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year-end update: taking stock of 2009

MSK Client Alert

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By Steven M. Schneider

The following is a look back at key labor and employment developments of 2009 and a look ahead at important matters currently pending.

DISCRIMINATION LAW DEVELOPMENTS

California Fair Employment and Housing Act ("FEHA")

FEHA Attorneys' Fees Can Be Denied If Plaintiff Wins $25,000 Or Less: In *Chavez v. City of Los Angeles*, ___ Cal.4th ___ (Jan. 14, 2010), the California Supreme Court unanimously held that plaintiffs who file an unlimited civil case but obtain judgment for an amount that could have been awarded in a limited case (where damages are limited to $25,000) may be denied their FEHA attorneys' fees by the trial judge. In this case, the plaintiff recovered damages of $11,500, but his attorney sought fees of $870,935.50, all of which the trial court denied. This decision should be helpful in opposing, and settling, low-damage FEHA claims.

Supervisors May Be Personally Sued For Harassment For Making Personnel Decisions: In *Roby v. McKesson Corp.*, 47 Cal.4th 686 (Nov. 30, 2009), the California Supreme Court overruled its own precedent in *Reno v. Baird*, 18 Cal.4th 640 (1998), and held that a supervisor can be personally sued for harassment regarding the manner in which he or she makes personnel decisions. In this case, a supervisor ostracized an employee, belittled her, and made negative comments about her body odor (about which other employees complained), despite knowing that the odor was produced by the employee's medication. The Supreme Court held that the "demeaning manner" in which the supervisor addressed this problem constituted harassment. Also, the Court determined that because the **employer's** wrongdoing was limited to its one-time decision to adopt a strict attendance policy, the plaintiff could only receive punitive damages in a one-to-one ratio to her compensatory damages. We now expect many new discrimination cases to include a harassment claim against the plaintiff's supervisor, if only to prevent removal of the case to federal court

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where it is easier for employers to obtain dismissal before trial.

Plaintiffs Must Prove That A Reasonable Accommodation Was Available: In *Scotch v. Art Institute*, 173 Cal.App.4th 986 (May 6, 2009), the Court of Appeal held that a plaintiff claiming disability discrimination must identify a specific reasonable accommodation before claiming that the employer violated its duty to engage in an interactive process. This means that an employer's failure to engage in that process will not give rise to liability unless the plaintiff can prove that doing so would have resulted in a reasonable accommodation.

Federal Employment Discrimination Law

Every Tainted Paycheck Restarts The Statute Of Limitations Clock: Soon after taking office, President Obama signed the Lilly Ledbetter Fair Pay Act ("Ledbetter Act"). The Ledbetter Act reversed a 2007 U.S. Supreme Court ruling, *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that the time to sue starts running when a discriminatory decision is made. This statute states that, with respect to wage-discrimination claims under federal antidiscrimination laws, the time to sue resets *each time an employee receives a paycheck affected by a discriminatory decision*. This will result in lawsuits challenging decisions made decades ago, which will be difficult to defend if the decision makers and documentary evidence are no longer available.

WAGE AND HOUR LAW DEVELOPMENTS

California Labor Code

Flexibility For Alternative Workweek Schedules: In May 2009, Assembly Bill 5 became law. Employers now may propose a regular workweek schedule of five eight-hour days among the "menu of options" they offer employees. If an employer consents, an employee may switch between schedules provided in the "menu of options" on a week-to-week basis. Also, a single employee may constitute a "work unit" under the alternative workweek schedule rules.

Salary Flexibility For Exempt Employees: A DLSE Opinion Letter issued on August 19, 2009, approved temporary commensurate reductions in workdays and salaries for employees exempt from overtime. This represents a change from the DLSE's previous position, which had held that an employer must provide a "fixed and regular sum" to any exempt employee.

