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Labor & Employment Briefing

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

UPDATES:

Administrative Exemptions to Overtime

by Colleen A. Déziel

We previously reported on Pellegrino v. Robert Half International (2009) 181 Cal.App.4th 713 regarding administrative exemptions to overtime compensation. Please note that the California Supreme Court has granted a petition for review of this matter. The Court has noted that the issue to be decided is whether claims adjusters employed by insurance companies fall within the administrative exemption to the requirement that employees are entitled to overtime compensation. A similar issue is being decided by the Court in Harris v. Superior Co. (Liberty Mutual) S156555 (#07-443)

Pooling

by Eric A. Schneider

The Ninth Circuit Court of Appeals in Cumbie v. Woodywoo, Inc., ___ F.3d ___, 2010 WL 610603(c)(a)(9)(OR) held that a restaurant may require its wait staff to participate in a "tip pool" that redistributes some of their tips to services.

A waiter at a Portland Oregon restaurant had brought suit on behalf of herself and all others similarly situated as a consequence of her restaurant employer requiring that she and the other servers contribute a portion of tips received to kitchen staff who are not customarily tipped in the restaurant industry.

In reaching its decision in favor of the employer, the court made it a point to note:

1. The restaurant itself did not claim a "tip credit" and,
2. The plaintiff's wage after the contribution of her tips to the pool still exceeded minimum wage under the Fair Labor Standards Act.

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Respondent Superior's "Special Errand" Doctrine Extends Liability to Employer for Employee's Tort Following Out-of-Town Business Conference

by Vanessa S. Davila

In Jeewarat v. Warner Bros. Entertainment, Inc., (2009) 177 Cal.App.4th 427, the Court of Appeal held that an employee's commute home from a business trip was a "special errand" benefiting the employer during which the employer could be held liable for an employee's torts under a theory of respondent superior. Warner Bros. employee, Marc Brandon, was involved in an auto accident while he was commuting home following a three-day out-of-town business conference. Warner Bros. did not provide Brandon with a car or gas allowance, nor did it reimburse him for mileage. Brandon was driving home from the airport in his own vehicle when he was involved in an accident with another vehicle. One of the two vehicles involved in the accident struck and injured pedestrians Chuenchomporn Jeewarat and two others. One of the pedestrians later died from her injuries. Jeewarat and the other injured pedestrians filed a personal injury action against Brandon and the driver of the other vehicle. Jeewarat's complaint was later amended to name Warner Bros. as a DOE defendant.

Employers beware – an employer can be vicariously liable for an employee's negligence when the employee is driving home from a business trip

Warner Bros. filed a motion for summary judgment on the grounds that Brandon was commuting from work to home when the accident occurred, and therefore, under the "going and coming rule," Brandon was not acting within the scope of his employment and Warner Bros. could not be held liable. Under the "going and coming" rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. However, exceptions exist to the "going and coming" rule.

The trial court denied the motion for summary judgment on the ground that there were triable issues of fact as to whether Brandon was acting within the course and scope of his employment when he drove home from the airport. Warner Bros. filed a petition for writ of mandamus. The plaintiffs contended that Warner Bros. was not entitled to summary judgment on the ground that the "going and coming rule" precluded vicarious liability for accidents occurring during Brandon's commute to or from work, because the business conference that Brandon attended was a "special errand" which had not yet concluded at the time of the accident. The Court of Appeal agreed.

Citing Felix v. Asai (1987) Cal.App.3d 926,931, the Court noted that when an employee is engaged in a "special errand" for the employer it will negate the "going and coming" rule. The Court further noted that an employee coming from his home or returning to it on a special errand either as part of his regular employment duties or at a specific order or request of his employer is considered to be in the scope of his employment from the time he starts on the errand until he has returned or until he deviates therefrom for personal reasons. An employee's attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine.

Here the evidence reflected that Warner Bros. paid for Brandon's airfare, hotel accommodations, and airport parking which led to a reasonable inference that Warner Bros. expected to derive a benefit from intervening personal deviations to remove him from the course and scope of employment. The special errand continued until such time as he arrived at his destination. The Court, therefore, held that the special errand doctrine may be applied to the business trip in this case and that Warner Bros.' motion for summary judgment should be denied as it failed to show that there were no triable issues of material fact as to whether Brandon was acting within the course and scope of his employment at the time of the accident.

What Can Employers Take Away From This?

Application of the "special errand" doctrine to business trips means that an employer may be held vicariously liable for an employee's tortious conduct while on a commute home from a business trip, at least where there are no intervening personal deviations as in this case, as the special errand continues for the entirety of the trip.

An Employee Who is Required to Have a Car, Even if Infrequently Used During Work Hours, Can Lead to Employer Liability for an Accident Involving that Employee – Even When the Employee is Simply Heading Home

by Colleen A. Déziel

Generally, under the theory of respondeat superior, employers are vicariously liable for tortious acts committed by employees during the course and scope of their employment. However, under the "going and coming" rule, employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work because employees are said to be outside of the course and scope of employment during their daily commute.

As noted in our prior article on page two herein, an exception to the "going and coming" rule arises where the use of the car gives some incidental benefit to the employer. The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment or if the employee has agreed, expressly or implicitly to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely upon its use.

