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RECENT DEVELOPMENTS IN EMPLOYMENT LAW 2007

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2007 Labor And Employment Law Update

INTRODUCTION

A number of factors have combined to provide for a relatively small number of significant developments in labor and employment law in 2006. Most significant is the divided government in Sacramento which has plotted a centrist course, which, in turn promotes the status quo. The federal Congress has also been relatively silent on labor and employment law issues in part due to election year politics. The 110th Congress, however, is expected to pass a significant federal minimum wage increase, but whether it passes into law is an open question. Those few significant developments are set forth below.

The courts have been more active than the other branches of government in the development of labor and employment law this year. There have been meaningful developments in most branches of labor and employment law. Additionally, cases decided by the intermediate Court of Appeal in 2006 have been set for argument in the California Supreme Court in 2007 that could portend big changes this year. These developments are also discussed below.

WAGE & HOUR

I. LEGISLATION

A. AB 1835: Increase in Minimum Wage

1. Effective January 1, 2007, California's minimum wage increases to \$7.50 per hour from \$6.75 per hour. Next year, on January 1, 2008, the minimum wage again steps up from \$7.50 per hour to \$8.00 per hour.
2. This legislation effects more than minimum wage workers. The "salary basis" test for exempt employees requires payment of a salary that is twice the minimum wage. The amount required to satisfy this test increases from an annual salary of \$28,080 to \$31,200 January 1, 2007, and to \$33,280 on January 1, 2008. While the law does not require you to make these increases, failure to do so will make employees paid less than this amount non-exempt.
3. Similarly, commissioned employees who must be paid 1.5 times the minimum wage (and more than half of their pay must be commissions) will require more pay to stay exempt.

ACTION: (1) Review the salaries and job descriptions of exempt employees.

(2) Update employee handbooks to reflect these changes.

B. AB 2095: Pay Stubs Re-Revisited

The new law allows employers to record overtime hours worked in a particular time period in the pay stubs for the following payroll period. When this is done, the next payroll period, the

overtime hours must be itemized on the pay stubs as “corrections” and include the dates they relate to.

ACTION: If this flexibility is important to your organization, implement the procedure carefully.

II. CASE LAW

A. Interpreting Labor Code Section 226.7

1. Introduction

The most significant development in wage and hour case law in 2006 was the decision of the California Supreme Court to finally decide the issue of what to call the penalties that employees may seek for an employer’s failure to provide meal and rest periods. The issue is whether or not they are purely “penalties” or some form of “wages.”

This seemingly semantic hair-splitting turns out to have drastic consequences for employers. If the penalties are deemed to be purely penalties, then the statute of limitations is only one year. If they are deemed some form of wages, the recovery may go back four years. Given the ease with which class actions are currently certified in wage-hour cases, this can mean the difference of huge sums.

Currently, different Court of Appeal Districts have issued conflicting opinions on this issue. The Case Court has held, according to the plain-meaning of the statute, that these penalties are just that: penalties. Another, the Case Court, held that these penalties represent some type of penalty-wage hybrid, and, therefore are subject to the longer four-year statute of limitations. Finally, yet

another Court has held that these are purely a form of wages, also subjecting the penalties to the four-year statute.¹

B. Class-Actions

1. Introduction

The near-automatic certification of wage-hour class actions may have reached its nadir in 2006. A recent Court of Appeal decision, *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422 (2006), took the *Sav-On* case at face value when it said that the proper standard for reviewing certification of class actions was to give the trial judge broad authority. This literal reading has gone against the recent trend, which has taken *Sav-On* to be a “pro-certification” decision. That trend has had the effect of removing any

2. Case Summary

Plaintiff Dunbar worked for Albertson’s as a grocery manager. Dunbar brought suit on behalf of himself, and all other of the 900 Albertson’s grocery managers, challenging Albertson’s classification of their positions as exempt from overtime requirements. Albertson’s challenged Dunbar’s class certification, arguing that the case wasn’t appropriate for a class-action due to the different situations of the various employees. Considering Dunbar’s claim, and the grounds for his challenge to Albertson’s classification, the trial court found that individual issues predominated over common issues in the case, and refused to certify Dunbar’s case as a class action. The trial court noted that, because of variations from store to store,

¹ The Division of Labor Standards Enforcement (“DLSE”), the administrative has ruled for its own purposes that these penalties are purely penalties. This rule only applies in Labor Commissioner hearings.

some grocery managers would be able to recover, some would not, and that these determinations would require each individual grocery manager to submit evidence on his or her regular job duties and functions. On appeal, the Court reviewed the trial court's decision, found that it was supported by substantial evidence, and upheld the denial of class certification.

