

A classified employee of the Los Angeles Unified School District received a disciplinary demotion. However, before he received notice of the demotion, he was placed on disability leave for reasons unrelated to his employment. Two years later, the Personal Commission found that his demotion was wrongful and ordered him reinstated, but did not award him back pay for the period of time that he was disabled and therefore unavailable for work. The court of appeal held that because back pay is a "make-whole remedy" intended to restore the employee to the financial situation that would not have existed but for the employer's wrongful conduct, an employee is not entitled to earnings which he or she would not have received had the wrongful termination not occurred.

PUBLIC SECTOR ARBITRATION

The Dills Act Prevents an Arbitrator From Reforming an Erroneous Memorandum of Understanding After It Has Been Ratified

Dep't of Pers. Admin. v. Cal. Corr. Peace Officers Assoc., 152 Cal.App.4th 1193 (2007)

Although this case arises under the Dills Act, California Government Code section 3512, et seq., the rationale of the court of appeal could be applied to any arbitration occurring between most public sector employers and unions representing their employees. The California Correctional Peace Officers Association entered into a collective bargaining agreement with the state of California by and through its agent, the Department of Personnel Administration. A dispute arose concerning the "release time bank" established under the contract. The precise nature of the dispute is not relevant. What is relevant is that there appeared to be an error in the published memoran-

dum of understanding which caused that published document to not reflect the intent of the parties. The union brought the dispute to the grievance procedure and ultimately to arbitration. The arbitrator ordered that the memorandum of understanding be reformed to reflect the intention of the parties. The court of appeal acknowledged that generally arbitrators do have the ability to reform contracts even when the contracts restrict the arbitrator from altering or amending the language of the contract. However, in the instant case, under the Dills Act, the memorandum of understanding must be ratified by the legislature. The court held that once the legislature had approved the memorandum of understanding, it may not be reformed without further legislative ratification.

As of the date of the preparation of this note, a petition for review was pending before the California State Supreme Court.

AUTHORITY OF COUNTY CIVIL SERVICE COMMISSION

A Civil Service Commission's Authority Is Limited by the Charter Which Created It

Berumen v. County of Los Angeles Dep't of Health Services, 152 Cal.App.4th 372 (2007)

An employee of the Los Angeles County Department of Health Services, employed in a civil service position, received an assignment which she contended constituted a de facto demotion because it stripped her of significant job responsibilities. However, neither her grade, rank nor pay had been reduced. A charter-created civil service commission has special and limited jurisdiction expressly authorized by that charter. In this case, the charter provided that the commission was an appellate body to review decisions about discharges and reductions of permanent employees. The civil service rule adopted by the commission limited the circumstances under which an employee could receive a hearing. It could provide hearings for lowering of rank, grade or pay. Thus, the commission had no authority to determine whether or not the petitioner's claim constituted a de facto demotion. It noted that the employee had a remedy whereby she might appeal an assignment, interdepartmental transfer or a change in classification to the Director of Personnel. She had failed to do so.

AGENCY FEE

States May Require Public Sector Unions to Obtain Affirmative Approval Before Using Non-Members' Fees for Political Purposes

Davenport v. Wash. Educ. Ass'n, ___ U.S.___, 127 S.Ct. 2372 (June 14, 2007)

Agency shop arrangements in the public sector raise First Amendment questions because they allegedly force individuals to contribute money to unions as a condition of government employment. The argument is that unwilling government employees are thereby forced to finance speech and activities with which they may not necessarily agree. Nevertheless, non-consenting public employees may be required to pay for the activities of exclusive representative unions as long as objecting non-members are not required to pay for ideological activities that are not germane to the union's collective bargaining duties. In the case of *Chicago Teachers Union v. Hudson,* 475 U.S. 292 (1986), the United States Supreme Court set forth procedural requirements which public sector unions must observe in order to ensure that objecting non-members can prevent the use of their fees for "impermissible" purposes.

Although California voters recently rejected a similar measure, the voters of the state of Washington passed a measure allowing public sector unions to charge members an agency fee equivalent to the full membership dues of the union and have this fee collected by the employer through payroll deductions. However, in 1992 the Fair Campaign Practices Act, referred to as section 760, restricted the union's ability to spend agency fees that it collects. "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee unless affirmatively authorized by the individual."

The normal practice of public sector unions is to send what is referred to as a "Hudson packet" to non-members advising them of the amount of the fee, the manner in which it is calculated, and the right to object to the calculation of the fee. Unless objection to the use of all of the money collected is received within a given period of time, the union transfers the entire amount out of escrow and into its general treasury. It may then use those funds for any purpose. Section 760 reverses the burden from the non-member to object, and places the burden upon the union to solicit and obtain affirmative approval for the expenditure of the funds for political purposes upon the union.

The unions' practices were undoubtedly based upon reliance upon language appearing in the *Hudson* case in footnote 16: "[D]issent is not to be presumed—it must be affirmatively made known to the union by the dissenting employee." 475 U.S. at 306. Justice Scalia, writing for the majority, determined that the Washington Supreme Court read far too much into the Court's admonition that "dissent is not to be presumed." Justice Scalia explained, "[w]e meant only that it would be improper for a court to enjoin the expenditure of the agency fees of all employees, including those who had not objected, when the statutory or constitutional limitations established in those cases would be satisfied by a narrower remedy." The Supreme Court overturned the decision of the state Supreme Court.

The United States Supreme Court opinion noted that the Washington Education Association argued an entirely different rationale than that relied upon by the Washington Supreme Court. The argument of the union was that section 760 constituted an unconstitutional restriction on how the union may spend "its" money. Justice Scalia chided the Washington Education Association, stating that section 760's requirement for affirmative approval was a condition placed upon the union's "extraordinary state entitlement to acquire and spend other people's money." This was a not unreasonable content-based restriction placed upon an entity which was subsidizing speech. "We do not believe that the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees."

FEDERAL TRANSPORTATION SECURITY ADMINISTRATION EMPLOYEES

Probationary TSA Employee Has a Right to Sue for Alleged Constitutional Violations, and the Union Has Standing in Its Own Right

Am. Fed'n of Gov't Employees Local 1 v. Stone, ___ F.3d ___ (9th Cir. Sept. 5, 2007), 2007 WL 2482144 (2007 DJ DAR 13725; filed Sept. 5, 2007)

A probationary Transportation Security Administration (TSA) employee was instrumental in organizing fifty individuals into the American Federation of Government Employees. He distributed literature during his break and made union forms available to fellow employees. He received a "written verbal warning" for these efforts, and when he refused to answer questions about his union activities, he was placed on paid administrative leave during an investigation. When he returned to work, he received a counseling memorandum and a written letter of warning. He later filed a grievance protesting work related changes made by his employer regarding baggage inspection, and sent a copy to the union's legal counsel. He was terminated for "improperly disclosing sensitive security information to an unauthorized party," namely the union's legal counsel. Under the law, the TSA has "wide latitude to determine the terms of employment of screeners." That fact, in addition to the fact that the employee was a probationary employee, meant that the employee had no administrative recourse to challenge his termination. Therefore, he filed a lawsuit in federal court for violation of his constitutional rights of speech and freedom of association. In addition, the union was named as a plaintiff claiming a violation of its rights and asserting that the termination of the individual plaintiff had a chilling affect on "other screeners." The trial court concluded the union had no standing to sue either on its own behalf or on behalf of the individual. The Ninth Circuit Court of Appeals held the union did have the right to proceed on its own behalf because it had a redressable injury. There were enough allegations in the complaint from which it could be inferred that the individual plaintiff was a member of the union even though that was not explicitly stated. But, whether or not plaintiff was a member, the union had a redressable injury because the complaint alleged the TSA unlawfully interfered with the union's efforts to recruit and communicate with its other members. Whether or not the union could collectively bargain with TSA, the union could nonetheless have a useful function for TSA employees.

The district court had also dismissed the action on jurisdictional grounds on the theory that the court had no ability to review the action of the TSA. The Ninth Circuit held that whether or not the individual had statutory rights under the Aviation and Transportation Security Act, the individual did have constitutional rights, and Congress had not shown a clear intent to deprive the court of its ability to provide relief for violation of constitutional rights. The Ninth Circuit relied upon the decision of the United States Supreme Court in *Webster v. Doe,* 486 U.S. 592 (1988). In so doing, it distinguished *United States v. Fausto,* 484 U.S. 439 (1988), which did not involve any constitutional claims. It also distinguished *Saul v. United States,* 928 F.2d 829 (9th Cir. 1991), on the ground that in that case the plaintiff could have availed himself of alternative mechanisms to pursue his constitutional claim.

The court noted that the First, Second and Tenth Circuits have issued opinions which could be interpreted as inconsistent with its decision, but it also cited decisions of the Third Circuit and the D.C. Circuit consistent with its decision. Given this background, it seems very likely that there will be more activity in this case.

Employment Law Notes

continued from page 9

ly and that plaintiffs' claims were barred by the applicable statute of limitations. However, in this *en banc* decision, the appellate court affirmed the district court's summary judgment against AT&T, concluding that service credit that excludes time spent on pregnancy leave violated Title VII.

Summary Judgment Granted in Meal/Rest Period Case

White v. Starbucks Corp., 497 F.Supp.2d 1080 (N.D. Cal. 2007) (Walker, C.J.)

Steve White, a former store manager for Starbucks, claimed the company had failed to (1) pay overtime wages in violation of Labor Code sections 201 and 204 and the California Code of Regulations, title 8, section 11070(12)(A); (2) provide meal and rest periods in violation of Labor Code sections 226.7 and 512; and (3) provide correct itemized wage statements in violation of Labor Code section 226. White also alleged that Starbucks had competed unfairly in violation of the Unfair Competition Law. White, who quit his job eleven days after starting work, admitted he did not notify Starbucks that he had worked overtime or off the clock. The district court granted summary judgment in favor of Starbucks, holding that no reasonable jury could conclude that Starbucks knew about the allegedly unpaid time. The court refused to follow *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005) and held that while an employer is required to *offer* meal breaks, it need not *ensure* that employees actually take such breaks. *Cf. Arias v. Superior Court,* 153 Cal.App.4th 777 (2007) (representative claim brought under the Unfair Competition Law must be brought as a class action, though representative claim brought under Private Attorneys General Act need not be); *Corrales v. Bradstreet,* 153 Cal.App.4th 33 (2007) (Labor Commissioner's attempt to issue a binding precedent decision regarding meal and rest periods was an invalid circumvention of the rulemaking requirements of state law).

