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California Employment Law Newsletter

What's New for California Employers?

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The following is a brief summary of the significant employment law developments since our last newsletter.[1]

WAGE AND HOUR

Independent Contractor Classification: FedEx drivers are employees, not independent contractors, within the meaning of California Labor Code § 2802, thereby entitling them to reimbursement of expenses. *Estrada v. FedEx Ground Package System, Inc.* Applying the common law "control of details" test, the Court found that FedEx's rather complicated "operating agreement" gave FedEx the requisite control to make them employers. *Comment:* FedEx's operating contract was so comprehensive that most people reading it would agree that FedEx controlled virtually all aspects of the delivery drivers' occupational activities.

Exempt Classification: Insurance claims adjusters are not exempt from overtime compensation because they are production workers, performing day-to-day operations of insurance companies. *Harris v. Superior Court of Los Angeles*. In this case, the Court found that the administrative exemption did not apply because adjusters were truly engaged in the "production" of services which constitute the business of insurance carriers. *Comment:* The "administrative exemption" is becoming a diminishing refuge for employers seeking to avoid overtime pay. A careful audit of the duties of employees so classified should be undertaken in consultation with employment counsel.

Labor Commissioner "Precedent Decisions": The California Appellate Court has invalidated the Labor Commissioner's practice of issuing precedential decisions. *Corrales v. Bradstreet.* Here, the Court found that the precedential decisions were underground regulations in violation of the Administrative Procedures Act. *Comment:* This decision was a sequel to the recent California Supreme Court decision, *Murphy v. Kenneth Cole Productions, Inc.*, in which the California Supreme Court invalidated an earlier Labor Commissioner precedential decision that missed meal/rest breaks are penalties, not wages. This case is generally good news for employers, as Labor Commissioner decisions tend to be pro-employee.

SEXUAL HARASSMENT

DFEH Training Regulations: The Department of Fair Employment and Housing (DFEH) has finally approved the training regulations issued to supplement

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[1] This summary is intended to be a brief overview of significant legal developments and is not an in-depth analysis of the cases or statutes discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein.

the mandatory sexual harassment training legislation. (California Government Code Section 12950.1.) The regulations define: (1) who is a covered "employer"; (2) who is a "supervisor"; (3) who is qualified to conduct training; (4) what subjects must the training cover, (5) what is "training year tracking", etc. *Comment:* You are welcome to contact us for clarification of the new regulations or to schedule sexual harassment training that is compliant with these regulations.

Vicarious Liability: An employer is vicariously liable for a supervisor's sexual harassment where the employee's delay in reporting the harassment did not constitute a failure to take advantage of preventative opportunities. *Craig v. M&O Agencies, Inc.* In this case, the Court did not find that a 19-day delay in reporting sexual harassment was unreasonable. *Comment:* This case from the Federal District Court with jurisdiction in California (Ninth District) has limited practical effect on sexual harassment cases in California. The reason is that most employee's lawyers proceed under a California state law which is more liberal than the federal law that led to this decision.

OTHER DEVELOPMENTS

Immigration: The Department of Homeland Security and U.S. Commerce Department have announced a series of immigration law changes, including how employers should respond to social security number "no match" letters. *71 F.R. 34281 (6/14/06).* The regulations describe how employers should properly respond when they receive from the Social Security Administration (SSA) a notice that the social security record does not match the information provided by the employer. The recommended responses will provide a safe harbor against the accusation that the employer "hires or continues to employ a person with knowledge that the person is not authorized to work in the U.S.," as prohibited by federal law. Among the steps that should be taken are: (1) Verify within 30 days that the mismatch was not a result of a recordkeeping error; (2) Request that the employee confirm the accuracy of the employment record; (3) ask the employee to resolve the issue with the SSA; and (4) If these steps lead to resolution of the problems, follow the instructions on the "no match" letter itself to correct the information with the SSA. *Comment:* Feel free to contact us regarding further clarification of the new "no match" regulations.

PAGA: The California Court of Appeals has recently clarified that while representative claims for unpaid wages brought under the Unfair Competition Law (UCL) must be brought as a class action, claims for penalties for unpaid wages can be brought under the Private Attorney General's Act (PAGA). *Arias v. Superior Court.* In this case, the employee sued his employer alleging that he was not compensated for overtime, nor had he received meal/rest breaks.

Comment: This case is primarily of interest to Plaintiff's attorneys determining how to most expeditiously proceed on these claims. Remember that changes to the UCL require that 75 percent of any penalties recovered under this statute be paid to the Department of Labor (and not the employee or his/her attorney).

"Bogus" Employment Law Claims: The California Supreme Court has made it easier for employers to sue plaintiff's attorneys who bring shotgun lawsuits that include "bogus" claims added simply to leverage higher settlements. *Siebel v. Mittlesteadt.* In this case, the employer was able to proceed against the plaintiff's attorneys for malicious prosecution even though a portion of the underlying case was resolved favorably to the plaintiff and his attorneys. *Comment:* In this case, the employer targeted the plaintiff's attorney, who had added the company's CEO as an individual defendant. The case against the CEO was weak, and the CEO prevailed, individually.

Pregnancy Discrimination: A company's policy of excluding pregnancy leave from service credit used in calculating retirement benefits, violated the Pregnancy Discrimination Act of 1978. *Hulteen, et al. v. AT&T Corporation.* Further, the Court found that excluding time spent on pregnancy leave in calculating benefits violates Title VII of the Federal Civil Rights Act of 1964. *Comment:* This case is instructive to employers in crafting employment policies related to employee benefits in general (e.g., vacation, time in service for purposes of promotion, etc.)

Punitive Damages: The U.S. Supreme Court has held that punitive damages based on the conduct of the company towards persons who are not a party to a lawsuit violates the company's due process rights. *Phillip Morris USA v. Williams.* In this case, the jury was permitted to award punitive damages based on the health consequences to smokers who are not parties to the lawsuit. *Comment:* This case will affect punitive damages in both state and federal actions, generally. Courts will be required to carefully instruct juries to disregard evidence of injuries to non-parties when deciding punitive damages against party-defendants.

If you have questions regarding any of the aforementioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.

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