ACTION: It is still exceedingly difficult to defeat the certification of wage-hour class actions. Employers should be ready to provide data, prepared with the advice of counsel, that demonstrates how circumstances (especially hours worked) can vary between employees with the same job description.

C. Advanced Sales Commissions that the Employee Does Not Earn May be Subject to a Chargeback Policy, and Taken Out of Future Commission Payments

Koehl v. Verio Inc. (2006) 142 Cal.App.4th 1313

1. Factual Background and Court Proceedings

Plaintiff Koehl worked as a sales associate for defendant Verio, an internet service provider whose customers are businesses with high volumes of internet traffic. Verio's compensation scheme for sales associates like Koehl included an advanced commission for anticipated recurring monthly charges to customers paid when the sale was made. If, after the sale was made, the customer later cancelled service, and thus reduced the recurring monthly charges, the sales associates' later commissions were subject to a chargeback for advanced commissions paid for monthly charges that were not collected by Verio.

Koehl challenged Verio’s plan, claiming that it violated the Labor Code because the commissions are wages that Koehl “earned” when the sale was made. Verio responded by claiming that the commissions were merely advanced when the sale was made, and that they were not “earned” until the customers actually paid the recurring monthly charges. Reviewing Verio’s employment contracts and policies, the court found that Verio’s plan was valid, and rejected Koehl’s claim. The court noted that commission wage scales may specify by contract when the commission is earned, and that Verio’s contract did so, saying that the commissions were actually earned when the revenue was paid to Verio.

2. Case Principles

- commission based wage plan may specify when and how an employee actually earns a commission.
- An employer may employ a chargeback scheme to recover commission advances paid to employees before the employees earn the commission.

D. The Labor Code Requires that All Wages Paid to Discharged Employees be Paid Immediately Upon Discharge Even If Employment Was For A Fixed Term

1. Factual Background and Court Proceedings

Plaintiff Smith worked as a hair model for defendant L’Oreal USA, Inc. (“L’Oreal”) for one day. L’Oreal hired Smith to appear, for \$500, at a one-day show featuring L’Oreal hair stylists. L’Oreal didn’t pay Smith until more than two months had passed. Smith brought suit, seeking penalties under Labor Code sections 201 and 203, which require an employer to immediately pay a discharged employee all wages owed.

L'Oreal argued that the Labor Code requirements only apply to termination from an on-going relationship, and thus did not apply to employment that, by its terms, was a for a fixed, limited time. The court disagreed, and held that the wage and hour laws mandating immediate payment upon employee dismissal apply to both an involuntary termination of an ongoing employment relationship and a release of an employee after completion of a specified assignment or duration of time.

2. Case Principles

The Labor Code requires that employees be paid immediately upon discharge from employment, regardless of whether the employment was ongoing or for a fixed assignment or duration.

DISCRIMINATION & HARASSMENT

I. LEGISLATION

The Fair Employment and Housing Commission drafted new regulations further detailing the law that requires employers with more than ten employees to hold mandatory sexual harassment training for all supervisory employees.

If approved, the regulations will go in effect in February, 2007. The regulations require employers to provide supervisory employees with two hours of live classroom or on-line sexual harassment training every two years. Employers must document the training and keep records to track compliance.

ACTION: Follow-up on the regulations after their final approval, and adjust your training programs accordingly.

II. CASE LAW

A. Federal Anti-Discrimination Law Prohibits Retaliation that Results in an Adverse Effect on the Terms, Conditions, or Benefits of Employment

Burlington No. & Santa Fe Ry. Co. v. White (2006) ____ U.S. ____, 126 S.Ct. 2405 (2006)

1. Background

Sheila White operated a forklift as a “track laborer” for Burlington Northern & Santa Fe Railway Company (“Burlington”). When White complained about a supervisor’s harassment, her duties were changed from operating a forklift to manual labor required of others with the same job title. In addition, White was suspended without pay for an incident that occurred at the same, even though she was ultimately

reinstated with back pay. After exhausting her administrative remedies, White filed suit against Burlington for violations of Title VII of the Civil Rights Act of 1964, claiming unlawful retaliation for her initial complaints about sexual harassment. At trial, the jury found for White, and awarded her compensatory damages. Burlington won on appeal, and White appealed to the Supreme Court. Before the Supreme Court, Burlington argued that White's claims were insufficient to support the verdict, because the actions taken against her did not amount to employment discrimination under Title VII.