Insurance Claims Adjusters Are Not Exempt From Overtime

Harris v. Superior Court, 154 Cal.App.4th 164 (2007)

Plaintiffs, members of four coordinated class actions filed against two insurance companies, alleged they were improperly classified as exempt employees in violation of the administrative exemption from the overtime requirements of California law. Applying the Administrative/Production Worker Dichotomy analysis, the court of appeal concluded that plaintiffs were primarily engaged in work that fell on the production side of the dichotomy, namely the day-to-day tasks involved in adjusting individual insurance claims. Accordingly, the court held that plaintiffs were not exempt administrative employees under either Wage Order 4 or Wage Order 4–2001. Cf. *Nigg v. U.S. Postal Service,* 2007 WL 2410165 (9th Cir. Aug. 27, 2007) (federal postal inspectors are entitled to overtime pay under the Fair Labor Standards Act).

Federally Chartered Credit Union Not Immune From Punitive Damages

McGee v. Tucoemas Fed. Credit Union, 153 Cal.App.4th 1351 (2007)

Kimberly McGee, a former vice president of lending for the credit union, took a leave of absence for surgery and chemotherapy after being diagnosed with breast cancer. The credit union allegedly told McGee that if she did not return to work within four months she would be fired. When McGee returned to work by the date specified by the credit union, she was demoted to a branch manager position, which involved greater physical demands. McGee quit her employment due to stress and sued for disability discrimination in violation of the Fair Employment Housing Act. The jury decided in favor of McGee, awarding her over $2 million in compensatory damages and an additional $1.2 million in punitive damages. The issue in this appeal was whether a federally chartered credit union is immune from punitive damages. The court of appeal held that the "sue and be sued" clause in the federal credit union enabling legislation presumptively waives immunity from punitive damages.

FedEx Drivers Were Employees for Purposes of Obtaining Reimbursement for Expenses

Estrada v. FedEx Ground Package Sys., Inc., 154 Cal.App.4th 1 (2007)

Anthony Estrada, a former driver for FedEx, alleged unfair business practices under Business and Professions Code section 17200, contending that the pick-up and delivery drivers were improperly classified as "independent contractors" rather than employees and, as a result, they were owed reimbursement for employment-related expenses as required by Labor Code section 2802. The court of appeal agreed, concluding that the drivers were "totally integrated into the FedEx operation," that they performed work essential to FedEx's core business, that their customers were those assigned to them by FedEx, that no specialized skills were required, that they were required to wear uniforms and conform absolutely to FedEx's standards, and that, in the end, each driver had a job with "little or no entrepreneurial opportunities." Therefore, the drivers were entitled to recover reasonable compensation for the business expenses they had incurred. However, the court of appeal reversed the trial court's award of $12.4 million in attorneys' fees as "excessive."

Discrimination and Sexual Harassment Suit Properly Dismissed on Summary Judgment

Jones v. Dep't of Corr., 152 Cal.App.4th 1367 (2007)

Kim C. Jones worked as a correctional officer at the R.J. Donovan Correctional Facility for approximately sixteen years before experiencing alleged gender discrimination, sexual harassment, race discrimination, assault and battery, and intentional and negligent infliction of emotional distress. The trial court granted summary judgment to the defendants, including her supervisors and the warden of the facility. In affirming summary judgment for defendants, the court of appeal concluded that Jones failed to present a triable issue of material fact from which it reasonably could be inferred that she suffered harassment proscribed by the Fair Employment and Housing Act. Jones repeatedly testified in her deposition that she did not believe that, or did not know whether, the com-

ments and complaints that formed the basis of her action were motivated by race or gender. Additionally, the alleged incidents were so few and trivial that they were not sufficiently severe or pervasive enough to constitute harassment or actionable discrimination. Finally, the court concluded the causes of action for assault and battery, infliction of emotional distress and negligent supervision were barred by the workers' compensation exclusivity rule. *Compare Craig v. M & O Agencies, Inc.*, 2007 WL 2264635 (9th Cir. Aug. 9, 2007) (summary judgment dismissing sexual harassment, assault and battery, and infliction of emotional distress claims reversed).

Discrimination, Retaliation Claims Under Title VII Were Untimely Filed

Payan v. Aramark Mgmt. Servs. L.P., 495 F.3d 1119 (9th Cir. 2007)

In response to a charge of discrimination and retaliation that Martha E. Payan filed with the Equal Employment Opportunity Commission (EEOC), the agency issued a right-to-sue letter on September 26, 2003. Payan asserted that the date she received the letter was "unknown." However, it was undisputed that she failed to file her Title VII complaint in federal court until January 2, 2004—ninety-eight days after the EEOC had issued the letter. Pursuant to 42 U.S.C. section 2000e-5(f)(1), Payan had only ninety days in which to file the action, which Aramark contended barred her claim. The Ninth Circuit Court of Appeals affirmed the district court's dismissal on summary judgment of Payan's claim after presuming that Payan received the right-to-sue letter by mail no later than three days after the EEOC had issued it. *Compare Holland v. Union Pac. R.R. Co.,* 2007 WL 2446250 (Cal. Ct. App. Aug. 29, 2007) (summary judgment in favor of employer reversed where employee said he relied upon the Department of Fair Employment and Housing's oral assurance that timely submission of a pre-complaint questionnaire would satisfy the filing deadline); *Forester v. Chertoff,* 2007 WL 2429374 (9th Cir. Aug. 29, 2007) (dismissal of discrimination claims filed by U.S. Border Patrol agents vacated even though they failed to wait thirty days after filing a notice of intent to sue with the EEOC before filing suit).

No Private Right of Action Under Federal Whistleblower Protection Program

Williams v. United Airlines, Inc., 2007 WL 2458504, 2007 U.S. App. LEXIS 20962 (9th Cir. Aug. 13, 2007)

Anthony L. Williams, a maintenance worker, sued United Airlines and his former supervisor, alleging retaliatory discrimination under the Federal Airline Deregulation Act's Whistleblower Protection Program (WPP) and related state law claims. Williams claimed that he was terminated in retaliation for a dispute related to an alleged safety violation. Although United did not challenge the district court's exercise of jurisdiction, the Ninth Circuit Court of Appeals nonetheless raised the issue of subject matter jurisdiction *sua sponte* and concluded that the district court lacked jurisdiction because the WPP does not create a right of action—it merely confers authority on the Secretary of Labor to accept complaints from aggrieved employees. *Cf. AmerisourceBergen Corp. v. Roden,* 2007 WL 2296775 (9th Cir. Aug. 13, 2007) (district court erroneously applied *Younger* abstention doctrine in dismissing employer's breach-of-contract claim filed against its former CEO).

Negligence Suit Against Employment Agency Was Not Time-Barred

E-Fab, Inc. v. Accountants, Inc. Serv., 153 Cal.App.4th 1308 (2007)

E-Fab designs and manufactures precision components and tools. When in 1996 E-Fab needed a temporary accountant, it contacted defendant Accountants, Inc. Services. Accountants represented to E-Fab that it had screened Vickie Hunt and had confirmed and verified her qualifications, credentials and accomplishments. From 1996 to 2003, Hunt embezzled approximately $1 million from E-Fab. After discovering the embezzlement, E-Fab contacted law enforcement, which informed E-Fab that Hunt had prior criminal convictions for theft and welfare fraud, and that she had been incarcerated and had falsified her academic credentials—facts the agency had failed to uncover during its "screening process." E-Fab filed suit against Accountants within two years of learning of Hunt's criminal record from the police and, over the objection of Accountants, relied upon the "discovery rule," contending it was unable to have made earlier discovery despite reasonable diligence: "Vickie Hunt appeared to be a competent and honest employee," said E-Fab. Although the trial court found E-Fab's claims were barred by the application of the two-year statute of limitations, the court of appeal reversed, holding that the "discovery rule" postponed the accrual of the cause of action until the plaintiff discovered or had reason to discover the basis for the claim.

Customs Service Employee Was Retaliated Against, But Not Constructively Discharged

Poland v. Chertoff, 494 F.3d 1174 (9th Cir. 2007)

James R. Poland, a former employee of the U.S. Customs Service, alleged age discrimination in violation of the Age Discrimination in Employment Act, retaliation and constructive discharge resulting from his transfer to a new job in a new location. After a bench trial, the district court entered a $339,000 judgment in favor of Poland. The Ninth Circuit Court of Appeals affirmed the determination that Poland was retaliated against for filing an Equal Employment Opportunity complaint regarding age discrimination and for filing subsequent retaliation complaints. Further, the court recognized that this was a case in which an employee with bias precipitated an investigation that led to adverse action being taken against the plaintiff by another employee who did not have bias—the so-called "cat's paw" theory. However, the court reversed the district court's judgment that the Customs Service's transfer of Poland from Oregon to Virginia amounted to a constructive discharge that resulted in his early retirement. Accordingly, the appellate court vacated the judgment and remanded the action so Poland could amend his complaint to seek remedies available under a retaliation theory rather than one involving alleged constructive discharge.

Company Failed to Prove Trade Secret Misappropriation by Former Employee

Yield Dynamics, Inc. v. TEA Systems Corp., 154 Cal.App.4th 547 (2007)

Yield Dynamics (Yield), which develops and markets software products designed to facilitate the fabrication of microchips, sued its former employee,

Terrence Zavecz, and two business entities of which he is a principal for breach of contract, violation of the Uniform Trade Secrets Act and related claims. After a non-jury trial, the trial court granted judgment for defendants. The court of appeal affirmed the judgment, holding that the eight segments of source code that were allegedly misappropriated did not possess the independent value necessary to constitute a trade secret. Further, the court held that Yield had failed to prove any damages, any unjust enrichment or provide any evidence regarding what a reasonable royalty might be. The court affirmed judgment for defendants on the various breach of contract, fraud, and unfair competition claims as well as an award of $175,000 in attorneys' fees to defendants.

