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# Labor & Employment Briefing

A NEWSLETTER ON EMPLOYMENT, LABOR AND BENEFITS LAW FOR CLIENTS AND FRIENDS OF ANDERSON, MCPHARLIN & CONNERS LLP

## The Court Of Appeal Clarifies Use Of The Lodestar Multiplier

*by Colleen A. Déziel*

In Nichols v. City of Taft, the Court of Appeal held that whether or not a trial court applies the Lodestar Multiplier when setting attorney's fees is discretionary.

In this matter, the trial court improperly found that it was *required* to apply the multiplier solely due to the fact that the plaintiff's attorneys were from an out-of-town area where fees were higher.

The Court of Appeal held that focusing solely on the issue of counsel being from out of town was improper, as the trial court should have also looked at the factor of whether the plaintiff made the threshold showing that obtaining local counsel was impracticable.

Thereafter, the trial court should consider the need to hire more expensive out of town counsel as a factor in determining the base fee used in the Lodestar figure or in evaluating whether to apply a Lodestar enhancement.

The Court of Appeal also reiterated that the Lodestar figure is calculated using the reasonable rate for comparable legal services in the local community for non-contingent litigation of the same type, multiplied by the reasonable number of hours spent on the case. And, in the unusual event that local counsel is unavailable, the plaintiff can make a threshold showing of such and consider out of town higher rates.

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## Costs & Fees Recoverable If Not Specifically Excluded In Statutory Offers To Compromise

*by Vanessa A. Davila*

***When using 998s be specific as to whether costs and fees are included or excluded***

This cautionary tale comes from the Court of Appeal in hopes of providing a warning to all employers. Where a statutory offer to compromise, made pursuant to California's Code of Civil Procedure § 998, is silent on costs and fees, the prevailing party is entitled to costs and, if authorized by statute or contract, fees.

Plaintiff Engle worked as a legal assistant for Copenbarger, her employer. Engle resigned following various alleged acts of sexual harassment and filed a Complaint against her former employer asserting various causes of action, including statutory discrimination claims for sexual harassment, discrimination based on sex, and retaliation for objecting to sexual harassment. Attorney fees were requested on the sex discrimination claim. Copenbarger made a statutory offer to compromise (C.C.P. § 998), proposing that judgment be taken against it for $35,000. The terms of the offer specifically provided that judgment be taken in exchange for a "release and discharge of any and all claims, of whatever nature (substantive or procedural) which the plaintiff may have against the defendants." Engle accepted the offer in writing the same day.

The following day, Copenbarger delivered the settlement check to Engle and asked that she sign a release. The language in the release, however, was significantly different from the offer accepted by Engle on the previous day. The release enumerated the relief sought in Engle's complaint, including her request for statutory attorney's fees. It further stated that Engle released Copenbarger from "any and all relief sought by virtue of plaintiff's complaint as specified in the prayer or otherwise," with the effect of essentially eliminating Engle's claim for costs and attorney's fees. Not surprisingly, Engle refused to sign the release. Copenbarger attempted to block entry of judgment but failed when the trial judge ruled it was not entitled to the release, and instead, entered judgment according to the terms of the offer. However, Engle's fee motion was denied by the trial court when it found, among other things, that the statement in the offer about the claims released was broad enough to include any claim for fees. Engle appealed the trial court's ruling arguing that she was entitled to fees because they were not expressly excluded in the offer to compromise. The Court of Appeal agreed with Engle.

In its reversal of the trial court's ruling, the Appellate Court held that there is a right-line rule concerning section 998 offers to compromise. The rule is that a C.C.P. § 998 offer to compromise excludes costs and fees only if it expressly states as such. Attorney fees authorized by statute are available to a party who prevails by a C.C.P. § 998 compromise settlement that is silent as to costs and fees. The rationale is this: "Section 998 only settles those issues which would have been resolved at the trial. Costs and attorney's fees are authorized solely by statute and are incident of the judgment unless expressly part of the judgment." If Copenbarger wanted a fee waiver, it should have put one in the offer. Since the offer was silent on fees, it did not bar a later fee motion by the employee.

Engle v. Copenbarger and Copenbarger, et al. (2007) 157 Cal.App.4th 165, 68 Cal.Rptr.3d 461.

## California Minimum Wage Now $8.00 Per Hour

*by Glen H. Mertens*

As of January 1, 2008, the minimum wage for employees working in California has been raised from $7.50 per hour to $8.00 per hour. This new increase requires employers in California to pay substantially more than is required under the federal minimum wage, which is currently set at $5.85 an hour (and will increase to $6.55 an hour on July 24, 2008). Although the California minimum wage is higher than the federal minimum wage, employers in California must post both the federal and state minimum wages at their respective worksites.

California employers must pay their workers for work performed on or after January 1, 2008 at the new, higher rate. Work performed through December 31, 2007 may be paid at the old rate of $7.50 per hour.