Another exception to the going and coming rule of which employers should be aware

In the matter of Lobo v. Tamco (2010) 182 Cal.App.4th 297, an employee was leaving his place of employment in his own car at the end of his work day. In this process, he collided with a Sheriff's Deputy who had been traveling on a motorcycle. The surviving family members of the deputy's family sued the employer, as opposed to the employee who was involved in the subject accident.

The plaintiffs argued that since the employee was required to have his car available during work hours in case he had to visit a customer, the exception to the going and coming rule applied. The appellate court agreed that there was a disputed issue of fact on whether the exception applied in this case, and thus, reversed a summary judgment that had been granted in favor of the employer.

The court found it significant that one of the employee's job responsibilities was to "answer all customer complaints, and if necessary visit the customers [*sic*] facilities to gain information and/or maintain customer relations."

Typically, the employee would get a ride from one of the sales engineers, but occasionally, when a sales engineer was not available, he was required to drive himself in his own car. He was reimbursed for mileage and it was undisputed that the employer derived a benefit from this employee making his car available for such use and visits, no matter how infrequent the use.

While the employer tried to argue that the employee's use of his vehicle was too infrequent to invoke an exception to the going and coming rule, the court noted that there was no legal authority that addressed the issue of the frequency of the use of the vehicle in question.

What Can Employers Take Away From This?

Employers need to be aware that if it requires or reasonably relies upon an employee to make his personal vehicle available to use and it is for the benefit of the employer (i.e., it derives a benefit from the availability of the vehicle), the employer could unwittingly be exposing itself to tort liability for that employee's negligence, even when that employee is simply going to or from work.

Reasonable Factors Other than Age is an Affirmative Defense to Disparate Impact Claims Under the ADEA *by Kimberly M. Foster*

The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits age-based discrimination against individuals, including job applicants, who are 40 or older. Over the past five years, the United States Supreme Court has attempted to convey the differences between the ADEA and Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.

In particular, in the Smith v. City of Jackson, Mississippi, (2005) 544 U.S. 228 and the Meacham v. Knolls Atomic Power, aka KAPL, Inc., et al., (2008) 128 S. Ct. 2395, 2402 cases, the Supreme Court explained the difference between the affirmative defenses available in ADEA and Title VII disparate impact claims. Whereas employers facing Title VII disparate impact must show that the facially neutral policy or practice that had a disparate impact on protected members was justified by business necessity, employers facing ADEA disparate impact claims may show that a reasonable factor other than age justified the adverse employment action at issue in the lawsuit, a more lenient standard.

Specifically, in Smith, the Supreme Court held that an employment practice that has a disparate impact on an older worker is not discriminatory when based on a reasonable factor other than age. At issue in Smith were salary increases offered to younger officers. Senior police and public safety officers argued that the city discriminated against them on the basis of age by not offering them the same salary increases offered to younger officers. The City justified its action by explaining that after a survey of salaries in comparable communities, the decision was made to raise the junior officers' salaries to be more competitive with the salaries offered by comparable communities. The court concluded that the City was not liable for age discrimination because it had produced evidence that a reasonable factor other than age, namely the ability to retain young officers in a competitive market, justified the employment decision. The court further held that because the scope of disparate impact liability under the ADEA is narrower than under Title VII, an employer's decision will be upheld so long as it is based on a reasonable factor other than age, even if it is not a business necessity (defense to Title VII claims) and there may have been other reasonable ways for the City to achieve its goals.

Then, in 2008, in Meacham, the Supreme Court clarified that "reasonable factor other than age" creates an affirmative defense to disparate impact claims under the ADEA and thus, the employer bears the burden of proof.

In line with these decisions, the Equal Employment Opportunity Commission is close to finalizing a rule to revise paragraph 1625.7(b) of the ADEA to clarify the scope of the "reasonable factor other than age" (RFOA) affirmative defense to disparate impact claims. The proposed revision would explain that a reasonable factor is one that is objectively reasonable when viewed from the position of the employer under like circumstances, taking reasonable care to avoid limiting the employment opportunities of older persons. To sustain its burden of proof of a RFOA, an employer must show that the challenged practice was reasonably designed to further achieve a legitimate business purpose and was reasonably administered with that purpose in mind. Under the proposed rule, the RFOA also envisions consideration for an employer who measures whether an employment decision will have a substantial adverse age-impact.

To aid in the determination of whether an adverse employment action is based on a reasonable factor other than age, the proposed paragraph would also include a non-exhaustive list of factors that may be relevant to the RFOA, including: (1) practice and implementation are common business practices; (2) the extent to which the factor is related to the employer's stated business goal; (3) the extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately; (4) the extent to which an employer assessed and sought to ameliorate the adverse impact on older workers; and (5) the severity of the impact on older workers.

What Can Employers Take Away From This?

The law with respect to employment discrimination is being defined and re-defined routinely. Employers are encouraged to familiarize themselves with the new law defining what a reasonable factor other than age is under the ADEA. Whether or not a decision is reasonable will also consider the extent to which an employer considered other alternatives that would not have an adverse impact on older workers. For example, in a reduction in force designed to reduce labor costs for salespersons with the highest paid salaries, the employer may consider the sales revenues that the affected salespersons generate.