Defamation Claims of University's Former Head Coach Were Properly Dismissed Under Anti-SLAPP Law

McGarry v. Univ. of San Diego, 154 Cal.App.4th 97 (2007)

Following the termination of Kevin McGarry's employment as head coach of the University of San Diego's football team, two university officials allegedly commented to the *San Diego Union Tribune* newspaper about the reasons for the termination. In response to these statements, McGarry sued the university and the officials for defamation. Defendants responded with successful motions to strike the defamation claims pursuant to the anti-SLAPP (strategic lawsuit against public participation) provisions of California law (Cal. Code Civ. Proc. § 425.16). The court of appeal affirmed the dismissal of the defamation claims, holding that the alleged statements constituted speech in connection with a public issue within the meaning of the statute. Once the burden shifted to McGarry, the court of appeal agreed with the trial court that he had failed to show the likelihood of success on the merits in light of the standards applicable to a limited purpose public figure like himself. The court further determined that one of the alleged statements was not a provably false assertion of fact. Moreover, since the trial court had denied McGarry's motion to compel the depositions of the newspaper's reporters, he had no competent evidence that the university or its officials were the source of the statements that were published in the newspaper.

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continued from page 11

Chairman Battista's opinion, dispositive.

"Committed" Domestic Relationship Between Owners of Two Companies Insufficient to Support Finding That the Two Companies Are Commonly Owned

U.S. Reinforcing, Inc. and its alter ego, U.S. Steelworkers, LLC, 350 NLRB No. 41 (July 31, 2007)

A Board majority determined that no alter ego relationship existed between two rebar contracting companies, which were owned by two unmarried but cohabiting individuals. The Board decided that the domestic arrangement of the two company owners was insufficient to support a finding of common ownership.

The first company, U.S. Reinforcing, Inc. (Reinforcing), was owned by Christian Redmond (Redmond). In 2002, Redmond developed a personal relationship with Denise Herheim (Herheim). Redmond and Herheim lived together and Herheim cared for Redmond's children.

In 2003, Reinforcing entered into a collective bargaining agreement with the union. In spring of 2004, Reinforcing began having financial difficulties. Redmond told his employees that Reinforcing would go out of business because Redmond could not afford to pay union wages. By fall of 2004, Reinforcing had ceased doing business altogether.

In mid-2004, Herheim, who had no prior experience with rebar contracting, decided to get into the business. In July 2004 Herheim founded U.S. Steelworkers, LLC ("Steelworkers"). She operated Steelworkers from the home she shared with Redmond, and used Reinforcing's resources, including its fax machine, computer, desk and telephone. Herheim paid rent of $100 per week to Redmond when she could "afford to pay it."

Because Herheim had no experience with rebar contracting, Redmond performed certain services for Steelworkers. He hired Steelworkers' employees, many of whom had previously worked for Reinforcing. Redmond also served as a foreman on Steelworkers' jobs. Steelworkers worked in the same geographic area, and for many of the same customers, as Reinforcing.

Steelworkers did not acknowledge the collective bargaining agreement between Reinforcing and the union. The union subsequently filed a charge against Steelworkers, alleging that the company was an alter ego of Reinforcing and should be bound by Reinforcing's collective bargaining obligations. Based on the evidence presented at the hearing, the ALJ agreed with the union, and determined that Steelworkers had violated the Act by its failure to honor the collective bargaining agreement.

The Board reversed the ALJ's decision. It noted that alter ego relationships usually require a finding of "substantially identical ownership." While substantially identical ownership has been found in cases where two companies are owned by different family members or by partners in marriage, the Board decided that in this case, the relationship between Herheim and Redmond was insufficient to qualify for familial or marital status. Despite the fact that they lived together as a "committed couple," and that Herheim cared for Redmond's children, the majority found it persuasive that "[t]hey have not taken the step of entering into the legal arrangement of a marriage, with the familial connection and attendant presumption of commonality of finances that such a legal arrangement may imply." The Board determined, therefore, that Herheim and Redmond separately owned Steelworkers and Reinforcing, and that Steelworkers did not violate the Act by its refusal to honor Reinforcing's collective bargaining agreement with the union.

Excelsior Lists Need Not Include Employee E-Mail Addresses, Even When Employees Cannot Be Contacted in Any Other Way

Trustees of Columbia Univ. in the City of New York, 350 NLRB No. 54 (Aug. 9, 2007)

The Board held that its decision in *Excelsior Underwear Inc.,* 156 NLRB 1236 (1966), did not require an employer to provide employees' e-mail addresses to a union prior to election, even though the employees in question worked on a research vessel which would be at sea during most of the pre-election period, and thus unable to receive postal mail.

At a pre-election hearing, the union requested that the employer provide it with the home addresses of employees, as well as with the e-mail addresses of those employees assigned to the crew of the research vessel. The union emphasized that the crew would not be able to receive postal mail while at sea, but that they could access e-mail. The Regional Director denied the request, and the Board affirmed the Regional Director's decision without prejudice.

With the exception of nine days when the vessel was in port in Puerto Rico and Panama, the vessel was at sea for the entire pre-election period between the filing of the petition and the election. The election resulted in a tie. The union filed objections, contending that the denial of e-mail addresses "thwarted the manifest purpose of *Excelsior*." The Regional Director sustained the objections.

The Board overruled the Regional Director, holding that the employer fully complied with *Excelsior* by providing the union with a complete and accurate list of employee home addresses. It contrasted the present case with those in which the employer's list "was incomplete, inaccurate, or both," and emphasized that to "look beyond the issue of substantial compliance with the [*Excelsior*] rule and into the additional issue of whether employees were actually informed about election issues would spawn an administrative monstrosity." The Board noted that the union was a "maritime union with vast experience and a long history of organizing and representing employees at sea," and that it began organizing employees while the vessel was still docked in the United States. It further pointed out that the union agreed to the election date with "full knowledge that the vessel would be at sea during most of the pre-election period." Finally, it noted that the employer did not use e-mail to communicate with employees about the election campaign.

The Board expressed a concern that a "multitude of unanswered and difficult questions" would spring up if it interpreted *Excelsior* to require employers to provide a union with e-mail addresses in addition to home addresses. Among the questions posed were: "What becomes of an employer's right not to furnish a forum . . . for a third party to express its view? What would be the interplay, if any, between newly imposed requirements and the Board's current law relative to

union access to an employer's property? Could employers continue existing e-mail monitoring programs without engaging in unlawful surveillance?"

Dissenting, Member Walsh advocated a non-mechanical application of *Excelsior* and emphasized that the purpose of *Excelsior* is "to ensure that all participants in an election have access to the electorate so that employees can make a free and reasoned choice regarding union representation." He noted that in most scenarios, Section 7 would not require the provision of employee e-mail addresses. However, Member Walsh would find that under the facts of this particular case, a list of employees' home addresses, alone, failed to effectuate the purposes of the Act.

Board Confirms That "Salts" Bear the Burden of Proving Back Pay Damages

Fluor Daniel, 350 NLRB No. 66 (Aug. 13, 2007)

On remand from the Sixth Circuit Court of Appeals, the Board considered whether an employer had violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire fifty-three voluntary union organizers, or "salts." The Board found unlawful discrimination in those cases where the employer knew of the job applicant was a salt and chose a different candidate for the job, even though the successful candidate was less qualified than the salt.

The Board noted that its recent decision in *Oil Capital Sheet Metal, Inc.,* 349 NLRB No. 118 (2007), had modified the evidentiary presumptions used to determine the amount of back pay due to union salts who were victims of a discriminatory refusal to hire. In a typical refusal-to-hire case, the Board presumes that back pay is due to the applicant from the date of the refusal to hire until a valid offer of reinstatement. But in *Oil Capital Sheet Metal* the Board held that this presumption does not apply where the applicant is also a salt because salts often do not seek employment for an indefinite duration. In such cases, the salt, rather than the employer, is in the best position to prove the amount of time that he or she would have remained in the position. Accordingly, the Board in *Fluor Daniel* stated that the General Counsel would not be permitted to rely on the usual presumption of employment for an indefinite duration, but instead would bear the burden of proving the period for which back pay would be due to the salt applicants.

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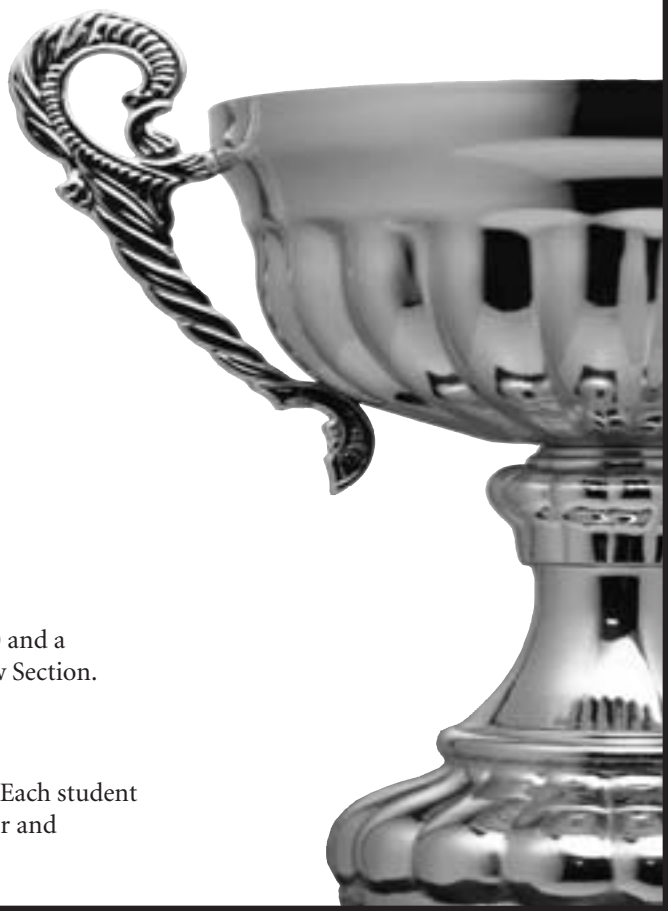

FIRST PRIZE

The first prize winner is *Kevin Kayvan Iradjpanah*, who will receive $2,000, a trip to attend the Section's Annual Fall Meeting, and a one-year student membership in the Labor and Employment Law Section.

The first prize paper will be published on the website for the Labor and Employment Section of the State Bar of California.

SECOND PRIZE

The second prize winner is *Calvin Chang*, who will receive $1,000 and a one-year student membership in the Labor and Employment Law Section.

HONORABLE MENTION

Olujimi Akindele and *Carmen Ruda* tied for Honorable Mention. Each student will receive $250 and a one-year student membership in the Labor and Employment Law Section.

will often be invalidated only after a proper factual showing against the court's newly enumerated factors.