Under Title VII, an employee can only bring a discrimination claim when the employer's actions affect the compensation, terms, conditions, or privileges of employment. The Court held that the prohibition on retaliation in Title VII covers a broader class of conduct than the prohibition on discrimination, and that Title VII prohibits any retaliatory actions which a "reasonable employee" would find "materially adverse," in that the retaliatory action might dissuade a reasonable worker from making or supporting a charge of discrimination.

2. Case Principles

Burlington is important for the following reasons:

- There is now a consistent standard which all courts must follow for federal Title VII retaliation claims.
- The anti-retaliation provisions of Title VII have a broader scope than the anti-discrimination provisions.

- The purpose of Title VII’s anti-retaliation provisions is to deter retaliation against employees who bring or support a discrimination claim. Any retaliation will be judged by whether the action would deter a reasonable employee from bringing or supporting a discrimination claim.

ACTION: Because the standard applied by California courts under the FEHA differs slightly, ensure that both are complied with. In some respects, this standard is more stringent than the FEHA standard, and so it may be preferred by Plaintiffs.

B. The California Supreme Court Clarifies the Contexts in Which Sexually Coarse and Vulgar Language Constitutes Sexual Harassment

Lyle v. Warner Bros. Television (2006) 38 Cal.4th 264

1. Factual Background and Court Proceedings

Plaintiff Lyle was hired by defendants Warner Bros. as a stenographer for the script writers for the show “Friends.” At hire, Lyle was told writing for the show involved frank discussions of sex, and that the writers therefore, as part of the creative process, regularly discussed sexual matters. Warner Bros. ultimately fired Lyle because of problems with her typing. Lyle brought a suit claiming that the writers’ vulgar language constituted sexual harassment under the Fair Employment and Housing Act (“FEHA”), Government Code §§ 12900 *et seq.*

The Court found that, while plaintiff was subjected to sexually coarse and vulgar language and conduct, such language and conduct did not, in the context of writing for a situation comedy whose plots frequently involve sex, constitute sexual harassment under FEHA. In reaching this conclusion, the Court noted that the language and conduct involved both male

and female writers, were part of the writers' creative processes, and were not aimed at Lyle or any other female employee.

2. Case Principles

- To constitute sexual harassment, sexually explicit conduct or language must be directed at an employee on the basis of sex. The FEHA prohibits sexual harassment, but does not outlaw sexually coarse and vulgar language or offensive, non-harassing conduct.
- Courts will, in deciding sexual harassment cases, examine the context in which the statements or conduct took place, including the type of work and whether or not the language or conduct is targeted on the basis of sex.

C. Under Federal Law, an Employer Grooming and Appearance Policy May Reasonably Differentiate Between Male and Female Employees

Jespersen v. Harrah's Operating Company, Inc. (9th Cir. 2006) 444 F.3d 1104

1. Factual Background and Court Proceedings

Defendant Harrah's employed plaintiff Jespersen as a bartender for twenty years. In 2000, Harrah's implemented a program mandating that all bartenders meet appearance and grooming standards, which outlined appearance requirements for both male and female bartenders and required all female bartenders to wear makeup. Jespersen had never worn makeup, objected to the policy, and ultimately left her employment with Harrah's because of the makeup requirement. Jespersen brought suit, claiming that the makeup requirement for female bartenders was sex-discrimination under 42 U.S.C. 2000e-2(e)(1).

The Court disagreed, and found that Harrah’s appearance requirements for their bartenders were not discriminatory, despite the fact that Harrah’s had different requirements for its male and female bartenders. Applying past case law, the Court noted that Harrah’s requirements appropriately differentiated between genders, and were thus not discriminatory.

2. Case Principles

- An employee appearance and grooming policy that differentiates between men and woman cannot do so in a manner that overly burdens one sex or that is based on sexual stereotypes.
- An employer may differentiate between men and women in appearance and grooming policies, provided that the sex differences in the policies are reasonable and not overly burdensome.