***California minimum wage earners get a bump up***

The increase in the minimum wage has ramifications beyond just the amount of pay that must be budgeted for workers earning a minimum-wage rate of pay. Perhaps the most significant of these "collateral effects" relates to salaried employees whom an employer wishes to consider "exempt" from California's overtime rules. In order to be considered an "exempt" executive, administrative, or professional employee, a worker must, among other requirements, meet the minimum salary requirement, which is calculated with reference to the minimum wage. With the increase in the minimum wage, the minimum salary required to maintain an exemption from the overtime regulations has increased to $2,773.33 per month, or $33,280.00 per year.

The minimum wage increase also affects the hourly base rate of pay for computer software employees who are considered “exempt” from the state’s overtime laws. The base rate of pay is one factor to be considered in determining whether or not a computer software employee is indeed exempt. Effective January 1, 2008, the hourly base rate for such employees must be at least $36.00 if the employer intends to consider such workers exempt.

The increase also has implications for commissioned “inside-sales” employees whom the employer wishes to consider exempt from overtime under California Wage Orders Nos. 4 and 7. In order for such sales personnel to be considered exempt, those employees must earn at least 1.5 times the new minimum wage for all hours worked.

Unionized employers who rely on the “collective-bargaining exemption” from the state’s overtime rules should review the compensation schedules for their unionized employees. The collective bargaining exemption permits an employer to exempt employees from the state's overtime requirements provided the affected employees are covered by a valid collective bargaining agreement that provides for, among other things, premium wage rates for overtime hours worked and a regular hourly rate of pay of at least 30% more than the state’s minimum wage. In 2007, the hourly pay rate required to maintain the collective-bargaining exemption was $9.75 per hour; effective January 1, 2008, the hourly rate of pay must be at least $10.40 per hour.

Employers doing business in California are advised to review their "labor law posters" to ensure that the new state minimum wage is properly stated. It goes without saying, of course, that any employer paying minimum wage to its workers must revise the rate of pay upward to comply with the rate that went into effect at the beginning of this year.

## Terminated Employees May Seek Recovery Of All Unpaid Accrued Vacation

***by Glen H. Mertens***

In California, accrued vacation pay is considered a form of "wages" and is not lost or forfeited merely because the employee does not use the accrued time to take vacations. As with other types of wages, accrued, unused vacation time must be "cashed out" and paid to a terminating employee at the time of termination. A worker who believes that (s)he has not received a pay-out of all the vacation time that (s)he had accrued as of the date of termination may bring a civil lawsuit to collect the unpaid vacation or file an administrative claim with the California Division of Labor Standards Enforcement ("DLSE") in which the DLSE is asked to recover the unpaid vacation. For years, the DLSE took the position that the applicable statutes of limitation that determine when a claim for unpaid vacation must be filed—typically three or four years, depending upon whether the vacation claim is based on the Labor Code or on a written contract that provides for vacation accrual---also determined how far back into the "bank" of accrued vacation the employee could go in seeking a pay-out of unused vacation time. The DLSE's rule had the effect of limiting the amount of vacation pay a long-term employee could recover, as any vacation that had accrued more than three or four years before the date of termination simply would not be recoverable.

In Church v. Jamison, however the Court of Appeals in Fresno invalidated the DLSE's position and held that the statutes of limitation on claims for unpaid vacation begin to run when the worker is terminated and do not operate "backward" to limit the amount of pre-termination vacation that may be recovered. Under this ruling, a terminated employee who believes that s(he) has not received a full pay-out of all unused vacation that (s)he accrued throughout the course of his or her employment may seek to recover a pay-out of all such vacation, including those portions of the vacation benefits that accrued several years prior to the date of termination. Thus, for example, a ten-year employee would be entitled to seek recovery of all unused vacation pay that had accrued during that ten-year period of employment and would not be limited to recovering only those amounts that had accrued during the last three or four years of the employment relationship.

Employers that offer vacation pay as a benefit need to remember that *all* accrued, unused vacation must be "cashed out" and paid to an employee who is being terminated at the time of termination. Vested vacation typically must be paid out at the employee's final rate of pay, even though some of the vacation may have accrued at earlier, lower rates of pay, so the employer's pay-out liability at the time of termination may be considerable.

There are two ways of managing this type of vacation liability. First, employers may place an express "cap" on the amount of total vacation that an employee may accrue. If the employee accrues the maximum amount of vacation permitted under the "cap," no further vacation will accrue in that employee's name until (s)he uses some of that vacation time and thereby reduces the amount of accrued vacation in his or her "bank." Second, an employer is free to encourage workers to take vacation and thereby reduce the amount of unused vacation time in their respective banks. An employer that provides for the accrual of vacation time but then discourages or dissuades its workers from taking vacation time off is simply creating a liability that will have to be paid out in full at the time each employee separates from the company.

## Three Instances Of "Inappropriate" Conduct Over Five Weeks Not Sufficient To Establish A Hostile Work Environment

***by Kristin M. Kubec***

Pamela Mokler was hired by the County of Orange in November 2000 as the executive director for their Office on Aging (OoA), which is an advocate agency of the County for elderly citizens.