Evidence Code Confidentiality Provisions Shield Mediation Related Documents From Disclosure, Even If Inequitable Results May Follow

Wimsatt v. Superior Court (ex rel. Kausch), 152 Cal.App.4th 137 (2007)

A client sued his former personal injury attorney for legal malpractice, alleging the attorney had made an unauthorized settlement demand that negatively impacted the client's settlement position at mediation. After the former attorney denied during deposition making an unauthorized settlement offer prior to mediation, the former client attempted to obtain from the former defendant the mediation brief, certain e-mails concerning the mediation brief, and all settlement-related communications between the attorneys.

The former attorney sought a protective order arguing California's mediation confidentiality laws (Evid. Code § 1115 et seq.) precluded disclosure. The trial court denied the protective order on the ground these confidentiality rules were not intended to shield perjury (i.e., the former attorney's potentially false statements at deposition concerning whether he had made an offer). The appellate court reversed, holding confidentiality rules precluded disclosure notwithstanding the inequitable results in this case.

The appellate court noted the Evidence Code's confidentiality provisions applied not simply to communications made "in the course of mediation," but also to communications "for the purpose of" or "pursuant to" a mediation. The court observed that these confidentiality rules fulfilled the public purpose of encouraging mediation, and that the Legislature had intended these provisions to apply broadly with only a few statutorily enumerated exceptions. More importantly, the appellate court noted the California Supreme Court had repeatedly refused to allow judicially created exceptions because only the Legislature could create such exceptions.

The appellate court concluded it was bound by the Evidence Code's statutory language and *stare decisis,* and held the Evidence Code's confidentiality provisions precluded disclosure of the mediation brief and the mediation related e-mails. The appellate court conceded its ruling likely foreclosed any relief and potentially insulated perjury in this case, and it identified numerous other potential inequitable results in future cases. The appellate court closed by observing it might be time for the legislature to reconsider California's broad and expansive mediation confidentiality statutes.

In the interim, the California Supreme Court is presently considering another case involving the ultimate scope of these mediation confidentiality provisions. (*Simmons v. Ghaderi* ___ Cal.App.4th ____, *review granted* (2006) S147848/B180735 (whether party's litigation conduct may estop that party from asserting mediation confidentiality provisions as defense to another party's efforts to enforce alleged settlement agreement).)

Trial Court May Not Deny Motion to Compel Arbitration on Statute of Limitations Grounds

Wagner Constr. Co. v. Pacific Mech. Corp., 41 Ca1.4th 19 (2007)

A subcontractor sued another corporation for breach of contract and filed a motion to compel arbitration. The defendant opposed the motion, arguing the subcontractor had waived the right to compel arbitration by not filing suit within the four-year statute of limitations. The trial court denied the petition, and the appellate court affirmed finding that the subcontractor's failure to file within the statute-of-limitations period constituted a waiver under Code of Civil Procedure section 1281.2(a). The California Supreme Court reversed and issued a ruling potentially applicable to employment arbitration disputes, particularly if the parties' arbitration agreement does not specify a time frame for demanding arbitration.

The court noted that motions to compel arbitration are governed by express statutory provisions (Code Civ. Proc. § 1280 et seq.) reflecting a strong public policy in favor of arbitration. The Court observed that Code of Civil Procedure section 1281.2 requires the trial court to order arbitration unless a statutorily-enumerated or judicially-created exception applies, and that the statute of limitations "is not among the legislatively or judicially recognized justifications for denying a motion to compel." The court further observed that refusing arbitration because of an affirmative defense violates section 1281.2(c), which provides that "an order to arbitrate such controversy may not be refused on the grounds that the petitioner's contentions lack substantive merit."

The court also rejected the argument that failure to file a lawsuit within the applicable statutory period effectively waives the right to compel arbitration for purposes of section 1281.2(a). The court reaffirmed that a party can waive the right to pursue arbitration, but concluded this waiver applied only to its ability to essentially pursue a "suit in equity to compel specific performance of a contract [to arbitrate]." The court concluded the waiver rule in section 1281.2(a) dealt with time requirements for demands and petitions, and were completely distinct from statutes of limitations creating affirmative defenses to the claims subject to the parties' arbitration agreement. Accordingly, the court concluded the trial court could not deny arbitration on statute-of-limitations grounds, and reaffirmed the arbitrator decides affirmative defenses including the statute of limitations. (*Accord Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 85 (2002) (arbitrator, and not the court, to decide if applicable statute of limitations makes dispute ineligible for arbitration).)

The court also concluded arbitration could not be denied simply because an arbitrator might resolve the statute of limitations defense differently than a trial judge. The court observed that "the possibility that arbitrators may base their decisions upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action is simply a risk that the parties by voluntarily submitting to arbitration have agreed to bear." The court observed the parties could safeguard against this risk by specific agreement that the arbitrators must comply with applicable law.

Notably, the court reaffirmed that a party may waive its arbitration rights by failing to comply with contractually agreed-to time limits for demanding arbitration, but noted the arbitration agreement before it lacked any such provision.

Arbitrator Exceeds Authority in Modifying Public Employee Collective Bargaining Agreement Following Legislative Approval

Dep't of Personnel Admin. v. Cal. Corr. Peace Officers Ass'n, 152 Cal.App.4th 1193 (2007)

The California Correctional Peace Officers Association (CCPOA) demanded arbitration pursuant to a Memorandum of Understanding (MOU) with the Department of Personnel Association (DPA) to resolve a dispute concerning leave donation time-banks for covered employees. The CCPOA requested the arbitrator modify the MOU to correct a "scrivener's error" which the CCPOA claimed had resulted in a 10,000 hours cap being removed from the provision regarding accumulated leave, but not from the nearly identical provision concerning hours contributions. After a hearing involving testimony from the CCPOA and the DPA, the arbitrator ruled in the CCPOA's favor finding the failure to remove the cap from the other provision prior to legislative approval resulted from mutual mistake or inadvertence. Accordingly, the arbitrator ruled the challenged hours cap was not part of the MOU.

The DPA filed a petition in superior court to vacate the arbitration award on the grounds the arbitrator exceeded her authority and violated public policy by altering the MOU after legislative approval. The superior court granted the DPA's petition to vacate the arbitration award, and the appellate court affirmed.

The appellate court confirmed that judicial review of arbitration awards is generally very narrow, but that courts may vacate arbitration awards violating a party's statutory rights or violating a well-defined public policy. In this case, the parties' MOU was governed by the Dills Act (Gov't Code § 3517 et seq.) requiring legislative approval of state employee MOU's and collective bargaining agreements. The appellate court concluded the arbitrator had violated the Dills Act by reforming the MOU in a manner that changed the provisions approved by the legislature, thus undercutting the public policy of legislative oversight of state employee contracts. As such, the arbitrator had exceeded her powers, consequently providing a basis to vacate the arbitration award.

Trial Court May Reconsider Order Compelling Arbitration of Putative Class and Class Action Causes of Action

Clark v. First Union Securities, Inc., 153 Cal.App.4th 1595 (2007)

An investment consultant licensed by the National Association of Securities Dealers, Inc. (NASD) sued his employer and the employer's successor-in-interest alleging various employment claims. In addition to his personal claims, the consultant filed claims on behalf of himself and others similarly situated for various Labor Code provisions, including unpaid wages, failure to pay minimum wage, and failure to reimburse for expenses. The employer successfully compelled arbitration of all claims (except those seeking injunctive relief) under the consultant's Form U-4 requiring arbitration of all employment-related disputes.

Once in arbitration, however, the employer filed a motion to dismiss the representative and class action claims on the grounds the NASD Code of Arbitration Procedure prohibited arbitration of class action or representative actions. The NASD arbitration panel granted the employer's motion concluding the representative actions were not "eligible" for arbitration under NASD rules. Following this dismissal, the trial court *sua sponte* reconsidered its prior ruling referring the class and representative actions to arbitration and ordered these actions be heard in the trial court.

The appellate court affirmed noting trial courts have inherent power to reconsider interim orders, including to "ensure the orderly administration of justice." The appellate court also observed that the arbitration panel had not substantively adjudicated the representative actions, but had simply concluded that they were "ineligible" for arbitration and that the NASD rules permitted the arbitrators to refer the dismissed claims back to the trial court. The appellate court also appeared concerned the employer had initially compelled arbitration of the representative claims, and then sought to dismiss these claims on the ground they were ineligible for arbitration. The court concluded its opinion noting "there was no agreement between the parties, nor an intent by the SEC through its Code, that putative and class claims would have no forum for resolution."

California Union That Did Not Sign Collective Bargaining Agreement Unable to Compel Arbitration Provision Contained in Agreement

Dist. Council No. 16 of the Int'l Union of Painters v. B & B Glass, Inc., ___ F.3d ___, 2007 U.S. App. LEXIS 19462 (9th Cir. Aug. 16, 2007)

A union district council located in Northern California filed a motion to compel arbitration in the Northern District of California against a Texas corporation (BBTX) concerning alleged collective bargaining violations by an Arizona corporation (BBAZ). Although neither BBAZ nor BBTX had signed the California version of the collective bargaining agreement (CBA) containing an arbitration provision, the union argued that the California CBA applied to BBTX, and by extension BBAZ, through "work preservation" and "out of area" clauses contained in the Texas CBA between BBTX and a Texas-based union affiliate of plaintiff-union. The California union argued that the Texas CBA's "out of area" provision required BBTX to abide by its terms or the terms of any otherwise applicable CBA when performing work in other jurisdictions, including California. The California union further argued that the Texas CBA's "work preservation" provisions extended the Texas CBA's terms to work performed by other entities (BBAZ) controlled or owned by BBTX.

The district court granted BBTX's motion to dismiss the petition to compel arbitration on the ground it lacked personal jurisdiction over BBTX, and the Ninth Circuit Court of Appeals affirmed. The appeals court noted that "out of area" and "work preservation" provisions are standard collective bargaining agreements, and suggested that upon the proper evidentiary showing, the California plaintiff-union could have enforced its California CBA against a Texas corporation for the actions of an Arizona affiliate. In this case, however, the appellate court noted that plaintiff-union had not presented evidence the Texas corporation was performing work in California, thus rendering the "out of area" provision inapplicable. The ninth circuit further noted that the plaintiff-union had failed to rebut BBTX's substantial evidentiary showing that it did not actively or sufficiently control BBAZ's for purposes of the "work preservation" provision.

interpreting the CBAs. Furthermore, if plaintiffs establish liability, calculating damages would likely involve reference to the CBAs to determine the appropriate wage rate, but not interpretation of them. The court vacated the district court's orders, and remanded the case to state court.