Only The Injured Are Left Standing: The California Supreme Court clarified and restricted who can bring claims under the Unfair Competition Law ("UCL") and the Private Attorneys General Act ("PAGA") in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (First Transit, Inc.)*, 46 Cal.4th 993 (June 29, 2009), and *Arias v. Superior Court (Angelo Dairy)*, 46 Cal.4th 969 (June 29, 2009). Now, the named plaintiffs must be *actually injured*. This means that labor unions and other membership groups cannot bring UCL or PAGA claims on behalf of their members unless the union or group itself has been harmed.

Federal Wage and Hour Law

Voluntary Reduction In Hourly Rate To Work A 12-Hour Shift Complies With FLSA: Of interest to hospitals and other health-care employers is the decision of the U.S. Court of Appeals in *Parth v. Pomona Valley Hospital Medical Center*, 584 F.3d 794 (9th Cir., October 22, 2009). The employer's 12-hour shift pay plan, which provided a lower base rate than for an 8-hour shift, had been approved by the nurses' union after the nurses requested the option of working a 12-hour shift. While the FLSA prohibits employers from setting contrived low hourly rates to evade overtime pay requirements, the Ninth Circuit concluded that the lower base rate for working the 12-hour shift was neither artificial nor unreasonable. The court also noted that employees working different shifts may be paid different base rates.

Concerted No-Overtime Action Requires 10-Day Notice Under NLRA Section 8(g): Section 8(g) of the National Labor Relations Act (NLRA) requires unions to give a health-care employer at least 10 days' advance notice of "any strike, picketing, or other concerted refusal to work at any health care institution." The stated purpose for this notice provision is to permit the health-care employer to make alternate provisions for patient care. In *SEIU, United Healthcare Workers-West v. NLRB*, 574 F.3d 1213 (9th Cir., August 3, 2009), the Ninth Circuit affirmed an order of the NLRB finding that the union had violated Section 8(g) by failing to give notice that the employees it represented were going to engage in a concerted refusal to work overtime.

Wage and Hour Class Actions

Plaintiffs Must Submit Claim Forms On Time: In *Martorana v. Marlin & Saltzman*, 175 Cal.App.4th 685 (July 1, 2009), a member of a class of plaintiffs in a wage and hour case who did not timely submit a claim form required by the court-approved settlement was held ineligible to recover unpaid wages. Wage and hour class actions are often settled by employers based on an assumption about the percentage of eligible employees who will actually file a claim form, and settlements have a time period for that submission. This case means that the claim filing time period in those settlements will be enforced by the courts.

Opt-In Requirement Stands In FLSA-Based Class Actions: Federal wage and hour class actions under the Fair Labor Standards Act (FLSA) require potential class members to affirmatively "opt in" to the lawsuit. California law wage and hour class actions in California state courts have no "opt in" requirement. Accordingly, an FLSA class action is likely to have fewer class members than a California law class action. In *Haro v. City of Rosemead*, 174 Cal.App.4th 1067 (June 9, 2009), the Court of Appeal held that an FLSA class action could not be certified under California's class action statute. This means that the opt-in requirement for FLSA class claims cannot be evaded by bringing that claim in a California state court.

Employers May Move To Deny Class Certification In Federal Court: The big fight in wage and hour class actions is whether the court will certify the class, or deny certification based on the individualized nature of class member claims. Usually, this issue is decided when the plaintiffs file a motion for certification of the class. However, in *Vinole v. Countrywide Home Loans*, 571 F.3d 935 (9th Cir., July 7, 2009), the federal court of appeals held that class certification was properly denied in response to the **employer's** motion to **deny** class certification. This decision means that, at least in federal wage and hour cases, the plaintiffs' attorneys no longer control the timing of resolution of the class-certification issue.

Individual Issues Defeat Class Certification For Mortgage Loan Consultants: A federal district court denied class certification concerning mortgage loan consultants in In *re: Wells Fargo Home Mortgage Overtime Pay Litigation*, Case Number M:06-CV-1770 (N.D. Cal., January 14, 2010). Despite the fact that Wells Fargo had uniform policies governing the activities of its mortgage loan consultants, their overtime exemption issue turned on what each of them actually did at work. Wells Fargo said that would involve a mini trial for each member of the alleged class.