ACTION: Review your Appearance and Grooming policies.

D. Isolated Incidents that Fail to Rise to an Adverse Employment Action Are Not Discrimination under the Fair Employment and Housing Act

McRae v. Dept. of Corrections and Rehabilitation (2006) 142 Cal.App.4th 377

1. Factual Background and Court Proceedings

Plaintiff McRae worked as physician for defendant Department of Corrections and Rehabilitation (the “Department”). After disputes with her supervisors, McRae first filed an administrative claim for discrimination. After more incidents, which resulted in her leaving her position, she

later brought suit against the Department, alleging discrimination and retaliation under California's Fair Employment and Housing Act ("FEHA"). At trial, the jury found no discrimination, but did find that McRae had been retaliated against for filing her administrative claim. On appeal, the court overturned the verdict in McRae's favor, finding that there was no adverse employment action taken against McRae. In making its decision, the court reviewed the facts from the trial court, found that all of the actions taken against McRae by the Department were isolated incident, and thus held that they were not part of a continuous course of retaliatory conduct.

2. Case Principles

- To establish a retaliation claim under FEHA, an employee must establish that the employer took retaliatory action against the employee that constituted an adverse employment action.
- To show retaliation in a FEHA retaliation claim, an employee must show that the actions taken against the employee were part of a continuous course of conduct, and not a series of unrelated events that are not the result of retaliation against the employee.

WORKERS' COMPENSATION: SB 899 CHALLENGED

In *Kopping v. WCAB*, 142 Cal. App. 4th 1099 (Cal. App. 3d Dist. 2006), the Third District held that employers and/or their insurance companies have the burden of proving what, if any, overlap exists between present and former permanent injuries. By doing this, the Court upheld the plain meaning of the statute and the intent of the Legislature in enacting SB 899.

On its own, this case is highly technical and not exceedingly important for employers. However, it may foreshadow how the Court of Appeal might rule on an upcoming challenge to another set of presumptions built into SB 899, specifically, whether the AMA standards enacted by SB 899 can be overcome by countervailing medical testimony. If so, much of the efficacy of SB 899 could be undermined.

A prominent Central Coast-based workers' compensation attorney who represents injured workers has been successful with this attack at the administrative level. The matter is currently entering the civil Court of Appeal on appeal from the Workers' Compensation Appeals Board.

MISCELLANEOUS

I. AT-WILL EMPLOYMENT

The California Supreme Court Rules that the Phrase “At Will” in an Employment Offer Really Means At Will

Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384

A. Factual Background and Court Proceedings

Defendant Arnold Worldwide, Inc. (“Arnold”) hired Plaintiff Dore, notifying Dore of the hiring via a letter that stated that any employment with Arnold was “at will,” and that Arnold therefore had the right to terminate Dore’s employment “at any time.” Arnold later terminated Dore’s position. Dore brought suit against Arnold, claiming that the letter offering the position to Dore implied that Dore’s employment could only be terminated for cause. The Court, reviewing the letter, found that the language “at will” and “at any time” unambiguously meant that Arnold did not have to have cause before terminating Dore’s position.

B. Case Principles

An employer who, absent any contract terms to the contrary, uses the terms “at will” and “at any time” has created an employment at will relationship with the employee.

ACTION: As ever, ensure that nothing in your policies incorrectly implies anything other than at-will employment.

II. EMPLOYEE PRIVACY

Court of Appeal Holds That Employees Can Maintain An Invasion of Privacy Action Without Showing That The Video Was Viewed By Others.

A. Factual Background

After learning that someone was accessing workplace computers, the employer installed video cameras to see who might be sneaking in to use the computers at night. Two women, who worked regular day shifts and were not suspects in the investigation, sued for invasion of privacy.

B. Case Principles

- This case has gone largely unnoticed in the labor and employment law world. It is significant, however, because it appears to reverse existing law which has held that employees had limited expectations of privacy in their workplaces.
- It appears, then, that workplace surveillance in California will be treated with a very skeptical eye. While the ruling here is overturning a summary judgment, chances are that trial courts will see this merely as a "pro-privacy" decision, much in the same way that they saw *Sav-On* as a pro-certification case.
- It might be ok to videotape employees who are aware of the videotaping, if that is of any use.