"Administrative/Production Worker" Dichotomy Applies to Current Wage Orders

Harris v. Superior Court, 154 Cal. App. 4th 164 (2007)

A class of insurance claims adjusters brought a class action suit against their insurance company employers for overtime compensation on the theory that they had been misclassified as exempt employees pursuant to the administrative exemption. The trial court denied plaintiffs' motion for summary adjudication and partially granted defendants' motion to decertify the class. The parties filed cross petitions for writ review.

The Second District Court of Appeal granted plaintiffs' petition for a writ of mandate, and held that plaintiffs were not exempt from overtime compensation requirements. At issue was whether the "administrative/production worker dichotomy" was dispositive under the two wage orders governing plaintiffs' employment, Wage Order 4, governing plaintiffs' employment prior to October 1, 2000, and Wage Order 4–2001, which succeeded Wage Order 4.

Certain federal regulations guide the interpretation of the administrative exemption under the wage orders. The administrative exemption to overtime pay is defined by federal regulations as "office or non-manual work" that is "directly related to management policies or general business operations." 29 C.F.R. § 541.205. Such work must also be of "substantial importance to the management or operation of the business." *Id.* Therefore, work that merely carries out day-to-day operations of a business is production, not administrative work. This is known as the "administrative/production worker dichotomy," and is determinative for any employees whose work falls squarely on the production side of the dichotomy.

Previously, the only cases which had interpreted the administrative exemption under Wage Order 4 were *Bell v. Farmers Ins. Exchange,* 87 Cal.App.4th 805 (2001)("*Bell II*") and *Bell v. Farmers Ins. Exchange,* 115 Cal.App.4th 715 (2004), which held that the administrative/production worker dichotomy is predominant and dispositive. There were no cases interpreting the exemption under Wage Order 4–2001.

The court of appeal agreed with the *Bell* cases concerning the role of the dichotomy under Wage Order 4. As Wage Order 4–2001 expressly incorporated the federal regulations, and there had been no change in the relevant federal regulations between the date Wage Order 4 expired and the date Wage Order 4–2001 took effect, the court held that the dichotomy plays the same role under Wage Order 4–2001. The undisputed evidence showed that plaintiffs were primarily engaged in work falling squarely on the production side of the dichotomy. Therefore, the court held that they were not exempt administrative employees. The court directed the trial court to grant plaintiffs' motion for summary adjudication of defendants' affirmative defense based on the administrative exemption, and deny in its entirety defendants' motion to decertify the class.

UCL Claims, But Not PAGA Claims, Must Comply With Class Action Requirements

Arias v. Superior Court, 153 Cal.App.4th 777 (2007)

Jose Arias brought an action against his former employer, Angelo Dairy, for various labor code and regulatory violations, alleging *inter alia* that he was not paid overtime wages, that he received no meal or rest periods, and that his employer-provided housing was not habitable. In addition to seeking damages for his individual injuries, Arias' complaint sought damages and injunctive relief in his representative capacity for the interest of other current and former employees. Arias brought his representative claim pursuant to two statutes: the Unfair Competition Law (UCL) (Bus. & Prof. Code § 17200 et seq.) and the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code § 2698 et seq.).

Angelo Dairy moved to strike the causes of action purporting to state claims in Arias' representative capacity on the ground that Arias did not comply with the requirements for pleading a class action. The superior court granted the motion to strike, and Arias filed a petition for writ of mandate.

The UCL prohibits business practices that are unlawful, unfair, or fraudulent. As enacted, the UCL authorized a person to bring an action for relief on his or her own behalf or for the benefit of the general public, i.e., to bring a representative action "not certified as a class action in which a private person [was] the plaintiff and [sought] disgorgement and/or restitution on behalf of persons other than or in addition to the plaintiff." *Kraus v. Trinity Mgmt. Services, Inc.,* 23 Ca1.4th 116, 126, fn.10 (2000). In 2004, California voters passed Proposition 64, an initiative that amended the UCL to require that a representative plaintiff have suffered damages and complied with the provisions of Code of Civil Procedure section 382.

On appeal, Arias argued that the plain language of Proposition 64 was clear and unambiguous, and that it contained no requirement that a representative suit be brought as a class action. While agreeing that Proposition 64 contained no such requirement on its face, the court of appeal nonetheless concluded that section 382 is commonly understood to authorize class actions and thus the UCL's requirement that representative claims comply with section 382 makes plain that such claims must be meet the basic class action requirements. The court found unpersuasive the cases Arias cited in support of his position, and ultimately rested its conclusion, to the extent that Proposition 64 presented any ambiguity, on the intent of the voters as set forth in the official ballot pamphlet, i.e., that representative claims under the UCL be brought as class actions.

With respect to Arias's cause of action under the PAGA, the court of appeal concluded that the Labor Code statute authorizing a private enforcement action

was an exception to the class action requirement and thus did not require compliance with Code of Civil Procedure section 382. The PAGA was adopted to empower aggrieved employees to act as private attorneys general and to authorize them to seek civil penalties, to be shared between those employees and the state, for Labor Code violations that previously could be assessed only by state agencies. Unlike the UCL, both the language of the PAGA and the express intent of the legislature indicate that an aggrieved employee can bring an action on behalf of other employees without complying with the requirements of a class action. The court "perceive[d] no difficulty" with the fiduciary and constitutional concerns raised by Angelo Dairy; the 25 percent recovery of penalties payable to aggrieved employees does not preclude such employees from pursuing any other claims they may have available under any other law.

Court Finds Courier Drivers to Be Employees, Not Independent Contractors

Air Couriers Int'l v. Employment Dev. Dep't, 150 Cal.App.4th 923 (2007)

Plaintiffs (collectively referred to as Sonic) were a group of companies that employ drivers to pick up and deliver packages. In May 2003, Sonic filed an action pursuant to Unemployment Insurance Code section 1241 to recover employment taxes they paid for drivers under the theory that said drivers were independent contractors rather than employees. Following an extensive analysis of the nature and details of the relationship, including the fact that most drivers executed written independent contractor agreements, the trial court rejected Sonic's theory. Sonic appealed, contending 1) the trial court employed the wrong standard, 2) no substantial evidence supported the court's finding, and 3) the court abused its discretion in holding Sonic liable for penalties.

The court of appeal, reviewing *de novo* the determination of the correct legal standard to apply, began with an extensive review of the key historical cases on employment status: *Empire Star Mines Co. v. Cal. Emp. Com.*, 28 Ca1.2d 33 (1946) (*Empire Star*); *Tieberg v. Unemployment Ins. App. Bd.*, 2 Ca1.3d 943 (1970) (*Tieberg*); *Grant v. Woods,* 71 Cal. App.3d 647 (1977) (*Grant*); and, finally, the source of much controversy in the present case, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations,* 48 Ca1.3d 341 (1989) (*Borello*).

Sonic argued that 1) *Borello*'s "far more liberal legal standard" only applied to workers' compensation cases and 2) the present case, involving employment taxes, should have applied the "vastly different" legal standard set forth in *Empire Star.* The court of appeal disagreed on both fronts. It found no reason to limit *Borello*'s analysis to workers' compensation cases, and, moreover, pointed out "in many aspects *Borello* echoes *Empire Star.*" While the control test—the extent to which the employer has the right to control the details of the service rendered—has become the principal measure of a "servant's status for common law purposes," *Borello,* citing both *Tieberg* and *Empire Star,* endorsed several "secondary" indicia of the nature of a service relationship. Among these are:

- whether or not the one performing services is engaged in a distinct occupation or business;
- the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- the skill required in the particular occupation;
- whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- the length of time for which the services are to be performed;
- the method of payment, whether by the time or by the job;
- whether or not the work is a part of the regular business of the principal; and
- whether or not the parties believe they are creating the relationship of employer-employee.

In addition to concluding that the trial court employed the proper legal standard, the court of appeal further held that there was substantial evidence supporting the lower court's finding and that the court did not abuse its discretion in holding Sonic liable for penalties.

From the Editors

EDITORIAL POLICY

We would like the *Law Review* to reflect the diversity of the Section's membership in the articles and columns we publish. We therefore invite members of the Section and others to submit articles and columns from the points of view of employees, unions, and management. Our resources are you, the reader, so we count on you to provide us with the variety of viewpoints representative of more than 6000 members. In addition, although articles may be written from a particular viewpoint (i.e. management or employee/union), whenever possible, submitted articles should at least address the existence of relevant issues from the other perspective. Thank you for all of your high quality submissions to date, and please…keep them coming! Please e-mail your submission to Section Coordinator Susan Orloff at susan.orloff@calbar.ca.gov.

The Review reserves the right to edit articles for reasons of space or for other reasons, to decline to print articles that are submitted, or to invite responses from those with other points of view. We will consult with authors before any significant editing. Authors are responsible for shepardizing and proofreading their submissions. Articles should be no more than 2500 words. Please follow the style in the most current edition of *The Bluebook: A Uniform System of Citation* and put all citations in endnotes.

Cases Pending

continued from page 15

Elimination of Racial Discrimination? (3) Does an ordinance that provides certain advantages to minority- and female-owned business enterprises with respect to the award of city contracts fall within an exception to section 31 for actions required of a local governmental entity to maintain eligibility for federal funds? Review granted/brief due.

REPRESENTATIVE CLAIMS

Amalgamated Transit Union., Local 1756, AFL-CIO v. Superior Court (First Transit), 148 Cal. App. 4th (2006), *review granted,* 2007 Cal. LEXIS 6526 (2007). S151615/B191879. Petition for review after denial of peremptory writ of mandate. (1) Does a worker's assignment to the worker's union of a cause of action for meal and rest period violations carry with it the worker's right to sue in a representative capacity under the Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code § 2698 et seq.) or the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.)? (2) Does Business and Professions Code section 17203, as amended by Proposition 64, which provides that representative claims may be brought only if the injured claimant "complies with Section 382 of the Code of Civil Procedure," require that private representative claims meet the procedural requirements applicable to class action lawsuits? Answer brief due.