Mokler's first supervisor consistently rated Mokler's job performance as "exceptional." Her second supervisor (Landrus) was appointed as interim director of the Community Services after Baker's retirement. Landrus informed Mokler that the Office of Aging would undergo some restructuring. Upon being told about the proposed restructuring of the OoA, Mokler expressed her belief that the planned restructuring would violate the County's contract with the California Department of Aging (CDA) as well as federal and state law.

Mokler's supervisors were concerned about Mokler's warnings and instructed her, both verbally and in writing, not to alert the CDA of the changes. Mokler ignored the instructions and informed the CDA about the changes being planned. Subsequently, the County fired Mokler.

Also during her employment, Mokler had several unpleasant interactions with Supervisor Norby, a board member. On three separate occasions over a five week period, Norby engaged in inappropriate behavior as follows: on the first occasion, he called her an "aging nun" when he discovered she was not married; on the second occasion, he told her she looked nice, pulled her close to him and asked her if she was lobbying him, also telling her she had a nice suit and nice legs; and on the third occasion, he told her she looked nice, put his arm around her at which point his arm touched her breast, and made the comment "why the f—k do you have to do something special for Mexicans?"

Mokler sued the County in the Superior Court of Orange County for (1) Breach of Contract; (2) Wrongful termination; (3) Unlawful retaliation under Labor Code section 1102.5, subdivision (b); and, (4) Gender-based "hostile work environment" claim under FEHA. The trial court dismissed the first two claims, holding that Mokler failed to exhaust her internal administrative procedural right to remedies.

Mokler proceeded to trial on the two remaining claims for unlawful retaliation and hostile work environment against the County and Norby. The jury returned a verdict in favor of Mokler, finding that she had been retaliated against as a whistleblower and that Norby created a "hostile work environment" for Mokler though she did not suffer any damages during her contact with him. The trial court denied the defendants' request for judgment notwithstanding the verdict (JNOV) as to liability on both claims, but did order a new trial on damages.

The defendants appealed the denial of their JNOV motion while Mokler appealed the partial new trial order.

The Court of Appeal held that the County's argument that Mokler had failed to exhaust her internal administrative remedies could not be raised for the first time on appeal. It further held that Mokler presented substantial evidence that the County's reasons for terminating her were a pretext for its true motive.

As to the hostile work environment claim, the Court of Appeal found that the three instances of conduct described by Mokler over a five week period were not sufficiently severe and pervasive enough to create a hostile work environment. The Court noted that the acts she described demonstrated rude, inappropriate and offensive behavior, but that in order to have an actionable claim for hostile work environment, the workplace must be "permeated with discriminatory intimidation, ridicule and insult. . ."[citations omitted] Mokler failed to present evidence of such sufficiently severe or pervasive acts, and therefore the Court of Appeal reversed the trial court's denial of the defendants' JNOV on that claim.

Mokler v. City of Orange *2007 WL 4148594*

## Medically Prescribed Use Of Marijuana Not A Reasonable Accommodation

***by Michelle T. Harrington***

On January 24, 2008, the California Supreme Court issued its decision in *Ross v. Ragingwire Telecommunications, Inc.*, 2008 Cal. LEXIS 784, a case that addressed the question of whether a person who is authorized to use marijuana for medical purposes under the California Compassionate Use Act (Cal. Health & Safety Code § 11362.5) and discharged from employment on the basis of his or her off-duty use of marijuana, has a claim under the California Fair Employment and Housing Act ("FEHA") (Cal. Gov't Code § 12900 et seq.) for discrimination based upon a disability or wrongful termination in violation of public policy.

In the *Ross* case, the plaintiff suffered from chronic strain and muscle spasms in his back as a result of injuries he sustained while serving in the United States Air Force. Because of his condition, plaintiff was a qualified individual with a disability under the FEHA and received governmental disability benefits. After failing to obtain relief from pain through other medications, plaintiff began to use marijuana on his physician's recommendation pursuant to the Compassionate Use Act.

Defendant RagingWire Telecommunications, Inc. offered plaintiff a job as lead systems administrator. Defendant required plaintiff to take a drug test as a condition of his employment. Before taking the test, plaintiff gave the clinic that would administer the test a copy of his physician's recommendation for marijuana. Plaintiff took the test and began work. A few days later, the clinic informed plaintiff that he had tested positive for a chemical found in marijuana. Plaintiff gave defendant a copy of his physician's recommendation for marijuana and explained to defendant's human resources director that he used marijuana for medical purposes to relieve his chronic back pain. After verifying his physician's recommendation for marijuana use, the defendant's board of directors met and decided to fire plaintiff because of his marijuana use.

The plaintiff filed suit alleging the defendant violated the FEHA by denying him employment and failing to make reasonable accommodation for his physical disability, chronic back pain and muscle spasms, for which he sought relief from the use of marijuana. The accommodation the plaintiff sought was for the defendant to allow him to use marijuana at home by waiving the defendant's policy of requiring a negative drug test of new employees. Just as it would violate the FEHA to fire an employee who used insulin or Zoloft, the plaintiff argued that it violated the statute to terminate an employee who used a medicine deemed legal by the Compassionate Use Act.

The plaintiff also contended that his discharge violated fundamental public policies supported by the Compassionate Use Act, the FEHA, and the privacy clause of the California Constitution.

