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California Employment Law Newsletter

What's New for California Employers?

HOLIDAY EDITION

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

WAGE AND HOUR

Donning & Doffing: The United States Supreme Court has recently clarified that compensable work time under the Fair Labors Standards Act (FLSA), for employees who are required to wear protective garments or gear to perform their job, includes the time spent donning the protective gear prior to the employee's work shift. *IBP, Inc. v Alvarez.* Also compensable is the time spent walking to the employee's work station, the time spent removing the protective gear at the end of the work day and the time spent walking from a work station to a locker room or other location for removal of the gear. *Comment:* This ruling potentially reaches farther than just workers who don protective gear. It arguably reaches all time that employees are required to spend, on site, preparing for the work day.

Overtime for Short-Notice Pay: Employees who get higher "short call" or "call back" pay for reporting to work on short notice are still entitled to overtime under the Fair Labor Standards Act (FLSA) if that extra work keeps them on the job more than forty hours in a work week. *Wage and Hour Opinion Letter, FLSA 2005 – 36*. Extra compensation may not be credited toward the employer's overtime obligations under the FLSA. However, the regular compensation provided for the "short call" hours worked… may be counted towards minimum wage obligation under the Act. *Comment:* This FLSA Opinion Letter applies only to employees who are "on call" to appear for work on short notice. Employers employing workers in that way must be cognizant of their overtime obligations where that on-call time, coupled with regular hours of work, pushes workers beyond a forty hour work week.

Independent Contractors: The California Appellate Court has recently found that certain street sweepers were employees and not independent contractors and thus entitled to overtime pay for overtime work. *Garces v Cannon Pacific Services*. The Court emphasized that the key test of the employee-contractor distinction is "whether the employee was subject the employer's orders and control and was liable to be discharged for disobedience or misconduct." In this case, CPS not only controlled the details of the sweepers work, but also had the right to fire them for disobedience and it was of no consequence that the workers signed documents referring to themselves as "subcontractors." *Comment:* This case is a reminder that employers should be sure that service providers identified as "independent contractors" are truly that. Beyond the Labor Code implications, there are worker's compensation insurance, tax withholding, EDD and other consequences which can amount to significant money.

Meal Periods: Employees could sue their employer for mandatory meal period

[1] This summary is intended to be a brief overview of significant legal developments and does not go into 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.

violations where the employers actively discouraged employees from taking the breaks. *Cicairos v Summit Logistics, Inc.* Here, the employer's policies provided for meal breaks but the employer was found to have actively discouraged the employees from taking their breaks because the employer did not schedule meal periods, create an activity code for meal breaks or monitor compliance so that "most drivers ate their meals while driving or else skipped a meal nearly every working day." *Comment:* Employers must provide in a meaningful way for its employees to take meal period, rest period and other breaks mandated by State labor laws. The Court here found that the employer paid lip service to that entitlement but practically made it impossible for its employees to realize the benefits of those laws.

Car Expense Reimbursement: A group of employees successfully sued their employer for indemnification for expenses incurred in using their personal automobiles for employer business. *Gattuso v Harte-Hanks Shoppers*. Here, outside sales representatives used their own cars to visit customers but the vast majority did not get reimbursed for vehicular expenses. The Appellate Court found that the employer was obligated to reimburse the employee for automobile expenses, but could do so by providing increased salaries or commissions, instead of reimbursing the employees for their actual automobile expenses. *Comment:* Employers must reimburse employees for all out-of-pocket job related expenses (e.g., uniforms). If there is no agreement regarding the method or rate of reimbursement from automobile use, the employer will be responsible for actual costs incurred – usually at the IRS rate ($0.405 per mile).

Shoe Store Manager Overtime: A manager of a Kenneth Cole shoe store was owed overtime because most of his work was spent selling shoes and stocking merchandise. *Murphy v Kenneth Cole Production, Inc*. The title "manager" and being required to perform some human resources did not transform the store manager's job into exempt where most of his time was spent on non-exempt tasks. *Comment:* Remember that labels such as "manager," although typically describing exempt positions, do not necessarily do so. Where there is doubt, employers should assure that employees with exempt classifications are spending at least half of their time performing exempt duties.

City of San Francisco Minimum Wage/Conditions Ordinance: The City of San Francisco has adopted an ordinance that establishes minimum wage and minimum labor conditions intended to apply to workers any where in the world. *Sweat Free Contracting Ordinance*. The ordinance applies to any business that contracts with the City to supply materials, supplies, equipment, etc. *Comment:* This ordinance applies only to companies doing business with the City of San Francisco and prohibits "sweat shop labor" which is broadly defined as work performed by any worker under terms or conditions that "seriously or repeatedly violate laws" of any jurisdiction in which the work is performed, including any labor, wage, safety, environment law, or "collective bargaining right."

WORKER'S COMPENSATION

Exclusive Remedy: A firefighter's civil action against the department for intentional infliction of emotional distress

was barred by the worker's compensation exclusive remedy (i.e., the employee was limited to the worker's compensation system for redress). *Hogan v City and County of San Francisco*. Here, the employee claimed that his employer intentionally inflicted emotional distress upon him by refusing to (1) transfer him to a field assignment, (2) assign him to a limited duty position when his doctor released for limited duty work in June 2000, and (3) allow him to draw his vacation pay in July 2002. The Court found that the alleged misconduct attributed to the employer is a normal part of the employment relationship and as such, falls within the bounds of the worker's compensation system. *Comment:* Employees can seek emotional distress based on claims that fall outside the normal work experience (e.g., discrimination, harassment, etc.). Here, when the employee lost the underlying claim (for violation of FMLA laws), his emotional distress claims was relegated to worker's compensation system (which has far less monetary damage potential).