RETALIATION

Jones v. Lodge at Torrey Pines P'ship, 147 Cal. App. 4th 475 (2007), review granted June 13, 2007. S151022/D046600. Petition for review after reversal of JNOV and an order granting a new trial in a civil action. May an individual be held personally liable for retaliation under the California Fair Employment and Housing Act (Cal. Gov't Code, § 12900 et seq.)? Reply brief due.

STATUTE OF LIMITATIONS

Doe v. City of Los Angeles, 137 Cal. App. 4th 438 (2006), *review granted,* 2006 Cal. LEXIS 7583 (2006). S142546/B178689. Petition for review after affirmance of judgment. Were plaintiffs' claims against the City of Los Angeles and the Boy Scouts of America for sexual abuse by a city police officer while they participated in police department programs in the 1970s barred by the statute of limitations, or did plaintiffs sufficiently invoke the provisions of Cal. Code Civ. Proc, § 340.1(b)(2), which permits the revival of certain claims of sexual abuse that would otherwise be barred where the defendant "knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person"? Argued September 5, 2007.

TERMINATION AND SUSPENSION

Ross v. Ragingwire Telecomm., 132 Cal. App. 4th 590 (2005), *review granted,* 2005 Cal. LEXIS 13284 (2005). S138130/C043392. Petition for review after affirmance of judgment. When a person who is authorized to use marijuana for medical purposes under the California Compassionate Use Act (Cal. Health & Saf. Code § 11362.5) is discharged from employment on the basis of his or her off-duty use of marijuana, does the employee have either a claim under the Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) for unlawful discrimination in employment on the basis of disability or a common law tort claim for wrongful termination in violation of public policy? Fully briefed.

Spielbauer v. County of Santa Clara, 146 Cal. App. 4th 914 (2007), *review granted,* May 9, 2007. S150402/ H029345. Petition for review after reversal of denial of writ of mandate. If a public employee exercises his or her Fifth Amendment right against self-incrimination in a public employer's investigation of the employee's conduct, must the public employer offer immunity from prosecution before it can dismiss the employee for refusing to answer questions asked in connection with the investigation? Fully briefed.

WAGE AND HOUR

Martinez v. Combs, decision without published opinion (2003), *review granted,* 2004 Cal. LEXIS 1914 (2004). S121552/B161773. Petition for review after partial reversal and partial affirmance of summary judgment. Briefing originally deferred pending decision in *Reynolds v. Bement,* 36 Cal. 4th 1075 (2005), which included the following issue: Can the officers and directors of a corporate employer personally be held civilly liable for causing the corporation to violate the statutory duty to pay minimum and overtime minimum wages, either on the ground such officers and directors fall within the definition of "employer" in Industrial Welfare Commission Wage Order 9 or on another basis? Fully briefed.

WHISTLEBLOWER PROTECTION ACT

State Bd. of Chiropractic Exam'rs v. Superior Court (Arbuckle), 148 Cal. App. 4th 1423 (2007), *review granted,* 2007 Cal. LEXIS 6811(2007). S151705/C052554. Petition for review after grant of petition for peremptory writ of mandate. Whether, under the Whistleblower Protection Act (Cal. Gov't Code § 8547 et seq.), a state employee may bring a civil action after suffering an adverse decision by the State Personnel Board without successfully seeking a writ of administrative mandate to set aside that decision. Answer brief due.

Ramirez v. Dep't of Health Servs., decision without published opinion, *review granted,* 2007 Cal. LEXIS 6811 (2007). S152195/C050718. Petition for review after affirmance of judgment. Briefing deferred pending decision in *State Bd. of Chiropractic Exam'rs v. Superior Court, supra.*

continued from page 1

appear and question the debtor. Under Federal Rule of Bankruptcy Procedure (FRBP) 2004, with court approval, a non-debtor party to an employment lawsuit may depose any entity, including the debtor, concerning the debtor's acts, conduct, property, liabilities, and financial condition, or any matter which may affect the administration of the debtor's estate, or the debtor's right to a discharge.[10]

B. Employer Files Bankruptcy

1. Automatic Stay

Upon the employer's bankruptcy filing, the "automatic stay" takes effect and precludes the employee from proceeding with the employment lawsuit in state or federal court.[11] Any action in the lawsuit taken after the bankruptcy filing is void. Moreover, the employee is liable to the employer for sanctions, including punitive damages, if the employee takes action in violation of the automatic stay knowing of the bankruptcy filing. Therefore, once plaintiff learns about an employer's bankruptcy filing, plaintiff should not proceed with the lawsuit.

The bankruptcy court will adjudicate the employee's claims through the claims adjudication process (discussed below). Alternatively, the employee may seek "relief from stay" to proceed in the non-bankruptcy forum.[12] An employee is entitled to relief from stay "for cause."[13] In determining whether "cause" exists, many courts follow some variation of a multi-factor test comparing the benefits and burdens of deciding the claim in bankruptcy court versus a non-bankruptcy forum.[14] Different factors apply based on the circumstances. Bankruptcy judges have broad discretion in granting or denying relief from stay.[15]

2. Proof of Claim

A proof of claim is the pleading by which an employee describes the claim.[16] **Under applicable bankruptcy law, filing a proof of claim waives the employee's right to a jury trial in bankruptcy court.** Yet if the employee does not file a proof of claim, the employee will receive no distribution from the bankruptcy estate because filing a proof of claim is a prerequisite to receiving a distribution. Given a bench trial versus not having a claim, the employee is probably better off filing a proof of claim. Moreover, even if the employee files a proof of claim, if the employee obtains relief from stay, the employee may have a jury trial anyway.

In Chapter 7 cases, the employee must file the proof of claim no later than ninety days after the first date set for the meeting of creditors under Bankruptcy Code section 341(a).[17] In Chapter 11 cases, the court sets the deadline.

If no one objects to an employee's proof of claim, the employee has an "allowed," or valid, claim. Unless there are insurance proceeds to pay the claim, the employee will receive on the claim only a pro rata distribution of funds distributed to unsecured creditors.

If someone objects to the employee's claim and the employee does not obtain relief from stay, the bankruptcy court will resolve the claim. The FRBP and local rules establish a litigation process similar to general litigation procedures in state or federal court, including pleadings to put a case at issue, a "meet and confer" process, discovery, pre-trial motions, and trial. Typically, the litigation process is faster and less comprehensive in bankruptcy than in general civil litigation.

3. Discharge

Employers are entitled to a discharge of their debts, including employment claims, under a Chapter 11 plan of reorganization or liquidation.[18] Any portion of the employee's claim not paid under the plan will be extinguished as against the debtor.[19]

C. Employee Files Bankruptcy—Whether Claims Are Property of the Estate

An employment claim that exists as of the date the employee files bankruptcy is property of the bankruptcy estate.[20] Any recovery on such claim belongs to the estate, and not to the employee individually. A claim that arises only after the bankruptcy filing is not property of the estate, but belongs to the employee individually.[21] The significance of this distinction is that the employee, who is probably the key witness in the case, may lose the incentive to pursue the claim if any recovery will inure only to the benefit of the employee's creditors.

III. TIPS FOR PLAINTIFF COUNSEL

A. Employer Files Bankruptcy

1. Make Sure Proceeding Is Cost Effective

Unless there is Employment Practices Liability Insurance (EPLI) coverage or solvent non-debtor co-defendants, an employee's recovery on any allowed claim will be limited to distributions from the bankruptcy estate. Employees are usually unsecured creditors. Distributions to unsecured creditors are often pennies on the dollar. Therefore, when the employer files bankruptcy, the employee should conduct a cost-benefit analysis to determine whether the likely recovery will outweigh the costs of litigation.

2. Use FRBP 2004

Since FRBP 2004 provides an examining party wide latitude in deposing a bankrupt employer, plaintiff's counsel should use FRBP 2004. For example, if an employee is suing two defendants, and only one is in bankruptcy, in addition to conducting discovery in the state court lawsuit against the non-bankrupt defendant, counsel can conduct broader discovery in the debtor's bankruptcy regarding the assets or liabilities of the debtor.

3. Seek Relief From Stay

Counsel should consider seeking relief from stay to maximize the likelihood of a jury trial. Moreover, where the employer files bankruptcy in another state, plaintiff is better off with relief from stay because plaintiff will be able to litigate the case in a California court rather than a remote bankruptcy court.

4. Claim Procedures in Wage-Hour Class Actions

FRBP 7023, similar to Federal Rule of Civil Procedure 23, authorizes class claims in bankruptcy cases. Class claims are beneficial to wage and hour class actions. Counsel and the named representatives should execute an FRBP 2019 Verified Statement of Representation.[22] While many courts allow class claims, one court has reached a contrary conclusion.[23] When counsel files a class claim, counsel should request the court to apply FRBP 7023 and seek class certification promptly after filing

the class claim, even where class certification was obtained pre-bankruptcy.[24]

5. *Obtaining Leverage in Asset Sales by Alleging Successor Liability*

Chapter 11 debtors often seek to sell their assets in bankruptcy. Buyers typically insist on acquiring the assets free and clear of all liens and claims, including litigation claims against the seller/corporate debtor. An employee with claims against the seller may legitimately obtain leverage by objecting to a sale to the extent the seller seeks to sell assets free and clear of the employee's successor liability claim against the buyer with respect to the employment claims.

While most case law suggests that a bankruptcy court can authorize a sale of assets free and clear of employment claims,[25] at least one court has concluded that a bankruptcy proceeding is not an absolute bar to finding successor liability against the purchaser.[26] Rather than asking the court to establish successor liability, plaintiff is more likely to obtain relief by requesting that the court not rule on successor liability in approving the sale. By using this leverage, plaintiff may be able to negotiate a resolution of the employment claim against the seller because the purchaser is not likely to proceed with the sale with any uncertainty as to successor liability.

6. *Wage Claim Priority*

Employees owed wages or other benefits such as vacation pay earned during the six months preceding the bankruptcy are entitled to priority for such amounts up to $10,000 per employee.[27] This could be significant in wage and hour cases.