Class Action Settlements: You Can't Have Your Cake and Eat It Too

California is unlike any other place when it comes to wage and hour class action litigation. Once the tenth largest economy in the world, California imposes a puzzling array of statutory obligations on employers, authorizes attorney's fees for prevailing parties and, despite the current economic downturn, still provides a dynamic place in which to do business. For those of us who have been involved in defending wage and hour class action lawsuits, we know that these lawsuits are time-consuming and costly to defend. For these reasons, reaching a class-wide settlement and resolving hotly disputed claims can bring closure and can wipe the slate clean, so to speak. However, resolving wage claims on a class-wide basis at mediation is just the first step in a process that is fraught with potential setbacks. A recent blockbuster decision, Clark v. American Residential Services LLC, (2009) 175 Cal.App.4th 785 illustrates the pitfalls that can derail a class action settlement that comes after hard-fought litigation.

In Clark, a group of hourly paid employees sued their employer, a purveyor of plumbing services. The employees alleged various wage and hour violations, including unpaid minimum and overtime wages, meal and rest period violations, unreimbursed employee expenses, illegal uniform deductions, wage statement violations, untimely payment of final wages at termination and unfair business practices. Intent on removing the case from state to federal court, the employer filed an expert declaration in support of its removal petition. The sole basis of the removal petition was that the "amount in controversy exceeded $5 million." Submitted "solely for purposes of the removal motion," the expert declaration valued the case between $21.7 and $32.8 million. The federal court ultimately sent the case back to state court because the "expert's calculations were based entirely on the assumption that the plaintiffs' damages were the same or similar to every class member's damages."

Ten months later, the parties participated in a day-long mediation with a highly-respected mediator who was well-versed in wage and hour class action litigation. The parties reached a settlement in principle: In exchange for a class-wide release, the employer would pay $2 million. This figure included $600,000 in attorney's fees, $40,000 in costs, and $25,000 incentive payments to each of the two named class representatives. Seven months later, the court granted preliminary approval of the class action settlement and ordered that 2,821 potential class members receive notice of the litigation and proposed class action settlement.

All seemed to go smoothly – or so it seemed – until 20 class members objected to the proposed class action settlement.

Arguing that the proposed settlement only compensated them "for approximately 1% of the total value of their claims" and that "no evidence had been presented to the court to justify the settlement," the objectors maintained that the court abused its discretion in determining that the settlement was "fair, adequate and reasonable." And perhaps most importantly, the objectors pointed out that in its removal petition, the employer's "expert had valued the lawsuit in the range of $21.7 to $32.8 million, and the only evidence presented in support of the proposed settlement was 'inadmissible and devoid of any reasoned damages calculations.'" The Clark court ultimately vacated the order granting approval of the settlement and sent the parties and the trial court back to drawing board.

What Can Employers Take Away From This?

Obviously, steering a class action settlement through both preliminary and final approval must be handled with patience and great care. But more importantly, employers and their counsel must carefully consider how their litigation strategy could impact the company's ability to settle class-wide wage claims in the future. Clark provides a cautionary tale. For example, determined to remove the case from state to federal court on the grounds that the amount in controversy exceeded $5 million, the employer submitted a declaration from an expert stating that if the class-wide allegations of unpaid overtime and meal and rest period violations were true, the "amount in controversy was between $21.7 million and $32.8 million." This got the employer in trouble because later, after the case was sent back to state court, the parties settled the entire case for only $2 million (including attorney's fees and costs) which was a mere fraction of the value previously estimated by the employer. Although the employer's expert declaration was filed with the caveat that it was submitted only for purposes of removal, the outcome in Clark could have been avoided altogether if the employer had not externally valued the claims at tens of millions of dollars, but then turned around and maintained that resolving the claims for a fraction of that amount was a "fair and reasonable settlement."

The lesson here: Be careful in crafting defense strategy. Sometimes, you really can't have your cake and eat it too.

Individual Liability for Wage and Hour Violations: Another Reason for Remaining Compliant

Individual liability for wage and hour violations??

As if there weren't enough incentives for employers to comply with California's wage and hour obligations, an unpublished federal district court decision once again highlights the perils of remaining passive when it comes to wage and hour compliance. This time, the message hits close to home because the decision provides a roadmap for exposing individuals to potential liability for wage and hour claims.

Specifically, while the California Supreme Court held in Reynolds v. Bement (2005) 36 Cal.4th 1075 that corporate officers cannot be held liable for alleged Labor Code violations based on status alone, the court in Ontiveros v. Zamora, Case No. CIV. S-08-567-LKK/DAD, 2009 WL 425962 (E.D. Cal. February 20, 2009), allowed an employee to pursue his civil action for wage violations against both the individual defendant, Mr. Zamora, and the corporate employer defendant.

With respect to individual defendant Zamora, the plaintiff alleged in his complaint that Mr. Zamora "owns and controls" the corporate defendant and "is a joint employer of the class." Plaintiff also alleged that Mr. Zamora exercised "control over the labor practices of" the corporate defendant and "caused the violations" set forth in his wage and hour complaint.