The defendant sought to have the case dismissed through a demurrer, arguing that the plaintiff's allegations failed to state a cause of action for either disability based discrimination or wrongful termination in violation of public policy. The trial

court judge granted judgment in favor of the defendant.

The plaintiff appealed the trial judge's ruling, but the Court of Appeal affirmed the judgment in favor of the defendant.

The California Supreme Court affirmed the Court of Appeal's decision. In affirming the lower courts' decisions, the Supreme Court examined the legislative history and scope of the Compassionate Use Act. The Supreme Court explained:

> "Plaintiff's position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the Act's effect is not so broad. No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law [citations], even for medical users [citations] …. California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees."

The plaintiff argued that not to require employers to accommodate marijuana use would "eviscerate the right promised to the seriously ill" by the Compassionate Use Act. The Supreme Court rejected that argument, holding that the only "right" to obtain and use marijuana created by the Act is the right of a "patient, or … a patient's primary caregiver, [to] possess or cultivate marijuana for the personal medical purposes of the patient upon the written approval or oral recommendation or approval of a physician" without thereby becoming subject to punishment under sections 11357 and 11358 of the Health and Safety Code. The Supreme Court further noted that an employer's refusal to accommodate an employee's use of marijuana does not affect, let alone eviscerate, the immunity to criminal liability provided in the Act.

The high court also rejected the plaintiff's argument that legislation enacted after the Compassionate Use Act requires employers to accommodate employees' use of medical marijuana at home. The plaintiff cited to Health and Safety Code section 11362.785, subdivision (a), which provides as follows: "Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained." According to the plaintiff, this language articulated express exceptions to a general requirement of accommodation.

In rejecting that argument, the Supreme Court commented that the plaintiff's interpretation might be plausible if the failure to infer a requirement of accommodation would render the statute meaningless, but such is not the case. Even without inferring a requirement of accommodation, the statute could be given literal effect as negating any expectation that the immunity to criminal liability for possessing marijuana granted in the Compassionate Use Act gives medical users a civilly enforceable right to possess the drug at work or in custody.

Interestingly, the high court rejected the statements submitted by five present and former state legislators who authored the bill adding section 11362.785 to the Health and Safety Code to the effect that they "believed that this statutory enactment clearly and sufficiently expressed [their] belief that the FEHA does require employers generally to accommodate off-duty, off-premises medical cannabis use by their employees, absent an undue hardship." In so doing, the Supreme Court explained that the legislators never asserted that they shared their views of the proposed legislation with the Legislature as a whole and, therefore, there was no basis for imputing the authors' views to the whole Legislature.

Then, citing to its decision in Loder v. City of Glendale (1997) 14 Cal.4th 846, 882-883, wherein the high court held that an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions, the Supreme Court held that the FEHA does not require employers to accommodate the use of illegal drugs. Accordingly, the court concluded that the plaintiff could not state a cause of action under the FEHA based upon the defendant's refusal to accommodate his use of marijuana.

The court then turned to the wrongful termination in violation of public policy claim. First, the high court addressed the plaintiff's contention his discharge violated the fundamental public policy supported by the Compassionate Use Act and the FEHA. In rejecting that claim, the court explained, "Nothing in the act's text or history indicates the voters intended to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees. Because the act articulates no such policy, to read the FEHA in light of the Compassionate Use Act leads to no different result."

Next, the Supreme Court dealt with the plaintiff's argument that his discharge violated the public policy that underlies an adult patient's right to determine whether or not to submit to lawful medical treatment, a right founded upon the privacy clause of the State Constitution and in the common law. The plaintiff's argument relied upon the decision of a federal district court in Abigail Alliance v. Von Eschenbach (D.C. Cir. 2006) 370 U.S. App. D.C. 391 [445 F.3d 470, 486]. In that case,

a federal court held that a terminally ill patient with no other government-approved treatment options had a due process right under the United States Constitution to have access to an investigational new drug that the Food and Drug Administration had not approved for commercial sale but had determined to be sufficiently safe for testing on human beings. Analogizing to Abigail Alliance, the plaintiff argued that the defendant was not permitted to prohibit the plaintiff from medical marijuana use under the State Constitution since such use was legal in California.

In rejecting this argument, the court explained that the defendant has not prevented the plaintiff from having access to marijuana. Rather, the defendant has only refused to employ the plaintiff. As a result, the court held that the plaintiff cannot state a claim for wrongful termination in violation of a public policy.

What should California employers learn from the Ross case? While the case appears to favor employers, employers should, nevertheless, be wary when discharging or refusing to hire an employee for medical marijuana use when it occurs off-duty, does not effect the employee's job performance, does not impair the employer's legitimate business interests, and provides the only effective relief for the employee's medical disability. As stated in the concurring and dissenting opinion of Justice Kennard, the purpose of the Compassionate Use Act is to allow California residents to use marijuana, when a doctor recommends it, to treat medical conditions, including chronic pain, without being subject "to criminal prosecution or sanction." Arguably, an interpretation of the Act that allows employers to terminate those employees who use marijuana pursuant to the provisions under that law defeats the law's purpose.