7. *Where the Employer Is on the Brink of Bankruptcy, Take Issues Into Account*

During the lawsuit, plaintiff may learn that the employer is on the brink of bankruptcy. A bankruptcy filing by the employer even after the employee has either settled with or prevailed against the employer can have significant impacts on the plaintiff, including (1) having to return to the bankruptcy estate as a "preference" any payments received by the employee on a judgment or settlement within the ninety days preceding the bankruptcy filing, or (2) to the extent that the employee has not been paid on the settlement or judgment or is required to return such payment to the bankruptcy estate, having the claim discharged. The employee can mitigate these impacts by including certain provisions in settlement agreements and forms of judgment. Counsel should consider consulting with a bankruptcy specialist to help mitigate these impacts.

B. Employee Files Bankruptcy—Plaintiff Counsel Must Be Employed by the Estate

Any attorney working on behalf of the bankruptcy estate must be employed and approved by the court prior to commencing legal services.[28] This includes contingent or hourly fee counsel.[29] If counsel's retention is not approved by the court, counsel will not be entitled to payment for services rendered after the bankruptcy filing. Obtaining court approval is a fairly routine matter involving a motion and order. Typically, the employee will have retained separate bankruptcy counsel, who can prepare the employment application or assist employment counsel in doing so. Alternatively, assuming that the employee has filed Chapter 7, the Chapter 7 trustee, who will be retaining employment counsel on behalf of the estate,[30] can prepare the employment application or assist employment counsel with the employment application.[31]

IV. TIPS FOR DEFENSE COUNSEL

A. Employer Files Bankruptcy

1. *Defense Counsel Must Be Employed by the Estate*

Defense counsel also must be retained by the bankruptcy estate and have such retention approved by the bankruptcy court when the employer files bankruptcy. If employment counsel does not do so, employment counsel will not be entitled to payment for services rendered after the bankruptcy filing. Retaining defense counsel is slightly more complicated than plaintiff's counsel because defense counsel presumably (1) is paid hourly, and (2) received payments for services prior to the bankruptcy filing, and particularly within the ninety days preceding the bankruptcy filing. Defense counsel should work with the client's bankruptcy counsel with respect not only to employment defense counsel's employment application, but also fee applications that would authorize employment counsel to be paid on a periodic basis during the bankruptcy.[32]

2. *Oppose Relief From Stay*

The employer should oppose relief from stay to keep the claims in bankruptcy court. Assuming that the employee filed a proof of claim, keeping the claims in bank-

"Under applicable bankruptcy law, filing a proof of claim waives the employee's right to a jury trial in bankruptcy court."

ruptcy court will ensure that plaintiff does not receive a jury trial. Moreover, where the employer has filed bankruptcy in a location far from the court where the lawsuit is pending, keeping the claims in bankruptcy court can result in additional expense to the plaintiff.[33]

3. *Ask Court to Extend Stay to Non-Debtor Co-Defendants*

Typically, the automatic stay protects only the debtor. If the plaintiff has sued the employer and the employee's supervisor, and only the employer files bankruptcy, the stay does not protect the supervisor. The employee may proceed with the lawsuit against the supervisor. This could pressure the employer if the supervisor has indemnification rights against the employer, or if the employer is required to defend the supervisor. Some courts in limited circumstances have extended the stay to non-bankrupt co-defendants upon the debtor's separate motion.[34]

B. Employee Files Bankruptcy

1. *Negotiate With the Correct Party*

Assuming that the employee's claims arose before the bankruptcy was filed, the bankruptcy trustee, not the employee, has standing to prosecute or settle the claims.[35] Therefore, defense counsel should communicate and negotiate with the bankruptcy trustee, not the employee, because the employee will not have authority to bind the estate.

2. *Argue That Claims Arose Pre-Bankruptcy*

If the claims arose pre-bankruptcy, they belong to the estate and not to the employee. Employees have much less incentive to participate in the litigation if recoveries will be paid to creditors and not to the employees. Therefore, defense counsel should attempt to categorize employment discrimination claims as pre-petition claims.

3. *As a Routine Matter, Check to See if Plaintiff Filed Bankruptcy and Failed to Schedule the Claims*

An employee is required to list pre-bankruptcy employment claims on the employee's bankruptcy schedules. If an employee fails to do so, the employee is precluded through the doctrine of judicial estoppel from pursuing the claims.[36] Therefore, as a routine matter, when an employer is sued for employment discrimination, defense counsel should determine whether the employee is currently, or ever has been, a debtor in bankruptcy, and whether the employee failed to schedule the claims.

4. *Consider Removing Employment Lawsuit to Bankruptcy Court*

If the employee has elected to proceed with the employment claims in state or federal court after filing bankruptcy, the employer should consider removing the lawsuit to the bankruptcy court to avoid a jury trial.[37]

V. CONCLUSION

A bankruptcy filing by a party to an employment discrimination lawsuit injects uncertainty for counsel to both parties. With knowledge of applicable basic bankruptcy concepts and issues, counsel can handle more routine matters on their own, and determine when to consult a bankruptcy specialist.

ENDNOTES

1. This article uses "employee" and "plaintiff" interchangeably, and "employer" and "defendant" interchangeably.
2. Not only do financially distressed subprime lenders employ many individuals, but such lenders' insolvencies may trigger financial distress in other industries or the economy in general. And the resulting loss of jobs, as well as other economic factors, may result in an increase of plaintiffs filing bankruptcy.
3. Congress has codified bankruptcy law in Title 11 of the United States Code ("Bankruptcy Code"). The U.S. Supreme Court has promulgated the Federal Rules of Bankruptcy Procedure ("FRBP"), akin to the Federal Rules of Civil Procedure, which govern procedure in bankruptcy courts. Each bankruptcy court has established its own local rules. Bankruptcy court decisions are reported in the Federal Bankruptcy Reporter, and are appealable first to specially created "Bankruptcy Appellate Panels" in some circuits, including the Ninth Circuit, or to U.S. district courts. Subsequent appeals are to the federal circuit courts, and then to the U.S. Supreme Court.
4. This article does not identify or address every issue that may arise when a party to an employment lawsuit files bankruptcy. Any time a party files bankruptcy, employment counsel and their clients should consider consulting with and retaining a bankruptcy specialist.
5. Substantive California non-bankruptcy law continues to apply to a creditor's claims against the debtor. If an employee asserts a claim under the California Federal Employment and Housing Act (FEHA) against a bankrupt employer, the FEHA will govern the merits of the employee's claim even if the bankruptcy is filed in another state, which is common. Bankruptcy venue provisions allow an entity to file bankruptcy in its state of formation as well as the state in which it is headquartered. Corporations headquartered in California and incorporated in Delaware routinely file bankruptcy in Delaware. If employment counsel is going to appear in a bankruptcy case outside of California, counsel should seek admission *pro hac vice* and consider retaining local bankruptcy counsel.
6. Because a debtor is required to disclose all of its assets and liabilities, an employee can discover an employer's net worth at the outset of a case without serving discovery. Absent the bankruptcy, the employee would not be able to obtain such information without serving a discovery request, and would not be entitled to such information without establishing liability on a claim for which punitive damages are appropriate.
7. To access Pacer, counsel must obtain a login and password. Pacer's website is www.pacer.psc.uscourts.gov. The telephone number for Pacer is (800) 676–6856. There is a nominal cost to retrieving documents electronically through Pacer.
8. The most common chapters under the Bankruptcy Code are Chapter 7 (Liquidation) and Chapter 11 (Reorganization). In a Chapter 7 case, a trustee is appointed by the bankruptcy court to liquidate the

debtor's assets and distribute the proceeds to creditors. Under Chapter 11, the debtor typically remains in control of its operations, and implements a plan of reorganization to emerge from bankruptcy still in business.

9. The examination, or initial meeting of creditors, is codified in Bankruptcy Code §§ 341(a) and 343.
10. The scope of a deposition under FRBP 2004 is extremely broad, typically broader than the scope of a deposition in the underlying employment case. Different courts have different rules regarding examinations under FRBP 2004 concerning, among other things, how to obtain a court order authorizing the examination, whether examinations are appropriate given the pendency of a state or federal court lawsuit, and serving subpoenas on non-debtor examinees. Counsel should be certain to consult local rules or a bankruptcy specialist when seeking to conduct an examination under FRBP 2004.
11. Bankruptcy Code § 362. The theory of the automatic stay is that when a debtor files bankruptcy, the debtor should be able to focus on reorganization efforts without the distraction of litigation. The stay also prevents any particular creditor from obtaining a comparative advantage against the debtor vis-à-vis the debtor's other creditors.
12. Even if the plaintiff obtains relief from stay, plaintiff will not receive payment on any judgment or settlement. Rather, plaintiff will have an "allowed claim" entitled to a pro rata distribution based on distributions to unsecured creditors at such time that distributions are made. An exception to this rule is if there is Employment Practices Liability Insurance (EPLI) coverage, in which case plaintiff will be entitled to payment from the proceeds of such coverage, subject to any other claimants that are also entitled to payments from such coverage.
13. Bankruptcy Code § 362(d)(1).
14. *In re Sonnax Indus.*, 907 F.2d 1280, 1286 (2d Cir. 1990) sets forth the test, which considers, among other things, whether all substantive issues would be resolved in the state or federal court, whether granting relief would interfere with the bankruptcy case, whether specialized legal knowledge by the judge is required, whether EPLI coverage exists, whether there are non-debtor third parties involved in the lawsuit, whether other creditors will be prejudiced if relief is granted, and whether the parties are ready for trial in the state or federal court.
15. *In re Mazzeo,* 167 F.3d 139, 143 (2d Cir. 1999). Employment counsel should consult the local rules of the particular bankruptcy court or a bankruptcy specialist to determine the procedural requirements of a relief from stay motion. For example, in the Central District of California, parties moving for relief from stay must use court forms, which are available on the Central District of California Bankruptcy Court's website.
16. Most bankruptcy courts use a one-page form available on their websites. The form is simple to complete, requiring the employee to describe, among other things, contact information for the employee's counsel, the basis for the claim, the classification of the claim (i.e., unsecured), when the claim arose, and the amount of the claim. In addition to completing the form, which should be signed by the employee, counsel should attach the state or federal court complaint and any documentary evidence supporting the claim.
17. A continuance of the first meeting of creditors does not postpone the deadline for filing a proof of claim.
18. Bankruptcy Code § 1141(d)(1)(A).
19. The employee, however, still may have recourse against third parties or insurance. First, to the extent that the employee has claims against non-debtor third parties, such claims will not be discharged and the employee will be able to pursue them. Second, if there are EPLI insurance proceeds available to cover the claim, the discharge of the employer will not preclude the employee from pursuing insurance proceeds, and in fact, the employee can proceed nominally against the employer, to collect against the insurer. *In re Coho Res., Inc.,* 345 F.3d 338, 342–343 (5th Cir. 2003).
20. Bankruptcy Code § 541(a)(1).
21. Presumably, under employment law, issues could arise as to whether a particular claim arose before or after the bankruptcy petition was filed. For example, if the employee was hired before filing bankruptcy and terminated after filing bankruptcy, whether the claim is pre-bankruptcy or post-bankruptcy may depend upon the substantive employment claim asserted.
22. *Reid v. White Motor Corp.*, 886 F.2d 1462, 1470–1471 (6th Cir. 1989), *cert. denied,* 494 U.S. 1080, 110 S.Ct. 1809, 108 L.Ed. 2d 939 (1990). FRBP 2019 provides that if counsel or a creditor is representing more than one party, counsel and the creditor must file a verified statement disclosing the particulars of the representation.
23. The following courts have allowed class claims to be filed: *In re American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988); *Reid v. White Motor Corp.*, *supra; In re Charter Co.*, 876 F.2d 866, 868–873 (11th Cir. 1989); *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 369 (Bankr. S.D.N.Y. 1997); *In re Chateaugay Corp.*, 104 B.R. 626, 634 (S.D.N.Y. 1989). The Tenth Circuit reached the contrary conclusion in *In re Standard Metals Corp.*, 817 F.2d 625, 630 (10th Cir. 1987).
24. Class claim issues are complicated and vary from circuit to circuit. Class counsel should consider consulting a bankruptcy specialist.
25. *In re TWA, Inc.,* 322 F. 3d 283 (3rd Cir. 2003); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 576 (4th Cir. 1996); *Myers v. U.S.,* 297 B.R. 774, 780–86 (Bankr. S.D. Cal. 2003).
26. *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995) (if the purchaser had notice of the claim and there is "substantial continuity" between the seller and the purchaser, there may be successor liability).
27. Bankruptcy Code § 507(a)(4).
28. Bankruptcy Code § 327(a).
29. Pursuant to Bankruptcy Code § 327(e), counsel who represented the employee pre-bankruptcy may continue to represent the employee or the estate post-bankruptcy with respect to the employment claims so long as counsel does not have a claim