The alleged violations in Ontiveros included the failure to pay minimum wages, overtime and reporting time wages, rest break violations, and the failure to provide accurately itemized wage statements. Rejecting Mr. Zamora's motion to dismiss the case on the ground that "as a corporate officer [he] cannot be liable for the violations of the Labor Code," the court stated, "Plaintiff has successfully pled that Zamora is a joint employer and that he caused the violations at issue."

While recognizing the rule in Reynolds v. Bement that proscribes corporate officers from individual liability for wage and hour violations based on status alone, the Ontiveros court relied on Labor Code Section 558, which states, "Any employer or other person acting on behalf of an employer who violates, or causes to be violated . . . any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty . . ."

According to the court, "Here, plaintiff has alleged that Zamora, in his capacity as owner of Zamora Automotive Group, 'caused' the wage and hour violations alleged in the complaint."

The court, moreover, also held that the plaintiff's "joint employer" allegations that Mr. Zamora "owns the dealership where plaintiff works and that he controls compensation and other labor policies" were sufficient to continue with the lawsuit against Mr. Zamora.

What Can Employers Take Away From This?

An employer is well advised to audit, audit, audit. Do not take a relaxed approach to wage and hour compliance. Be proactive in ensuring that your company's wage and hour policies and practices comply with the rigorous requirements of the Labor Code.

Not only can a "leave it alone" attitude invariably lead to errors and the unintended running afoul of the law, it will make it more difficult to prevail on the merits.

The "teachable moment" in the Ontiveros decision is that a plaintiff need only allege certain facts to maintain a wage and hour lawsuit against you and/or individuals within the company. While you and/or these individuals may ultimately prevail, it will come at great expense – both in terms of time, defense costs and attorney's fees – leaving you with a "hollow" victory.

California Law is Tougher on Employers than Federal Law with Regard to Whether Commute Time is Compensable

by Eric A. Schneider

Rutti v. LoJack Corporation, Inc., (2010) 596F.3d 1046.

On March 2, 2010, LoJack technician Mike Rutti sought to bring a class action on behalf of himself and all other LoJack technicians. Specifically, he claimed compensation for commuting to and from worksites in LoJack vehicles and for time spent on preliminary and "postliminary"[1] activities. The opinion offers a thorough analysis of these issues and illustrates the difference between federal and California law in addressing the same factual scenario.

Rutti was one of over 450 LoJack technicians who would install and repair recovery systems in vehicles. Most of the work was done at the clients' locations.

LoJack provided him a car which he was to use solely to drive to and from the clients' locations. The company paid him beginning when he arrived at his first job location and ending when he completed his final job installation of the day.

More wage and hour class action news

Rutti sought compensation for the time he spent commuting, for certain "off-the-clock" activities before he left for the first job and for other activities after he returned home until the completion of his last job. In addition, he asserted that LoJack required him to be on call from 8:00 a.m. until 6:00 p.m. Monday through Friday and from 8:00 a.m. until 5:00 p.m. on Saturdays. During that time he was required to keep his mobile phone on and answer requests from dispatch to perform additional jobs, although he had the right to decline those jobs.

LoJack moved for summary judgment and the District Court granted the motion as to all of the claims. Rutti appealed.

The 9th Circuit Court of Appeals affirmed in part and reversed and remanded in part.

The Court first addressed Rutti's claim for reimbursement under federal law for his commuting time. He claimed that he was entitled to that compensation because his use of the LoJack vehicle was not voluntary, and the limitations placed on his use of the car during the commute rendered the commute compensable.

The Court rejected that argument on the basis of the Employee Commuter Flexibility Act ("ECFA"), 29 U.S.C. §254(a)(2). That statute provides that an employer need not compensate an employee for traveling to and from the actual place of performance of the principal activity that the employee is employed to perform or for activities which are preliminary to or postliminary to those principal activities.

The Court also rejected Rutti's second argument with regard to the restrictions rendering the commute compensable on the basis that the ECFA specifically provides that "activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities."

The Court then analogized these facts to two cases from the Federal Circuit Court where employees had considerably more responsibility during the course of their commute, but were still held to the incidental rather than integral to the principal work activity.

The Court, however, determined that even though the commute was not compensable under federal law, it was compensable under California law which requires that employees be compensated for all time "during which an employee is subject to the control of an employer." In

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[1] The court in a footnote pointed out that the word "postliminary" is not in the dictionary, but it is in the critical statute, 29 U.S. C. § 254(c)(2).

that regard, the Court cited the California Supreme Court case of Morillon v. Royal Packing Co. (2000) 22 Cal.4th 575. In a straightforward application of that case, the Court noted Rutti was required not only to drive the LoJack vehicle to and from the job site, but was forbidden from attending to any personal business along the way. He was, therefore, wholly under the employer's control and therefore entitled to be paid.

Next, the Court addressed Rutti's claim for work he performed before he headed off for the clients' worksites and after he returned from them. Under the ECFA, Rutti would have to show that the preliminary and postliminary activities were related to his "principal activities" for LoJack. The Court relied in the test enunciated in Dunlop v. City Elec., Inc. (5th Cir. 1976) 527 F.2d 394:

The test, therefore, to determine which activities are "principal" and which are "an integral and indispensable part" of such activities, is not whether the activities in question are uniquely related to the principal activity of the business, but whether they are performed as part of the regular work of the employee in the ordinary course of business.