Insufficient Information Sinks Class Action Settlement: In *Clark v. Residential Services*, 175 Cal.App.4th 785 (July 6, 2009), a class action settlement was rejected because insufficient information regarding its fairness to class members was provided to the court. The courts must approve settlement of class actions, and judges want to know that a settlement is within the zone of fairness and not just a payoff to the plaintiffs' lawyers for sacrificing the interests of the class members.

Miscellaneous Wage and Hour Decisions

The price of coffee at Starbucks is safe for the time being. In *Chau v. Starbucks*, 174 Cal.App.4th 688 (June 2, 2009), the Court of Appeal reversed an $86-million-dollar judgment against Starbucks in a tip-pooling case.

In *Owen v. Macy's Inc.*, 175 Cal.App.4th 462 (June 29, 2009), California's unique vacation pay vesting statute, Labor Code Section 227.3, was interpreted to mean that an employer may deny vacation benefits that have not vested.

The issue of when salespeople are entitled to post termination commissions continues to result in lawsuits. In *Nein v. HostPro, Inc.*, 174 Cal.App.4th 833 (June 3, 2009), a sales representative was held not entitled to post termination commissions.

General contractors might incur liability for wage claims against some of their subcontractors. In *Sanders Construction Co. v. Cerda*, 175 Cal.App.4th 430 (June 29, 2009), employees of an unlicensed subcontractor were permitted to assert their unpaid wage claims against the general contractor.

In *D'Este v. Bayer Corp.*, 565 F.3d 1119 (9th Cir., May 5, 2009), the federal court of appeals certified questions to the California Supreme Court concerning whether pharmaceutical sales representatives qualify as overtime-exempt "outside salespersons" under the applicable California Industrial and Welfare Commission Wage Order.

The DLSE issued an Opinion Letter regarding meal periods for hazardous material truck drivers who under applicable federal regulations are not permitted to be more than 100 feet away from their vehicle, and even then must have the vehicle in their unobstructed sight. (Opinion Letter 2009.06.09.) That limitation resulted in the DLSE's opinion that the drivers would ordinarily not be able to have a lunch period free from all work, but written on-duty meal period agreements with them might be appropriate.

Federal Express continues to insist that its drivers are independent contractors, not employees. In *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir., April 21, 2009), the federal court of appeals reversed the NLRB's conclusion of employee status, finding instead that the Fed Ex home-delivery drivers at issue were independent contractors. This decision apparently was made in large part because of the drivers' opportunity for entrepreneurial gain for, among other things, being able to hire other drivers to work for them, and to sell their

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routes to third parties.

OTHER 2009 DECISIONAL DEVELOPMENTS

Attorney-Client Privilege

Factual Material In Confidential Legal Opinion Not Disclosable: In *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725 (Nov. 30, 2009), the California Supreme Court unanimously decided that the trial court violated Costco's attorney-client privilege by ordering Costco to release to its plaintiff in-store managers a redacted copy of a 22-page opinion letter written by Costco's outside counsel. The trial court and Court of Appeal had upheld a discovery referee's ruling that the parts of the letter describing Costco in-store managers' job responsibilities and duties were subject to disclosure because they constituted factual material separable from the attorney's opinions. However, the Supreme Court held that, because Costco had asked the attorney to investigate the facts and provide a confidential legal opinion, the entire letter was privileged even it contained some unprivileged factual material. That factual material could be discoverable by other means in the lawsuit, but not by disclosing a redacted version of the letter over Costco's objections.

The Supreme Court did not reach the question of whether what the in-store managers told Costco's outside counsel during her interviews of them was also subject to the attorney-client privilege. Accordingly, it is possible that employees interviewed by the employer's lawyer might be asked in lawsuit discovery to answer the question "what did you tell the company's lawyer?"