Off-Duty Manifestation of On-Duty Injury: The family of an employee who suffered a fatal heart attack while off duty was nevertheless able to recover worker's compensation benefits. *Cynthia Jackson v WCAB.* Here, a medical expert stated that he believed the employee's heart attack stemmed from an upper respiratory infection, which he had sustained on the job. *Comment:* Typically, off-duty injuries will not be covered by worker's compensation. However, here the employee's heirs were able to produce expert testimony that the heart attack was related to an on the job experience and the employer was unable to prove that the heart attack was solely caused by an off-duty occurrence.

Risk of Re-Injury: An employer can properly refuse to return an employee to work following an industrial injury where the residuals of the injury pose a substantial risk of re-injury to the employee. *County of San Luis Obispo v WCAB.* Here, the employee was assaulted and sustained serious injuries to his neck, back and upper extremity while on the job. After his recovery, an examining doctor posed work restrictions of no "very heavy lifting," and no "heavy work activities" as the employee had lost half of his pre-injury capacity for bending, stooping, pushing, lifting, pulling, climbing, or other comparable activities and that he should not perform a job that could involve physical altercation. There was undisputed evidence that the juvenile delinquents that he would be managing were capable of being physically aggressive and weighed 200 to 365 pounds. The Court thus found that the employer had a good faith belief that the employee could not return to work without risking further serious injury. *Comment:* This case is very helpful to employers who are apprehensive about returning employees to work following industrial injury. Where the employee poses a substantial risk of harm to himself or others, the employer is within its rights (and not liable for a CLC §132(a) violation) in refusing to return the employee to work.

DISCRIMINATION / HARASSMENT

Interactive Process: An employer's decision not to communicate with a discharged employee's attorney allowed the employee to pursue his action for failure to engage in the interactive process to determine whether an effective, reasonable accommodation was possible. *Claudio v Regents of the University of California*.

Here, an employee of a veterinary medicine school contracted a disease that left him unable to work around animals where he might become infected. Thereafter, his employer notified him that he was fired on four occasions, but sent an employment specialist to determine whether an alternative position, away from animals, might be available. The former employee told the specialist to speak to his attorney but when the specialist found that the attorney was a worker's compensation lawyer, stopped attempting to communicate with him because this was not a worker's compensation matter. The Court found that the employer's employment specialist had acted unreasonably and had not adequately attempted to engage in the interactive process. *Comment:* It is critically important in disability discrimination cases that employer make a clear record of their efforts to discuss and consider all reasonable attempts to return disabled workers to work. Failure to do so can expose an employer to liability for failure to engage in the interactive process, even where no accommodations were possible (so that the underlying discrimination would fail in any event).

Sexual Harassment: A male advertising manager who complained that he was groped and propositioned by his female general manager could not establish a sexual harassment claim because he had tried to deal with the matter himself and did not report "specific gory details" to his employer. *Hardage v CBS Broadcasting, Inc.* Here, plaintiff was groped and propositioned on numerous occasions but insisted on trying to handle the matter himself, rather than access available complaint procedures. His failure to attempt to access available complaint procedures was a complete bar to sexual harassment claims under federal discrimination law. *Comment:* Under California law, the result would have been somewhat different as failure to access available complaint procedures reduces (but does not eliminate) the potential damages that might be recovered for sexual harassment. Here, the employee was probably penalized for trying to take care of the problem in a discreet manner. However, the law is clear that before an employer can be held liable for sexual harassment, it must be given a fair opportunity to correct the offending conduct.

ARBITRATION

Waiver of Right to Arbitration: An employer cannot compel arbitration of a fired employee after the company refused to respond to the employee's notice of intent to arbitrate. *Brown v Dillards*. "When an employer enters into an agreement requiring its employees to arbitrate, it also must participate in the process or lose its right to arbitrate." *Comment:* This case is unusual as employers are generally the parties seeking to compel the arbitration agreements and employees are typically trying to avoid them in pursuit of greater rewards through the civil justice system.

Modified Agreements: Where an employer modified its arbitration agreement with employees without having them sign the new agreement, the agreement was not enforceable. *Griffin v United Healthcare Services*. Here, the employees signed a "Code of Conduct" handbook which set forth the new arbitration agreement, but did not sign a separate agreement regarding the same. The Court refused to enforce the agreement because the new agreement (which superseded the old) had not been

signed by the employees and the language in the handbook was insufficient to create a binding agreement. *Comment:* It is important that employers have employees sign stand-alone arbitration agreements clearly setting forth that the agreement governs *all* employment disputes and is binding on both parties.

OTHER DEVELOPMENTS

Taxation of Settlement Payments: The entire amount of a settlement that does not designate what portion is for personal injuries is subject to federal and state income tax withholding. *Rivera v Baker West, Inc.* While the designation of what portion of a settlement is subject to withholding is not binding on the IRS, failure to make any allocation makes the entire amount subject to withholding. *Comment:* It has always been the better practice to designate some portion of economic damages as subject to withholding. Unless the nature of the underlying action demonstrates that no portion of the case sought recovery of economic damages, some designation toward economic damages should be made.

HAPPY HOLIDAYS

We wish all of our clients and other friends the happiest of holidays and continuing successes in the coming year. We value our relationship with you and look forward to continuing it in the new year.

-Ron

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