The Court also addressed the *de minimis* rule, taking the lead from the United States Supreme Court opinion in Anderson v. Mt. Clemens Pottery Co. (1946) 328 U.S. 680. The Court then looked at its own opinion in Lindow v. United States (9th Cir. 1984) 738 F.2d 1057 where it noted that even though some of the activities were principal activities, the lower court in that case had properly determined that the seven to eight minutes spent by employees reading a log book and exchanging information were *de minimis* and, therefore, not compensable.

In applying those cases to Rutti's situation, the Court found that his morning activities did not appear to be integral to his principal activities because most of them were for receiving, mapping, and prioritizing jobs and routes which related to his commute. To the extent that some of the activities were distinct from his commute, they were nevertheless *de minimis* and thus not compensable.

The Court however found that his postliminary activities of sending a computer transmission to LoJack using a modem provided by LoJack after he arrived home was part of his regular work and necessary to the business.

Although there was some evidence that it might take only five to ten minutes to initiate and send the transmission, the records show that the employee was also required to come back and check to see that the transmission was successful, and if not, to send it again.

The Court did not apply the *de minimis* rule and stated that it was not adopting a 10 or 15 minute *de minimis* rule. Instead, there would be a three prong test:

1. The Court would first look at the practical administrative difficulty in recording the additional time;
2. The Court would look at the aggregate amount of compensable time; and,
3. The Court would look at the regularity of the additional work.

Because Rutti had asserted that the transmissions took about 15 minutes a day, that added up to over an hour per week which could be a significant amount of time and money for many employees.

What Can Employers Take From This?

Firstly, California employers are held to a higher standard with regard to what in other places would be regarded merely as commuting. If the employee is prohibited from engaging in activities of his or her own choice on the way to the worksite, that time becomes part of the compensable work day.

Secondly, whether preliminary or postliminary work is compensable must be decided on a case-by-case basis. There are certainly no bright line distinctions, and employers would be well advised to give their every doubt to the employee with regard to work before or after the regular work day.

A Policy of Unlimited Sick Days is Not Subject to Kin Care Statute

by Colleen A. Déziel

In McCarther v. Pacifictelesis Group, (2010) 48 Cal.4th 104, the Supreme Court of California decided the issue of whether the labor code provision which permits the use of accrued sick leave for "kin care" applied to an employer's policy which provided an uncapped number of days off.

In this matter, Pacifictelesis Group had a written policy (in a collective bargaining agreement) which required that employees be compensated for any day in which they miss work due to their own illness or injury for up to five consecutive days of absence in any seven-day period. Once an employee returns to work following any period of absence, this policy is triggered again if the employee is absent for his or her own illness or injury. There is no bank of paid sick days that employees incrementally accrue over a period of time. There is no cap on the number of days employees may be absent from work nor is there a particular number of days that employees vest, earn, or accrue under the sickness absence policy.

The employer never maintained a policy or practice of paying employees under this policy for absences to care for ill family members.

The plaintiffs in this matter argued that Labor Code Section 233 applied to this policy such that the employer was required to compensate the employees for any time that each took to care for an ill family member. The Court of Appeal agreed, however, the Supreme Court disagreed.

When sick leave isn't sick leave

In coming to this ruling, the Supreme Court looked at both the plain meaning of the statute at issue as well as its legislative history. The relevant portion of Section 233 provides that "[a]ny employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months, at the employee's then current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic partner of the employee."

Essentially, the Supreme Court held that Section 233 does not apply to any and all forms of compensated time off for illness, but only to "sick leave" as defined by the statute and only in the amount specified (i.e., the statute applies only to those policies in which employers provide "accrued increments of compensated leave.")

The fact that Section 233 defines sick leave as "accrued increments of compensated leave," and that the statute limits the amount of sick leave that can be used to care for an ill family member to "an amount not less than the sick leave that would be accrued during six months," indicates that the reach of the statute is limited to employers that provide a measurable, banked amount of sick leave.

In the instant matter, the Supreme Court found that since it was impossible to determine the amount of compensated time off for illness to which an employee might be entitled in a six-month period, Section 233 did not apply to Pacifictelesis's policy (i.e., its sickness absence policy did not provide a bank of sick leave hours or days to which the employee is entitled in a six-month or 12 month period, but rather provided that an ill employee would be compensated for up to five consecutive days for each instance of illness. And, once the employee returns to work, he or she is again entitled to compensation for another five-day period of illness.)

What Can Employers Take Away From This?

For those employers who have a policy that provides an unlimited number of sick days that do not vest or accrue to employees, Section 233 does not require them to allow the employee to use these sick days for kin care. To the extent that an employer's sick policy provides sick leave in accrued increments, please be aware that its employees are entitled to use half of that annually accrued amount for kin care.

In a Wage and Hour Case, an Employee Must Satisfy Class Action Requirements in Bringing Representative Action Against Former Employer Under California's Unfair Competition Law

by Vanessa S. Davila

In Arias v. Superior Court (2009) 46 Cal.4th 969, the California Supreme Court recently found in favor of the employer in a wage and hour action brought under California's unfair competition law ("UCL"). Therein, the plaintiff, Jose A. Arias, sued his former employer, Angelo Dairy, alleging on behalf of himself and other current and former employees of defendant, causes of action for violations of the UCL.