Non-compete Agreements

Employee Covenants Not To Compete And Not To Solicit Customers Are Facially Void: In *Dowell v. Biosense Webster, Inc.*, 179 Cal.App.4th 564 (Oct. 20, 2009), the Court of Appeal found that employment agreement clauses prohibiting the plaintiffs from working for a competitor and soliciting the employer's customers were facially void under Cal. Business & Professions Code Section 16600, and that their inclusion violated California's Unfair Competition Law (Section 17200, et seq.). While employers, even in California, can protect their trade secrets, and customer contract and contact information might qualify as trade secrets, the restrictions on employees must be carefully tailored to protect only true trade secret information. In this case, by contrast, the customers for the products at issue (physicians and hospitals) were easily identified from publicly available resources.

Voluntary Incentive Compensation

Forfeiture Provisions Of Voluntary Incentive Compensation Plan Upheld: Citigroup offered its employees a voluntary incentive compensation plan, which provided them with shares of restricted company stock at a reduced price. Participating employees paid for the restricted shares by forgoing part of their cash wages, rather than writing a check. Employees who chose to participate in this plan agreed that, if they left employment (voluntarily or discharged for cause) before their shares vested, they would forfeit both the unvested shares and the wages previously paid for them. In *Schachter v. Citigroup, Inc.*, 47 Cal.4th 610 (November 2, 2009), the California Supreme Court upheld that forfeiture provision, despite Labor Code Sections 201, 202 and 219, which provide that all

wages earned must be paid to the employee. Agreeing with Citigroup that the employees had been paid all compensation due them, part in wages and part in restricted stock, the Supreme Court found nothing wrong with the plan's forfeiture provisions. (It was probably helpful here that the plaintiff voluntarily had quit employment, so there was no inference that the employer had caused forfeiture of the restricted stock.)

Employee Privacy Rights

Unique Circumstances Prevent Liability For Privacy Intrusion: Under California's tort of invasion of privacy, two elements must be shown by the plaintiff: (1) intrusion into his or her privacy, (2) by conduct that is "highly offensive" and constitutes an "egregious violation of prevailing social norms." In *Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272 (August 3, 2009), the California Supreme Court considered this privacy violation tort in the workplace.

The female plaintiffs worked in a shared enclosed office, each having her own desk and work computer. The employer learned that numerous porn sites had been viewed during the late-night and early-morning hours from several of its computers. One of those computers was on one of the plaintiffs' work desks. To try to catch the porn viewer, the employer installed a video camera and related equipment in the plaintiffs' shared enclosed office. Concerned that disclosing the camera's presence would scare off the perpetrator, the employer did not inform the employees in that office about the camera.

This surveillance equipment was only active late at night and in the early-morning hours, after the plaintiffs had left work. Accordingly, at no time were the plaintiffs' images ever recorded or viewed on these devices. After three weeks of this electronic surveillance, no one had been videotaped using the computer in that office, and the employer removed the equipment. Upon learning that this equipment had been used to spy on their enclosed office, the employees who worked in that office filed a lawsuit against the employer for breach of privacy.

Under the unique facts of this case, the California Supreme Court held that the plaintiffs had failed to establish the second element of the tort, namely, that the intrusion was "highly offensive" or constituted an "egregious breach of social norms." The Court emphasized the limited placement of the equipment, for a short 21-day period, during times when the plaintiffs were not present in that office.

However, the Court did find that the first element of this tort had been met -- intrusion on the plaintiffs' reasonable expectations of privacy -- in part because the employer had no policy about video surveillance on its premises. Accordingly, this fact-intensive decision is not a license to employers to engage in covert electronic surveillance of their employees. Before engaging in electronic surveillance of employees' work areas or conducting searches there, employers should consult experienced employment counsel.

