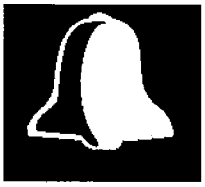

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# California Employment Law Newsletter

## *What's New for California Employers?*

## *THANKSGIVING EDITION*

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

## WAGE AND HOUR

*Meal/Rest Breaks:* Defendant obtained summary judgment in this case alleging violations of the California Labor Code regarding overtime wages, meal/rest breaks, and failure to provide an itemized wage statement. *White v. Starbucks Corp.* Plaintiff quit after working for defendant for 11 days, and admitted that he had not notified Starbucks that he had worked off the clock or been denied meal/rest breaks. The court held that while an employer is required to *offer* meal breaks, it does not have to "*ensure* that employees actually take such breaks." Further, that no reasonable jury could conclude that the defendant knew about the alleged unpaid overtime. *Comment:* This case is good news for employers regarding this common set of allegations which employers frequently face. It should be noted that the plaintiff in this case had been employed for only 11 days and admitted that he did not report overtime (as required by company policy). Also, it should be noted that this decision is from a federal court interpreting California law, which may not be the same interpretation that some California courts give to the same law. Nevertheless, the decision is favorable for employers and is consistent with common sense.

[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.

*Federal Premption:* The Labor Management Relations Act (LMRA) does not preempt state law regarding the requirements that employees be paid for the time traveling between job sites in company vehicles. *Burnside v. Kiewit Pacific Corp.* The right to be compensated for employer-mandated travel time is conferred by state law, independent of collective bargaining agreements, and thus not pre-empted by federal law. *Comment:* This is the latest in the series of cases holding that state labor laws are not pre-empted by federal labor laws.

*Administrative Exemptions:* Insurance claims adjusters are not exempt from federal (and state) overtime laws as "Administrative" employees. *Harris v. Superior Court.* Here, the Court found that found that work performed by adjusters was not of "substantial importance to the management or operation of the business," but rather, merely carried out the day-to-day operations of the business as production. *Comment:* The Administrative classification is the most misunderstood overtime exemption. Employers should consult counsel before taking the risk of misclassifying employees with this exemption.

*Expense Reimbursement:* Employers may reimburse employees for automobile expenses by paying them higher wages and commissions, so long as higher payments are adequate to cover the employee's actual expenses. *Gattuso v. Harte-Hanks Shoppers, Inc.* In this case, the California Supreme Court held that an employer's use of lump-sum payments to reimburse

employees for work-required automobile expenses was permissible. The court also held that employers may satisfy their obligations to reimburse business expenses under the Labor Code by paying employees enhanced compensation in the form of increases in base salary or commission rates, so long as the employer establishes some means to identify the portion of overall compensation that is intended as reimbursement. *Comment:* This case is also welcome news for California employers wishing to avoid the administrative hassles of precisely accounting for business expenses. However, employers electing this method of reimbursement must ensure (1) that expenses are separately identified from compensation (for tax purposes), and (2) they adequately compensate the employees for the expenses actually incurred.

*Computer Professional Exemption:* Effective January 1, 2008, highly-skilled computer professionals who qualify for the professional overtime exemption must also satisfy a minimum hourly rate test. *California Labor Code section 515.5*. That rate is currently $49.77 an hour, but is being reduced to $36.00 per hour. *Comment:* Computer professional exemptions are also commonly misunderstood and misapplied. Employers should consult with their employment counsel before taking the risks associated with misclassifying these employees.

*Salary Basis Test:* Bona fide disability plans that deduct salary on the first day of disability leave do not violate the "salary base test" exempting employees from overtime pay entitlement. *Sumuel v. Advo, Inc.* Exempt employees must generally receive their designated salaries, without deductions, for time off. If this "salary basis test" is violated, the employer loses the exemption, and these employees must be paid for overtime. But in this case, the Court held that the deduction of a single day of disability leave will not violate the salary basis test. *Comment:* The appellate court rightly held that such *di minimus* transgressions of the salary basis test will not destroy an employer's overtime protection.

## ARBITRATION

*Waivers:* Provisions in an arbitration agreement waiving an employee's entitlement to bring a class action were found unconscionable and therefore unenforceable. *Murphy v. Check 'N Go of California, Inc.* In this case, defendant sought to avoid a class action that alleged misclassification of certain employees. The employer relied on the company's mandatory arbitration agreement, which waived class action rights. *Comment:* This is the latest case invalidating class action waivers in a mandatory employment arbitration agreement.

*Collective Bargaining Agreements:* An employee is not required to first exhaust administrative remedies in a collective bargaining agreement (CBA) in order to sue an employer for employment discrimination. *Ortega v. Contra Costa Community College District.* To preclude arbitration outside of the CBA, the CBA must state, "in clear and unmistakable" terms that a union member's discrimination claims are to be fully resolved by arbitration, with the resulting loss of entitlement to a jury trial. *Comment:* This case follows a prior precedent in holding that an employer cannot avoid civil court litigation by invoking the arbitration provisions in a CBA.

## LEGISLATION

*EEO-1 Forms:* Effective September 30, 2007, EEO-1 forms mandated by the EEOC have been changed. The forms now have revised race/ethnicity groupings in job categories. Private employers with 100 or more employees, as well as federal contractors with at least one government contract of $50,000 and 50 or more employees, must file these reports annually. The changes include: (1) moving "Hispanic or Latino" into a separate reporting category, and (2) dividing "Asian or Pacific Islander" into separate groupings of "Asian" and "Native Hawaiian or other Pacific Islander," and (3) renaming "Black" as "Black or African-American," and further adding (4) a new grouping of "two or more" of these other race/ethnicity groupings.

*Military Spouses:* California employers with 25 or more employees must allow an employee who is a spouse of a member of the armed forces, National Guard, or reserves to take up to 10 days of *unpaid* leave during a "qualified leave period," when the employee's spouse is home on leave. *California Military and Veterans Code § 395.10.* The legislation took effect "immediately" in October 2007.

## AGE DISCRIMINATION

A 54-year old employee of Google, Inc., sued that company for age discrimination following his termination. *Reid v. Google, Inc.* Plaintiff claimed that "every few weeks" during his 2-year career with Google, he was told that his ideas were "too old to matter," and that he was "slow" and "sluggish." Colleagues also referred to him as the "old man" or "fuddy duddy." *Comment:* This case reminds us of the general rule that derogatory references to any protective classification is dangerous. The reason is that any such comments can be invoked by a disgruntled employee who have experienced adverse employment action after hearing the derogatory comments.

## TRADE SECRETS

*Independent Economic Value:* To be protected as a trade secret, a software (or other product) had to have independent economic value. In this case, the Court was not convinced that the company's former employee (defendant), had sold to a competitor company a product similar to the one that he had sold to defendant, during his employment with the defendant. *Comment:* In this case, the Court found that the alleged trade secret was not "sufficiently valuable and secret to afford an actual or potential economic advantage over others."

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