Specifically, Arias brought causes of action under *Business & Professions Code* § 17200, et seq., based on defendant's failures to credit plaintiff for all hours worked, to pay overtime wages, to pay wages when due, to pay wages due upon termination, to provide rest and meal periods, and to obtain written authorization for deducting or offsetting wages. Arias sought enforcement under the UCL of penalties provided for in *Labor Code* §§ 203, 226.

More wage and hour class action news

The employer brought a motion to strike the causes of action brought on behalf of plaintiff and other employees on the ground that the plaintiff had failed to comply with the pleading requirements for class actions. The trial court granted the motion with respect to the UCL causes of action.

Plaintiff Arias petitioned the Court of Appeal for a writ of mandate. The Court of Appeal held, and the California Supreme Court agreed, that the causes of action brought in a representative capacity alleging violations of the UCL were, in fact, subject to class action requirements.

The plaintiff had also brought claims alleging violations of the *Labor Code* Private Attorneys General Act (PAGA), but the Court of Appeal, and the California Supreme Court also, held that unlike the UCL claims, the PAGA claims did not require the plaintiff to satisfy class action requirements.

What Can Employers Take Away From This?

Employers would be wise to keep the Arias decision in mind the next time they find themselves confronted with representative claims alleging UCL violations brought by an employee.

Unless the employee can meet the Code of Civil Procedure § 382 requirements for class actions, the employer will be able to defeat the UCL claims early on by bringing a dispositive motion similar to the one brought in the Arias case on behalf of employer Angelo Dairy. However, a savvy plaintiff may bring similar claims under PAGA and bypass the class action requirements altogether.

California Supreme Court Rules that Attorney Opinion Letter is Absolutely Privileged

by Kimberly M. Foster

In Costco Wholesale Corp. v. Superior Court,(2009) 47 Cal. 4th 725, the California Supreme Court handed a victory to employers who retain outside counsel to conduct workplace investigations and to opine upon them. Their opinions, whether spoken or written down, are absolutely protected by the attorney-client communication privilege and cannot be disclosed during the course of litigation.

In June 2000, Costco hired an outside law firm to interview two managers of a Costco warehouse about the duties performed by various classes of managers and to provide legal advice as to whether the duties they performed rendered them exempt from California overtime laws. Outside counsel for Costco prepared a 22-page opinion letter following interviews with the managers. The opinion letter became the subject of a protracted discovery battle that lasted for over three years.

Investigation reports and opinion letters of outside counsel are absolutely privileged and employer does not have to prove irreparable injury

The plaintiffs in the underlying class action litigation, which asserted that various managers were improperly classified as salaried non-exempt and deprived of meal and rest breaks, asserted that either the letter contained unprivileged matter or that Costco has waived the privilege by putting its contents at issue.

The trial court ordered the letter be reviewed by another judge, a so-called "discovery referee," who later ordered disclosure of a heavily redacted version of the letter. Without weighing in on the issue of waiver, the discovery referee concluded that "factual information about various job responsibilities" were not privileged.

The trial court adopted the findings of the discovery referee without reviewing the letter and Costco soon appealed on the grounds that the entire letter was absolutely privileged from disclosure and further that the privilege had not been waived. The California Court of Appeal upheld the discovery referee's findings and further held that Costco was unable to produce evidence that it would suffer actual harm from the disclosure of the letter.

On appeal, the California Supreme Court held that the entire letter "irrespective of its content" was absolutely privileged and as such, protected from disclosure. The Court further held that the trial court committed a reversible error by reviewing the letter *in camera* to decide whether or not it was privileged, "[a] court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege."

Lastly, the party seeking to protect the privileged nature of an attorney-client communication need not prove an additional irreparable injury as a result of the disclosure: Disclosure in and of itself threatens the confidential relationship between Costco and its attorneys.

Although in Mohawk Industries, Inc. v. Carpenter, (2009) 130 S.Ct. 599, the United States Supreme Court limited the ability of a party to immediately appeal an order disclosing communications over which there is an assertion of attorney-client privilege, no portion of the *Costco* decision has been reversed and it remains good law.

What Can Employers Take Away From This?

The lesson of Costco and its progeny is that employers must be extremely careful when conducting workplace investigations since the results of those investigations and their legal ramifications could be the subject of discovery during litigation and ordered to be disclosed, absent the communication occurring within the protected sphere of the attorney-client relationship.

Court of Appeal Provides Additional Guidance to Companies that Offer Vacation Benefits to Their Workforce

by Kimberly M. Foster

While companies are not obligated to provide vacation pay to their employees, many companies do so as part of their fringe-benefits packages. Employees have come to expect these benefits. According to the California Supreme Court, once it is provided, paid vacation "is not a gratuity or a gift, but is, in effect, additional wages for services performed" or a "form of deferred compensation." In this litigious climate, it is critical that employers comply with the legal obligations that come with offering vacation pay. A recent decision sheds welcome guidance on what employers can and cannot do when they offer vacation pay to their workforce.

In Owen v. Macy's, (2009) 175 Cal.App.4th 462 a former sixteen-year employee filed a putative wage and hour class action against the retailer for allegedly violating Labor Code Section 227.3. That statute provides that "whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination."