Trade Secrets

Employers May Be Liable For Both Sides' Attorneys' Fees In Trade Secrets Actions: If former employees are joining a competing firm, or setting up their own shop, their employer might be quite concerned that their company's proprietary information will be used against it. Employers might want to stop such information misuse by filing a prompt lawsuit alleging violation of California's Uniform Trade Secrets Act (California Civil Code Section 3426, et

seq.). However, the decision in *FLIR Systems, Inc. v. Parrish*, 174 Cal.App.4th 1270 (June 15, 2009), teaches that a company in this situation should gather as much evidence as possible before filing the lawsuit. In this case, the employer's lawsuit was not sufficiently calibrated to California's trade secrets law because the employer had alleged an untenable theory. The court accordingly deemed the lawsuit to be "objectively specious." In addition, there was evidence of bad faith. When asked why the lawsuit was filed, the employer's CEO testified, "We can't tolerate a direct competitive threat by [defendants] Bill and Tim." The combination of objective speciousness and bad faith resulted in the Court's ordering the employer to pay the defendants' attorneys' fees and costs, ***which exceeded $1.6 million***. The lesson from this decision is: don't file a trade secrets claim in California unless you (1) have a viable legal theory under relevant California law; (2) have sufficient evidence that the defendants are actually using your trade secrets or overtly threatening to do so; and (3) are not using the lawsuit to halt legitimate competition.

Unfair Labor Practices

Selective Enforcement Of E-Mail Use Restrictions Can Be An Unfair Labor Practice: In *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir., July 7, 2009), the employer committed an unfair labor practice by disciplining an employee for using work e-mail for non-work, union purposes. The employee sent three e-mails to employees, one about a union rally and two about supporting the union in its collective-bargaining negotiations with the company. He received a warning for violating the company's Communication System Policy.

The NLRB found that the company was aware that employees used the company's e-mail system to send and receive personal messages. The Administrative Law Judge specifically noted that employees sent personal messages "without reprimand." Accordingly, although the company's Communication System Policy was held not to discriminate on its face against employee activity protected under the NLRA, the company violated the NLRA in its selective enforcement of that policy.

Union's "Shame Campaign" Not An Unfair Labor Practice: Rather than filing petitions for a representation election with the NLRB, some unions engage in "corporate campaigns" of harassment against an employer. In *Local 79, Laborers Int'l Union (JMH Development LLC)*, 354 NLRB No. 14 (April 30, 2009), the union's "shame campaign" against the target employer's CEO was held not to be an unfair labor practice. Among other things, the union passed out leaflets to the public in front of the CEO's residence in Manhattan, at a meeting he attended in California with potential investors, and at a charity event. At the charity event, a group of union representatives stood in front of the CEO's wife, their son, and the wife's mother as they exited their vehicle. The union tried to give them leaflets, and shouted obscenities at them, until the restaurant security guard was able to escort the family into the restaurant.

STATUTORY AND REGULATORY DEVELOPMENTS

Family and Medical Leave Act ("FMLA")

New FMLA Regulations Create New Challenges For California Employers: There are notable differences between the federal Family and Medical Leave Act ("FMLA") and California law, so employers have to navigate through

these differences in order to comply with both sets of leave laws. California employers must recalibrate their leave law navigation systems because the U.S. Department of Labor ("DOL") issued new regulations interpreting the FMLA, which took effect on January 16, 2009. For California employers, the new FMLA regulations create challenges because the California Family Rights Act ("CFRA") regulations still provide that employers can rely on the FMLA regulations *that were issued on January 6, 1995*, as long as those regulations are not inconsistent with California law. 2 Cal. Code of Regs. § 7297.10.

The California Fair Employment and Housing Commission has stated that it plans to revise the CFRA regulations, but that has not yet occurred more than a year after the effective date of the new FMLA regulations. Currently, the new FMLA regulations and the CFRA have some key differences, including with respect to military family leaves, the definition of "serious health condition," and the information that an employer may request from health-care providers. California employers should be aware of their expanded notice and leave obligations under the FMLA and take appropriate action to comply. This includes updating personnel policies, employee handbooks, and administrative practices.