Furthermore, in light of the FEHA's broadly stated purpose "to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of … physical disability … [or] medical condition ...," the requirement that provisions of the FEHA be construed liberally, and the chameleon nature of this area of law, employers might be wise to evaluate whether accommodating an employee's medical marijuana use would pose an undue hardship upon the employers' business or effect the safety of its employees before making a decision to discharge or not hire an employee due to his or her legal cannibis use.

## Employer Vowing To "Crush" Opposition To Its Plan Crushed By Jury

***by Eric A. Schneider***

In Wysinger v. Automobile Club of Southern California, (2007) 157 Cal.App.4th 413 ("ACSC"), Santa Barbara office district manager, Guy Wysinger, had asked for a transfer to the Ventura office and promotion to the position of office manager. He sought the position both because it represented a promotion and more money and because it represented a less arduous commute which might ease his rheumatoid arthritis symptoms. He also suffered from Lupus and a heart condition.

The position he wanted opened up in the Ventura office, and he put in for it. Robert Kane, however, recommended another individual for that position even though that person had not even applied, and Kane had agreed that Wysinger was the most qualified for the job.

Kane had a few years prior called Wysinger into his office and told him "We are going to crush those opposing [a new compensation plan]." He further stated,

"It doesn't matter what you did for this company in the last 30 . . . years. None of that matters. And you can die at your desk. We will replace you tomorrow. Nobody cares."

Upon being passed over for the promotion, Wysinger brought suit on a variety of theories. The jury found in his favor and awarded economic damages of $204,000, non-economic damages of $80,000, and $1 million in punitive damages.

ACSC appealed on a variety of grounds. It contested that there had been an adverse employment action. The Court of Appeal rejected that argument because ACSC's conduct, which included undeserved negative job reviews, reduction in his staff, ignoring his health concerns, and ultimately denying the promotion taken as a whole constituted an adverse employment action. In that regard it cited the California Supreme Court in Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028 noting that the collective impact of a series of retaliatory acts may constitute adverse employment action even if some of the acts individually would not.

The court also rejected the defendant's argument that the jury's finding that the employer was not liable for failing to provide a reasonable accommodation for the employee's disability while at the same time finding it liable for failing to engage in the interactive process to determine reasonable accommodations was inconsistent. In that regard the court found that the reason there was no failure to provide a required accommodation was that the parties had never reached the stage deciding which accommodations were required because the employer had prevented that from happening by refusing to engage in the interactive process.

The trial court had also awarded Wysinger's attorneys almost $1 million in fees. ACSC contended that the fees had to be apportioned because the plaintiff had only prevailed on some but not all of the causes of action.

The court denied that argument citing United States Supreme Court in Hensley v. Eckerhart (1983) 461 U.S. 424 at 440: "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount or reasonable fee." At the same time, however, in *Hensley* the court also said, "Where if plaintiff has obtained excellent results, his attorney should recover a fully compensated fee. Normally this would encompass all hours reasonably expended on the litigation. . . . In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." Hensley v. Eckerhart, supra 461 U.S. at 435.

## Provisions In Mandatory Arbitration Agreements That Purport To "Waive" Employee's Right To Pursue A "Class Action" May Be Unenforceable

***by Glen H. Mertens***

Many employers routinely require new employees to sign mandatory arbitration agreements as a condition of employment. Given the dramatic increase in "class action" claims, particularly in the field of wage-hour litigation, many employers have included in those arbitration agreements a provision by which the employee purports to waive his or her right to address future employment claims as part of a class action. In Gentry v. Superior Court, 42 Cal.4th 443 (2007), the California Supreme Court held that such class action waiver provisions may be unenforceable, even if the basic arbitration agreement itself is enforceable.

The case involved a dispute between Circuit City Stores and one of its employees, Mr. Gentry. Mr. Gentry had signed an arbitration agreement at the start of his employment that provided that he and Circuit City would resolve any employment-related disputes they might have through binding arbitration. The written agreement also contained a clause that provided that the claims of multiple employees could not be combined or aggregated into a class action.

The arbitration agreement notwithstanding, Gentry eventually filed a class action lawsuit in court against Circuit City in which he alleged that he and other, similarly situated employees had been misclassified as "exempt" from California's overtime rules and that all of the class members were entitled to compensation for the overtime that they supposedly had worked. Not surprisingly, Circuit City invoked the written arbitration agreement that Gentry had executed and argued that the lawsuit should be diverted into binding arbitration. Circuit City also argued that the provision by which Gentry "waived" his right to participate in a class action meant that none of his wage-hour claims could proceed as a class action, whether litigated in court or before an arbitrator.

Following proceedings in the trial court and before the intermediate court of appeals, the matter reached the California Supreme Court. The Supreme Court devoted most of its attention to the issue of whether or not the class action waiver was enforceable. The Supreme Court declined to enforce the waiver, expressing a number of concerns about such class action waivers. Although the Court did not rule that all such class action waivers were per se unenforceable, the criteria that the Court identified as being relevant to a determination as to the enforceability of such waivers suggest that most such waivers are likely to be found unenforceable, particularly in the context of wage-hour claims. The Supreme Court sent Mr. Gentry's case back to the trial court with instructions that it review the Circuit City class action waiver under the criteria that it outlined in its opinion.