ACTION: Contact legal counsel before implementing a video surveillance program in any private office.

III. ARBITRATION PROVISIONS.

The California Court of Appeal Upholds an Employment Contract that Requires Employees to Waive Their Right to File Consolidated or Class-Action Claims

Konig v. U-Haul of Cal. (2006) ____ Cal.App.4th ____, 2006 Cal.App.Lexis 1992

A. Factual Background and Court Proceedings

Plaintiff Konig brought a wage and hour claim against defendant U-Haul. The parties' employment contract contained an arbitration clause that included a waiver of the employee's right to bring consolidated or class-action claims against U-Haul. U-Haul sought to enforce the employment contract, compelling arbitration of Konig's claim and seeking dismissal of Konig's arbitration provisions.

At the trial court, U-Haul sought an order compelling arbitration of Konig's claim pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and sought enforcement of the contract's class-action waiver. Konig opposed the motion on the grounds that the contract was unconscionable, and therefore legally unenforceable. The trial court granted U-Haul's motion, and ordered arbitration and the enforcement of the class-action waiver. Konig appealed the trial court's decision.

On appeal, the court upheld the trial court's decision, and found the employment contract enforceable. Noting that, under California law, class-action waivers are not always unenforceable, the court applied relevant case law in determining that, in the employment context, courts' may enforce class-action waivers in employment contracts. Central to the court's decision was the fact that wage and hour claims, like the disputed between Konig and U-Haul, are typically for large amounts of money. While the court recognized that class-action waivers are unenforceable in the consumer context,

where any particular claim will be small, the rationale for refusing to enforce such waiver does not apply in the employment context.

B. Case Principles

1. Courts will enforce arbitration provisions in employment contracts unless the court finds that, under California contract law, the arbitration provision is unenforceable.
2. Courts will enforce class-action or representative claim waivers in employment arbitration contracts because the likely claims in any dispute between the employer and employee will typically be over large sums.
3. Courts *may* base their decision on whether to enforce the arbitration provision on the type of claim that is the subject of the current dispute.

ACTION: The legal issue in *Konig* is unsettled, and the court's ruling is unlikely to be the definitive word on the subject. Until the law regarding employee class-action waivers is settled, we do not recommend changing employment policies to include an employee class-action waiver.

IV. POSTER UPDATES

Four Posters Are Updated For 2007:

- A. The Department of Fair Employment and Housing (DFEH)-162 poster;**
- B. Your Rights Under the Uniformed Services Employment and Reemployment Rights Act (USERRA) notice;**

C. The state minimum wage posting reflecting new rates for 2007 and 2008; and,

D. The Employment Development Department (EDD) Notice to Employees.

ACTION: Update your posters.

V. 2008 CELL PHONE BAN

SB 1613 bans the use of hand-held cell phones while driving a motor vehicle. The law goes into effect on January 1, 2008.

ACTION: Employers should consider revising policies for employees who drive as part of their job duties. Providing a “hands-free” unit with company-issued cell phones would preclude anyone needing to violate this law when it goes into effect.

VI. MILITARY LEAVE/RETURN TO WORK REGULATIONS

The Department of Labor issued new regulations implementing the Uniformed Services Employment and Re-employment Rights Act of 1994 that went into effect on January 18, 2006.

The regulations include a broad definition of “employer” that includes individual supervisors who have control over employment opportunities, thereby triggering personal liability for those individuals. It also details the requirements for returning service members seniority rights.

ACTION: Ensure that you comply with these regulations when a service member employee goes on leave for service and when he or she returns.

VII. HEALTH SAVINGS ACCOUNTS

The ever-increasing cost of providing health insurance to employees has made “Health Savings Accounts” an increasingly popular option. One of the last acts of the 109th Congress was to make Health Savings Accounts even more attractive.

The new rules allow annual Health Savings Account contributions up to the full statutory limit, regardless of the plan deductible. The old rules capped the contribution at the amount of the deductible. It may potentially have positive tax consequences for employee Health Savings Account users.

The new rules also streamlined the process for implementing Health Savings Account plans mid-year. The new rules also streamlined a number of technical issues in plan administration.

ACTION: Health Savings Accounts are now more attractive to employers and employees, but are probably most attractive to relatively financially sophisticated employees who can take advantage of them.