Economic Stimulus Package

New COBRA Subsidy Applies To Employers With Twenty Or More Employees: The American Recovery and Reinvestment Act of 2009 ("ARRA") created a new 65% premium subsidy for employees who elect health-care continuation coverage under the Consolidated Omnibus Reconciliation Act ("COBRA"), and placed new notice requirements upon employers. COBRA - which applies to employers with twenty (20) or more employees - allows most involuntarily terminated employees to self-pay for continuation of their employee group health insurance coverage for up to eighteen (18) months. Employees did so by paying up to 102% of the full premium (including the employer's contribution) for the continued coverage.

Uncle Sam now provides a subsidy, equal to 65% of the COBRA premium, for up to nine months, for former employees and dependents who have lost group health coverage as a result of an involuntarily termination from employment occurring between September 1, 2008, and December 31, 2009. Employers will be reimbursed for the subsidy through payroll tax credits or direct payment from the U.S. Treasury. Individuals who earn $125,000 or more, and couples with combined annual earnings of $250,000 or more, are **not** eligible for this subsidy.

Employers' COBRA notices must include information about the premium subsidy. Employers must also notify eligible individuals who initially declined COBRA coverage that they have a renewed right to elect subsidized COBRA coverage.

Additionally, as part of the Department of Defense Appropriations Act of 2010, which became law on December 19, 2009 ("DODA Act"), Congress extended the COBRA subsidy originally enacted by the ARRA. For former employees for whom the nine-month original subsidy expired on November 30, 2009, the employer should give them a model "Premium Assistance Extension Notice" by January 29, 2010. For former employees for whom the original nine-month subsidy expired on December 31, 2009, the employer should give them a model notice by March 1, 2010. The Department of Labor's model notices are available on its web site.

2010 - A LOOK AHEAD

PENDING LEGISLATION TO WATCH IN 2010

Paycheck Fairness Act

The Paycheck Fairness Act would update the Equal Pay Act of 1963 in four significant ways. First, it would require employers to show that pay disparities between men and women performing similar work are job-related, not gender-based, and consistent with legitimate business needs. Some current defenses to Equal Pay Act claims would be eliminated. Second, it would enhance available remedies under the Equal Pay Act. Third, it would facilitate class actions, by making class membership automatic unless individual members opt out. Fourth, it would prohibit employers from retaliating against workers who discuss their wages and salaries with coworkers.

PENDING CALIFORNIA SUPREME COURT DECISIONS

The California Supreme Court has at least the following ten labor and employment cases currently pending before it for decision:

Labor Code Section 203 Penalties For Late Payment Of Final Wages. In *Pineda v. Bank of America, N.A.*, 170 Cal. App.4th 388, 390 (2009), the Court of Appeal held that Labor Code "section 203 penalties may not be recovered as restitution under Business and Professions Code section 17203." That opinion is no longer citable as precedent. The Supreme Court will address the following issues. (1) When a worker files an action to recover penalties for late payment of final wages under Labor Code § 203, but does not concurrently seek to recover any unpaid wages, which statute of limitations applies: the one-year period for penalties under Code of Civil Procedure § 340 (a) or the three-year period for unpaid wages under Labor Code § 202? (2) Can penalties under Labor Code § 203 be recovered as restitution in an Unfair Competition Law action under Business & Professions Code § 17203?

California Wage And Hour Law Application To Out-of-State Employees. The California Supreme Court accepted the questions certified to it by the U.S. Court of Appeals for the Ninth Circuit in *Sullivan v. Oracle Corp.*, 557 F.3d 979 (9th Cir. 2009), which are: (1) Does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week? (2) Does California Business and Professions Code § 17200 apply to the overtime work described in question one? (3) Does § 17200 apply to overtime work performed outside California for a California-based employer by out-of-state plaintiffs in the circumstances of this case if the employer failed to comply with the overtime provisions of the FLSA? The Ninth Circuit withdrew its earlier opinion in this case, *Sullivan v. Oracle Corp.*, 547 F.3d 1177 (9th Cir. 2008), which had held that California wage and hour law applies to out-of-state employees sent to work in California.