In its analysis, the Supreme Court looked favorably on the class action device as a means by which individuals with claims of small monetary value would not be discouraged from enforcing their rights. The Court observed that when individual amounts at stake are small and the cost of maintaining one's own lawsuit (or arbitration) is high, individual employees might be discouraged from pursuing their claims, thereby allowing an employer who is in violation of the labor laws to benefit from its wrongdoing. In Gentry's case, the Court noted that the wage-and-hour laws at issue established rights to overtime compensation that cannot be waived by an employee who is "non-exempt." Expressing a concern that an employee's right to overtime compensation under the wage-hour laws might be compromised if the employee were to be precluded from participating in a class action claim, the Supreme Court identified the following factors that a court should consider in determining if a class action waiver is enforceable:

- The modest size of the potential individual recovery;
- The potential for retaliation against individual members of a class who make a claim to enforce their rights under the applicable laws;

- The fact that putative class members may be poorly informed about their rights under the applicable laws; and

- The obstacles individual class members would face in trying to vindicate their rights through individual actions.

If the trial court considers the above factors and concludes that a class action is likely to be a significantly more effective way of vindicating the rights of the affected employees and/or concludes that denying a class action will likely lead to a less comprehensive enforcement of the laws at issue, that court must invalidate the class action waiver that the employee(s) ostensibly agreed to as part of the arbitration agreement.

As a practical matter, the criteria developed by the Supreme Court in Gentry will make it extremely difficult for an employer to enforce a class action waiver in the context of a "garden variety" wage-hour claim. Most such disputes involve "modest" requests for recovery, such that it would not be difficult for a court to conclude that there is a real risk that all of the employees who allegedly were "victimized" by the employer's failure to abide by the wage-hour laws will be unable or unlikely to prosecute actions to recover what they are owed under the law in separate, individual lawsuits or arbitrations. Indeed, the criteria set forth by the Supreme Court in Gentry is largely a paraphrase of justifications identified in earlier cases for upholding the propriety of the class action device in wage-hour litigation. The employment community should not be surprised if virtually every class action "waiver" is found to be unenforceable by trial courts applying the Gentry criteria in wage-hour cases.

It is important to note, however, that the Supreme Court did not rule that such class action waivers are inherently or per se unenforceable. It is theoretically possible, therefore, that an employer might successfully invoke such a waiver and have a judge or an arbitrator rule that a particular claim may not be prosecuted as a class action. For instance, hypothetically, a group of highly paid executives might have a difficult time convincing a judge or an arbitrator that their claims to "hundreds of thousands of dollars" in unpaid severance compensation, for example, are so "modest" as to make it difficult for them to prosecute individual actions to vindicate their rights. Similarly, employees who seek large awards of compensatory damages for "emotional distress" and punitive damages because of some perceived wrong allegedly committed by the employer may find it difficult to persuade a judge or an arbitrator that their rights are unlikely to be vindicated unless they are allowed to prosecute their claims in the form of a class action.

It is also important to note that Gentry does not alter or change the rules for determining whether or not a class action is in fact appropriate in a given case. Gentry focused on whether or not an employee's purported waiver of the right to participate in a class action is enforceable; it did not address the rules that would be applied in determining whether or not the case should ultimately proceed to trial as a class action. A court might conclude that the waiver of the right to participate in a class action is unenforceable and nevertheless conclude, later in the case, that a class action is not an appropriate vehicle for the adjudication of the claims at issue. For instance, the number of putative class members may be too small to warrant class certification, or the claims of the potential class members are so different and diverse that there are little "common questions" among the claims that would make a class action an appropriate vehicle for resolving the disputes.

While avoiding class action litigation is a commendable goal, employers in California should not assume that they may simply "write class actions out of existence" by having employees execute waivers of their right to participate in such actions. The enforceability of a class action waiver must be evaluated on a case-by-case basis, such that an employer will have little certainty at the moment a new claim is filed as to whether or not such a waiver will result in the dismissal of the class action allegations.

## One-Year Statute Of Limitations Applies To Claims That Seek Only "Waiting-Time" Penalties

***by Glen H. Mertens***

As all employers doing business in California should know, California Labor Code § 201 requires that all wages (including accrued, unused vacation) earned by an employee must be paid to that employee on the day (s)he is terminated. If the employee resigns without notice, Labor Code § 202 provides that the employer has 72 hours from the point of resignation to tender all of the employee's accrued pay. Failure to tender all of the employee's accrued pay in a timely manner subjects the employer to "waiting-time" penalties under California Labor Code § 203. Section 203 provides that the employer must pay a penalty amounting to one day's pay for each day that it is late in tendering the employee's accrued wages. The maximum amount of such penalties is 30 days' pay. Given the fact that most disputes over allegedly unpaid wages are not resolved within 30 days, an employer who is accused of not paying an employee for all hours worked, including overtime, at the time of that employee's separation almost inevitably is facing the possibility of a 30-day penalty under Section 203 in addition to the amount of unpaid compensation that is the subject of the dispute.