against the employee. If counsel is being paid on a contingency fee basis, it is unlikely that counsel will have a pre-bankruptcy claim against the employee for unpaid fees.

30. Assuming the employee's claims arose pre-bankruptcy, once the employee files bankruptcy, the claims belong to the estate, not to the employee. Thus, counsel's client technically becomes the trustee on behalf of the estate. That is why the trustee will have to retain counsel.
31. Obtaining a court order authorizing employment does not automatically authorize payment. Therefore, counsel will either need to include in the employment application a request for authorization to make a contingency fee payment when proceeds become available, or at such time that the employment claim is resolved, counsel will have to bring a separate application to be paid.
32. To be employed by the bankruptcy estate, counsel must be "disinterested." That counsel has provided pre-bankruptcy services to the employer will not by itself preclude counsel from being retained post-bankruptcy. Bankruptcy Code § 327(e). However, if counsel is owed fees by the employer as of the petition date, counsel is not considered disinterested because counsel holds a claim against the employer. Counsel can eliminate this issue by waiving any claim for pre-petition fees against the employer. Employment counsel should be willing to do so because in most circumstances, counsel would only recover pennies on the dollar on such unpaid pre-petition attorneys' fees, while on a going forward basis, counsel will be entitled to payment of 100% of its post-bankruptcy fees, subject to court approval. Counsel should also be aware of potential preference liability with respect to any payments received by counsel during the ninety days preceding the bankruptcy filing. Since payments made contemporaneously with or prior to providing services, or in the ordinary course of business, are not recoverable as preferences, it is good practice for an attorney who suspects that the employer client is in financial trouble, to obtain retainers when possible and ensure timely payment of attorneys' fees bills. If employment counsel has received what appears to be a preferential payment during the ninety days preceding the bankruptcy, counsel should discuss the issue with the employer's bankruptcy counsel. Even if counsel returns such payments, the preference could preclude counsel's retention if the preference created an actual conflict of interest. *In re Pillowtex, Inc.*, 304 F.3d 246 (3d Cir. 2002) (debtor's general bankruptcy counsel disqualified where payments received were preferential, and counsel could not overcome conflict by agreeing to disgorge payments).
33. Not only will plaintiff incur significantly more travel expenses and attorney time, but plaintiff likely will have to retain local counsel.
34. *Queenie, Ltd. v. Nygard Int'l,* 321 F.3d 282, 287–288 (2d Cir. 2003) (automatic stay extended to non-bankrupt corporation because corporation was wholly owned by individual debtor and adjudication of claim against corporation would have immediate adverse impact on debtor); *McCartney v. Integra Nat'l Bank North,* 106 F.3d 506, 511 (3rd Cir. 1997) (while it is universally acknowledged that stay may not be invoked by non-bankrupt co-defendants such as sureties, guarantors, co-obligors, or others with the factual or legal nexus to the debtor, automatic stay applies to the non-debtor where the debtor was the real party in interest in the litigation, since the litigation against the third party would have established an obligation of the debtor).
35. *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004).
36. *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004); *Barger v. City of Cartersville,* 348 F.3d 1289, 1295 (11th Cir. 2003); *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999); *cert. denied,* 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed. 2d 814 (2000); *Estel v. Bigelow Mngmt.,* 323 B.R. 918, 924 (E.D. Tex. 2005); *but see Best v. Kroger Co.*, 339 B.R. 180, 185 (W.D. Tenn. 2006) (while debtor-plaintiff had knowledge of the factual basis of her Title VII claim during her bankruptcy, and could have amended her schedules to include the Title VII claim, because she had no motive to conceal the claim, as all her creditors were paid in full and she therefore would not receive a windfall from the claim, the failure to disclose could have been inadvertent and the employer's motion to dismiss or for summary judgment on judicial estoppel grounds was denied).
37. Removal is governed by 28 U.S.C. § 1452(a). FRBP 9027(a)(2) sets forth the procedural requirements of removal.

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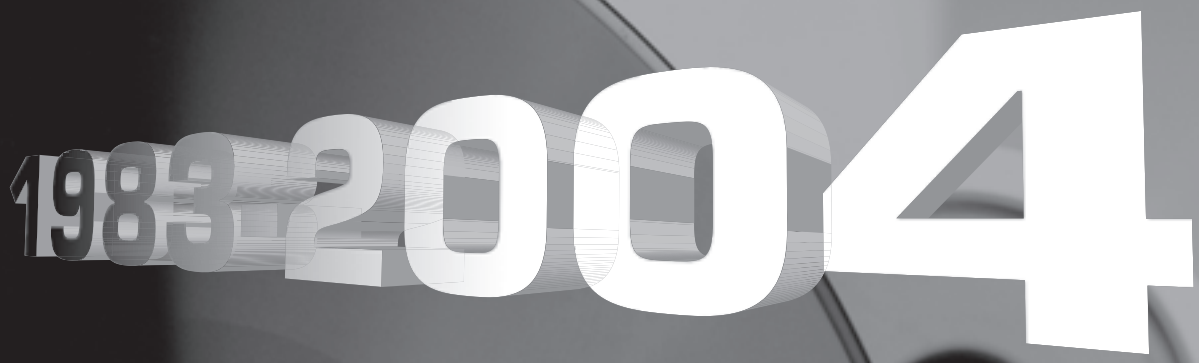

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Message from the Chair

By Phil Horowitz

Phil Horowitz is past Chair and current Board member of the California Employment Lawyers Association. He volunteer teaches trial advocacy at University of San Francisco and Stanford Law Schools. Mr. Horowitz has his own San Francisco law firm, representing employees.

This year the Labor and Employment Law Section is celebrating its 25th birthday. As with all milestone birthdays, now is a good time to ask where we have been and where are we going.

The legal landscape that California's labor and employment lawyers face has certainly changed a lot over the past twenty-five years. The number of statutes governing the employment relationship has grown. The number of legal claims filed by employees has likewise grown. The law governing California employment relationships has become more and more complex.

One constant has been the Labor and Employment Law Section. Through it all, the Labor and Employment Law Section has been a resource to help our members keep up with changes in the law and continue to develop our legal skills. Education is the primary mission of our Section.

The publication you are now reading is one of our Section's most important educational endeavors. The California Labor and Employment Law Review not only has incisive articles about important legal issues we face in our practices, but also includes case notes summarizing significant new employment cases as they are decided.

With changing times has come changing technology. Our Section now offers members the opportunity to receive e-mail alerts when the appellate courts issue decisions on labor and employment law. The e-mail alerts are a paragraph or two, with a link to the opinion's full text. To sign up, go to www.calbar.ca.gov, log onto your Member Profile, click on "Change My Email List Preferences," and check the box marked "Labor and Employment Law Case Law Alerts."

Our Section's Annual Meeting has long been our signature live educational event. With two days of panels, there is always plenty to learn. The Annual Meeting is also a great place to catch up with friends in the field, and to make new friends. We've been adding more social events to the Annual Conference to make it even more friendly. If you've never been to an Annual Meeting, please check one out. You'll be glad you did.

About halfway through our Section's quarter century history, we began presenting an annual Public Sector Conference. Our Section's Public Sector Conference is the largest annual gathering of public sector labor and employment lawyers in California. If your practice includes work in the public sector, this is the one conference each year that you should not miss.

Speaking of California public sector labor law, did you know that our Section publishes the leading treatise in the field? We call our book "California Public Sector Labor Relations." Practitioners call it "indispensable."

Our Section has also begun presenting more half-day and one-day seminars. Coming up this next year will be a seminar on internal investigations, a seminar on employment issues in the retail industry, a seminar to "train the trainers" how to do sexual harassment prevention training, and much more.

Changing technology has also allowed our Section to provide continuing legal education online. Did you know that our Section has more than fifty continuing education programs available online? You can even get participatory MCLE credit. To check out the offerings, visit www.calbar.org/online-cle and click on "Labor and Employment."

California labor and employment law has changed a lot over the past quarter century. The technology to deliver continuing education has also changed a lot. One thing has remained a constant though it all. You can depend on the Labor and Employment Law Section to keep delivering the practical and high-quality continuing education you want.

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