Exemption Status Of Insurance Company Claims Adjusters. In *Harris v. Superior Court (Liberty Mutual Ins. Co.)*, the issue is whether insurance company claims adjusters meet the administrative employee overtime exemption. The Court of Appeal in this case concluded that they did not, contrary to a string of other cases finding insurance company claims adjusters to be exempt from overtime.

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Employee Claim Arbitration Issues. In *Pearson Dental Supplies, Inc. v. Superior Court (Turcios)*, the issues are: (1) What standard of judicial review applies to an arbitrator's decision on an employee's discrimination claim under the FEHA that is arbitrated pursuant to a mandatory employment arbitration agreement? (2) Can such a mandatory arbitration agreement restrict an employee from seeking administrative remedies for violations of the FEHA?

In *Sonic-Calabasas A, Inc. v. Moreno*, the issues are: (1) Can a mandatory employment arbitration agreement be enforced before conclusion of a Labor Commissioner proceeding concerning an employee's statutory wage claim? (2) Was the Labor Commissioner's jurisdiction of that claim divested by the decision of the U.S. Supreme Court in *Preston v. Ferrer*, 552 U.S. 346, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008)?

Stray Remarks. In *Reid v. Google, Inc.*, the California Supreme Court will address the following issues. (1) Should California law recognize the "stray remarks" doctrine, which permits the trial court in ruling on a motion for summary judgment to disregard isolated discriminatory remarks or comments unrelated to the decision-making process as insufficient to establish a triable issue of discrimination? (2) Are evidentiary objections not expressly ruled on by the trial court at the time of decision of such a motion preserved for appeal?

Kin Care. In *McCarther v. Pacific Telesis Group*, the issues are: (1) Does Labor Code § 233, which mandates that employees be allowed to use a portion of their "accrued and available sick leave" to care for sick family members, apply to employer plans in which employees do not periodically accrue a certain number of paid sick days, but are paid for qualifying absences due to illness? (2) Does Labor Code § 234, which prohibits employers from disciplining employees for using sick leave to care for sick family members, prohibit an employer from disciplining an employee who takes such "kin care" leave if the employer would have the right to discipline the employee for taking time off for the employee's own illness or injury?

State And Federal Law Preemption Issues. Pending for decision in *California Grocers Ass'n v. City of Los Angeles* are the following questions: (1) Does California's state food-safety laws preempt a local ordinance that requires a grocery store, after a change of ownership, to retain the employees of the former owner for a 90-day transition period? (2) Do federal labor laws preempt the local ordinance?

Meal Periods. In *Brinker Restaurant v. Superior Court (Hohnbaum)*, and several related cases, the issue is whether California employers must monitor employees to make sure that they actually take their meal periods free from work, or merely avoid hindering employees who want to take their meal periods. While a seemingly mundane issue, many millions of dollars are riding on this decision. Hundreds of pending wage and hour law class action cases raise meal period issues that will be governed by the California Supreme Court's decision in *Brinker*.

A related issue, which might one day be decided by the California Supreme Court, is whether employers must pay only one, or more than one, penalty hour's pay per day for meal and rest period violations. *See, e.g., Marlo v. United Parcel Service, Inc.*, 2009 U.S. Dist. Lexis 41948 (C.D. Cal., May 5, 2009) (holding that more than one penalty hour's pay per day is possible).

Employee Tips. Whether Labor Code § 351, which prohibits employers from taking "any gratuity or part thereof that is paid, given to, or left for an employee by a patron," creates a private right of action for employees will be

decided in *Lu v. Hawaiian Gardens Casino, Inc.*

Are Corporate Directors And Officers Personally Liable For Employee Wage Claims? In *Martinez v. Combs*, the California Supreme Court will decide whether officers and directors can be held personally liable for causing the corporate employer to violate the statutory duty to pay minimum wage and overtime. If that question is answered yes, we expect corporate directors and officers to be named as individual defendants in wage and hour lawsuits, in part to prevent their removal to federal court by defeating diversity jurisdiction.

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