A claim for unpaid wages is subject to a three-year statute of limitations. In most wage-hour cases, a claim for waiting-time penalties under Section 203 is simply "piggybacked" onto a claim for unpaid wages/compensation, in which case, pursuant

to the terms of Section 203 itself, the claim for the penalty is considered timely if the claim for the unpaid wages is timely.

In the recent case of McCoy v. Superior Court, however, plaintiff Derrick McCoy filed a lawsuit in which he sought only waiting-time penalties from defendant Kimco Staffing Services' on account of the latter's alleged failure to pay final wages on completion of temporary work assignments in violation of Labor Code §§ 201 and 202. The case was styled as a class action, in which Mr. McCoy alleged that he and other temporary employees of the defendant had not been paid their final wages upon discharge or within 72 hours of resignation but had, instead, been paid on the next scheduled pay day. McCoy conceded that the wages due had been paid; the lawsuit sought only to recover waiting-time penalties under Section 203.

The court in McCoy noted that the California Labor Code does not contain a statute of limitations that expressly applies to a claim for penalties under Section 203. The court concluded that the one-year statute of limitations set forth in California Code of Civil Procedure § 340(a) applies, as that section sets forth the statute of limitations for a claim seeking to recover a "penalty." The McCoy court noted that the California Supreme Court, in the case of Murphy v. Kenneth Cole Productions, Inc., had held that the wages called for in Section 203 "accrue as a penalty." As McCoy's lawsuit sought only to recover waiting-time penalties under Section 203 and did not seek to recover any of the wages that allegedly had been paid in an untimely manner (those wages evidently having already been paid, albeit belatedly), the lawsuit was governed by the one-year statute of limitations rather than the three-year period that would apply had the plaintiff sought to recover wages or other compensation as part of the claim.

Although McCoy is a helpful clarification of the law on this point, the practical effect for employers is likely to be minimal. In most wage-hour cases brought by workers whose employment has ended, the claim is typically for compensation that allegedly was due and payable at the time of separation but which was never paid. Even though the former employee may seek waiting-time penalties under Section 203, the fact that (s)he is also seeking payment of the compensation allegedly due (which is often the subject of dispute), a three-year statute of limitations will be deemed to apply. In those cases where a former employee has been paid all compensation due and the only issue in dispute is whether or not that compensation was paid in a timely manner, however, a lawsuit on that dispute would have to be filed within one year of the date the compensation should have been paid.

Employers in California are advised to comply with the requirements of Labor Code §§ 201 and 202 carefully. If an employee is to be terminated, his or her final paycheck must be prepared and tendered to the employee on the day of the termination, even if the check has to be prepared manually, separate and apart from the normal payroll processing routine.

## Appellate Courts' Unusual Action Regarding "Provision" Of Meal Breaks Cause For Concern

***by Glen H. Mertens***

As all California employers should be aware, non-exempt employees are entitled to a meal break of at least one-half hour if they work more than five hours in a workday. Moreover, those non-exempt employees are entitled to a ten-minute, paid rest break in the middle of every four-hour block of time they work in a workday. An employer is required to compensate an employee one extra hour's worth of pay for each meal break that is not provided. Similarly, an employer must pay an extra hour's pay if a non-exempt employee is not provided with an appropriate number of rest breaks throughout the course of a workday. In Murphy v. Kenneth Cole Productions, Inc., the California Supreme Court ruled that claims for the one-hour penalties for missed breaks are subject to a three-year statute of limitation rather than a one-year statute of limitation. [It is possible for the employee to extend the claim for such penalties back four years if (s)he characterizes the violation of the state's wage-hour laws as an "unfair business practice," although that issue was not addressed expressly in the Murphy decision.] In the worst-case scenario, this means that an employee who claims to have been "denied" meal and/or rest breaks on a consistent basis may seek to recover one, possibly two, hours' pay for each day (s)he worked going back at least three years.

Given the extended period of recovery authorized by the Murphy case, probably the most important question being asked by employers concerning meal and rest breaks in California is what is meant by the obligation to "provide" such breaks. Does "provide" require employers literally to force non-exempt employees to take such breaks (by direct orders, disciplinary procedures, etc.), or does the term merely require employers to make such breaks available to the affected workers? If the law is that the obligation to "provide" breaks means that the employer must take steps to ensure/guarantee that the breaks are taken irrespective of the desires of the individual employees, then a large percentage of California's employers face huge risks from disgruntled employees and former employees who chose to skip their breaks claiming that they were not "provided" breaks on a regular basis.

The California courts have not provided a clear, definitive answer to this critical question. Last October, though, an intermediate court of appeal, in the case of Brinker Restaurant Corp. v. Superior Court, concluded that an employer's obligation to "provide" employees with meal breaks merely means to "offer" meal breaks, i.e., to make such breaks available. Equally important, the appellate court noted that it was improper to certify a "class action" on a claim for missed breaks, because the jury would have to determine on a worker-by-worker basis whether the breaks were missed as a result of a supervisor's coercion,

(e.g., "No, you can't take a break today; we're too busy"), or because the employee made a choice to waive such breaks and continue working. Although the Brinker decision was not a published opinion and thus could not be cited by lawyers as a definitive statement of the law, the decision was widely reported and provided some hope to the employment community that the law was at least moving in the right direction.