The gravamen of Ms. Owen's lawsuit was that Robinsons May (which Macy's acquired) allegedly failed to pay employees all accrued, vested vacation compensation because under its vacation policy, new employees did not earn paid vacation during the first six months of employment.

Robinsons' employee handbook provided: "All eligible associates earn and vest in paid vacation after they have completed six months of continuous employment." Thus, because "Robinsons imposed a six-month waiting period before new employees begin to earn vacation," the court noted, "Someone who worked at Robinsons for five months [and] then quit to take another job would not earn or vest in vacation time."

The Owen court held that Robinsons' policy was lawful, stating, "The law permits an employer to offer new employees no vacation time: If an express written policy forewarns new employees that their compensation package does not include paid vacation during their initial employment, then no vacation pay is earned and none is vested." The court continued, "When such a policy is in place . . . employees cannot claim any right to vested vacation during their initial employment, because they know in advance that they will not earn or vest vacation pay during this period."

Indeed, unlike a vacation policy which provides that employees earn two weeks of employment during the "first year" of employment (i.e., starting on day one of the employment), "it is clear from the Robinsons' employee handbook that the amount of vacation time earned during the first six months of employment is zero." The Owen court affirmed the dismissal of Ms. Owen's vacation pay claim.

What Can Employers Take Away From This?

The Owen decision holds that a company policy specifying that no vacation is earned during an initial period of employment is permissible. The key is for new employees to understand that they do not earn paid vacation starting from the first day of their employment. As the court noted, "By making it clear in advance that vacation is not part of a new employee's compensation, Robinsons does not run afoul of the rule that prohibits an employer from reducing an employee's wages for services after the service has been performed."

Be as specific when it comes to informing your employees about the accrual of vacation pay. If all employees accrue .83 hours of vacation per month (10 days per year) – except recently-hired employees for the first three months of employment – put it in writing and advise new employees from the start.

Failure to properly advise employers and/or failing to pay accrued and unused vacation could not only give rise to liability for unpaid vacation wages under Labor Code Section 227.3, but also expose your company to waiting time penalties for late payment of all wages due at the time of termination under Labor Code Section 203. Such penalty can include 30 days of wages for each former employee, which can be staggering when hundreds or thousands of employees are involved.

Settlement Over Disputed Wage Claims with Putative Class Members are OK

by Kimberly M. Foster

In Chindarah v. Pick Up Stix, Inc., (2009) 171 Cal. App. 4th 796, the California Court of Appeal upheld the settlement of disputed wage claims entered into by Pick Up Stix and over 200 former and current employees who were involved in an overtime class action that had not yet been certified.

In February 2003, former employees of Pick Up Stix filed a class action litigation for overtime pay on behalf of all current and former general managers, assistant managers, and lead cooks employed by Pick Up Stix during the time period of February 1999 through September 2003.

And yet more class action wage and hour news

The plaintiffs argued that the managers were not properly classified as exempt from California overtime laws.

After an unsuccessful mediation with plaintiffs, Pick Up Stix met with hundreds of putative class members (individuals who worked as managers and lead cooks during the relevant time period, but prior to any class being certified) and offered them a settlement amount based on what was offered during the mediation. Over 200 people opted to sign an agreement settling their claims against Pick Up Stix.

The settlement agreements contained a general release, which included language that during the course of their Pick Up Stix employment, the employees were properly classified as exempt and further affirmed that they would not participate in the pending class action litigation.

Eight individuals who signed the agreement later sought to have it invalidated by the court, arguing that the agreements violated sections of the California Labor Code, which prohibit employers from settling "a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made." Labor Code § 206.5.

Pick Up Stix, in turn, sued the eight individuals for breach of contract and sought to have the settlement agreements upheld by the court.

The Court held that the settlement agreements were valid and rejected the plaintiffs' interpretation of the Labor Code, which would preclude *any* settlement of a dispute over overtime compensation. *Id*. at 799. Thus, individual settlements of disputed wage claims are enforceable.

What Can Employers Take Away From This?

The lesson learned from Chindarah is that when faced with costly class action litigation, employers are well advised to explore early resolution of individual claims for disputed wages, including overtime and meal/rest break claims.

In a Case of First Impression, Ninth Circuit Court of Appeal Rules that the Court, Rather than the Jury, Determines the Amount of a Front Pay Award Under the Federal Family Medical Leave Act

by Michelle T. Harrington

The plaintiff, Jill Traxler, a former employee of Multnomah County Sheriff's Office ("the County"), had been employed by the County for 18 years and received regular promotions. Beginning in 2002, she took medical leave under the federal Family and Medical Leave Act ("FMLA") and again in 2005 due to a serious health condition.

During her employment, she never took more than the leave permitted under the FMLA of 12 work weeks during any 12-month period. In mid-June 2005, the County notified Traxler that her position would be eliminated effective July 1, 2005 and it had a uniformed officer escort Traxler out of the office. She was placed on paid administrative leave and then transferred to a lower paying job.

She continued taking FMLA leave and in September 2005, she received an unfavorable performance review in her new position. Traxler filed a written response to the performance review, but the County terminated her employment in late September 2005.