Unfortunately, the appellate court had a change of heart about some aspect of its opinion and asked the California Supreme Court to vacate the opinion and transfer the case back to that appellate court for reconsideration. The Supreme Court granted the appellate court's request and remanded the case to the appellate court, which has not yet issued a revised opinion on the case.

The fact that the very court that issued the favorable rulings in Brinker went out of its way to request an opportunity to reconsider those rulings is cause for concern among California employers. While it is, of course, possible that the court will not change its mind on the important issues of class certification in meal-break cases and what it means to "provide" such breaks, it is also possible that the court will issue totally new conclusions on those topics that differ dramatically from the pro-employer rulings found in the original decision. The court may also choose to publish its revised opinion and thereby make that opinion a statement of law that other courts will look to in determining the same questions in subsequent cases. The employment community is now "holding its breath" awaiting the revised Brinker opinion, recognizing that the opinion, if published, could open the floodgates for more missed-break litigation or limit such litigation to situations where employees claim to have been affirmatively prevented from taking their breaks.

Employers are advised to review their daily scheduling procedures to ensure, at a minimum, that staffing levels are such that non-exempt employees truly do have the opportunity to take the required meal and rest breaks throughout the course of the workday. Meal break times should be recorded as part of the daily time records. Rest break times do not have to be recorded in the same manner, but an employer would be wise to have each non-exempt employee acknowledge that (s)he did take "X rest breaks" for each day worked, the number of breaks noted being dependent on the hours the employees actually worked. [E.g., a full-time employee working eight hours a day would acknowledge that (s)he took two rest breaks for each day worked.]

## Employee Expenses May Be Paid Via Increased Or Enhanced Wages Or Commissions

***by Colleen A. Déziel***

In an update from our last newsletter wherein we noted that the Supreme Court was going to decide whether or not expenses could be paid through increased/enhanced wages or commissions, we note that the Supreme Court has ruled that indeed an employer may satisfy its statutory obligation by paying those expenses in this manner.

More specifically, Labor Code section 2802 requires an employer to indemnify its employees for expenses they necessarily incur in the discharge of their duties. Does section 2802 permit an employer to do so through an increase in overall compensation rather than through a separately identified reimbursement payment? The Supreme Court went through an exhaustive analysis of the various ways in which expenses may be calculated and reimbursed before coming to its decision.

This analysis included:

(1) the *actual expense* method. This method is not favored because it imposes an onerous burden on both the employee and the employer by requiring detailed record keeping by the employee and complex allocation calculations, and also the exercise of judgment by the employer to determine whether the expenses incurred were reasonable and therefore necessary;

(2) *the mileage reimbursement* method, which is also not favored. This method is merely an approximation of actual expenses and inherently less reliable than the actual expense method. Given this, the employer must provide to employees the right to appeal the employer's decision on the amount owed; and,

(3) the *lump sum* method, which was the crux of the dispute in this appeal. Under this method the employer pays a fixed amount for automobile expense reimbursement . The fixed amount may take various forms and is generally based on the employer's understanding of the employee's job duties, including the number of miles that the employee typically or routinely must drive to perform those duties.

According to the Supreme Court, Labor Code section 2802 does not restrict the method an employer may use to satisfy this code section and does not prohibit the lump sum method, provided that the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred. As such, the employer is free to use this method. However, the high court went on to add that the employer must establish some means to identify the portion of overall compensation that is intended as expense reimbursement.

## Claims Adjustors Exempt? The Supreme Court Will Be Deciding This Issue Soon

*by Colleen A. Déziel*

In another update from our last newsletter, we previously reported that in Harris v. Superior Court, the Court of Appeal found adjusters did not fall within the administrative exemption. Since then, the Supreme Court has decided to review the decision and revisit the issue of what exactly qualifies as an administrative exemption.

## "Me Too" Evidence To Be Decided By The U.S. Supreme Court

*by Colleen A. Déziel*

Another case to watch is Sprint/United Management v. Mendelsohn. In this case, the issue is whether workers claiming discrimination under the Age Discrimination Act may introduce adverse testimony of co-workers regarding similar mistreatment to support the employees' job bias claims. Typically, such evidence has been excluded. We will keep you updated.

## Make Sure You Obtain Signed Arbitration Agreement Before You Attempt To Enforce the Arbitration Clause

*by Colleen A. Déziel*

In Mitri v. Arnel Management, the plaintiffs filed claims, and the Court held that even though the employer had an arbitration provision in its handbook, the fact that it could not produce a signed copy of an Arbitration Agreement prevented the trial court from enforcing the Agreement. The Court reasoned that the provision in the handbook stated that as a condition of employment, all employees were required to sign an arbitration agreement, and yet no such executed agreement could be produced. Under these facts, the reference to arbitration in the handbook was insufficient.

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