The court, not a jury, determines front pay award

Traxler filed suit under the FMLA and the Oregon counterpart. After a four day trial, the jury found that the County had taken adverse employment actions against Traxler in retaliation for her legitimate use of protected leave under the FMLA. The jury awarded Traxler $250,000 in damages (back pay) up to the time of trial and $1,551,000 in front pay. Front pay is an award of the salary and benefits a wrongfully discharged employee would have earned from the employment after the time of trial.

The County filed a post-trial motion requesting judgment as a matter of law or a new trial arguing that the district court erred in submitting the calculation of front pay to the jury and asking that the court limit the amount of front pay awarded to Traxler. The district court agreed it made an error in allowing the jury to consider the amount of front pay because front pay is an equitable remedy that must be determined by the court.

The district court vacated the jury's front pay award and reduced Traxler's front pay award from $1,551,000 to $267,000. The district court denied the County's motion for a new trial conditioned on Traxler's acceptance of a remittitur of $267,000. Traxler appealed the district court's finding that front pay is an equitable remedy to be decided by the court.

What Can Employers Take Away From This?

While the holding in this case favors employers to the extent that judges are typically not going to make excessive front pay damages awards like a runaway jury might, the rule established by this case is limited to claims made pursuant to the federal FMLA. You should be aware, however, that the California equivalent of the FMLA is the California Family Rights Act ("CFRA"), which is a part of the California Fair Employment and Housing Act ("FEHA").

As a result, the remedies available for a violation of the CFRA are the same as for other FEHA violations. The FEHA, as you are no doubt aware, does permit the jury to make front pay awards.

An HR Perspective

What Not to ~~Wear~~ Say *by Rick B. Friedman, Administrator*

Various state and federal laws consider it illegal to ask questions related to certain *protected categories* such as nationl origin, citizenship, age, marital status, disabilities, arrest/conviction record, military discharge status, race, gender, or pregnancy status. Questions that ask a candidate to reveal information about such topics is in violation of various laws.

Innocent questions can lead to potential employment discrimination lawsuits. If an applicant went to the same school as you, it is easy to ask, "When did you graduate?" That question can also be a way to determine the applicant's age. How do you find out things about your applicant without exposing your employer to potential lawsuits?

Since you want to learn more about the applicant, ask questions requiring more than just "yes" or "no" responses: Why do you want to work here? What about our company interests you? Why did you leave your last job? What do you consider to be your best skills? What job skill weaknesses do you try to work on?

Some questions you should <u>never</u> ask: Are you comfortable working for someone of the opposite sex? Would it bother you to work with others who are younger (or older) than you? How was your attendance at your last job?

Frequently, applicants say things that you should just leave alone. You do not want to pursue comments such as: "I go to bible study every Wednesday night and would have to leave 15 minutes early," or "I need a flexible schedule because I have three pre-teen children in school."

Don't ask:	Ask:
When did you graduate from college/high school?	Are you over the age of 18?
Are you married? Is that your married name? Are you living with anyone?	Do you have any responsibilities or commitments that would prevent you from meeting specified work schedules?
Do you have any children? Are you pregnant? Do you want to have children someday?	Do you anticipate any absences from work on a regular basis? (If "yes," you CAN ask the applicant to explain).
How tall are you? How much do you weigh?	Are you able to lift a 50-pound weight and carry it 100 yards? (only if that is an important part of the job).
How long have you lived at your current address?	What is your address?
Do you have any disabilities? How is your health?	Are you able to perform the essential functions of this job with or without reasonable accommodations? (You must thoroughly describe the job prior to asking this).
Are you a United State citizen? Where were you born?	Are you authorized to work in the United States? If the ability to speak different languages is directly relevant to job performance, you may also ask, "Do you have any language abilities that would be helpful in doing this job?"
Have you ever been arrested?	Have you even been convicted of a crime other than a misdemeanor?
Do you go to church? What is your religion?	Do you belong to any groups or organizations that you consider relevant to your ability to perform this job?
Can you work weekends? Can you work on Christmas?	An applicant may belong to a religion prohibiting Saturday or Sunday work. You must be able to justify this question showing that an inability to work a weekend would create an undue hardship (i.e., our hours of work are Tuesday through Saturday).

Have a Question?

If you have H.R. problems or have questions regarding H.R. procedures, please call us or send them via email (to CAD@amclaw.com). We will be happy to provide comments or options on steps that can be taken in an effort to help you reach successful conclusions.

Employment Practices Group at Anderson, McPharlin & Conners LLP

Our Employment Practices Group places a special emphasis on keeping pace with rapidly changing employment laws and providing employers with effective representation in this constantly evolving area. For twenty years, our clients have known that we understand the challenges they face and that we will work with them in assessing risks and developing cost-effective strategies to bring employment matters to prompt and satisfactory resolution.

Our Employment Practices Group has broad experience with labor and employment matters and is well versed on the intricacies of the subjects with which we deal. Our Employment Practices attorneys have published numerous articles on a wide range of labor and employment topics and are frequently featured as speakers at seminars and conferences around the country. Equally important, the Group's attorneys have considerable "hands on" experience in addressing the problems that businesses encounter in managing a workforce and are thus able to offer practical, real-world advice that makes good business sense.

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