



labor & employment law 2010: a year-end in review

MSK Client Alert

January 24, 2011

By Steven M. Schneider

The following is a review of important labor and employment developments in 2010, and a look forward to important issues pending for 2011.

practice areas

employment litigation & counseling

labor & employment

labor litigation & counseling

DISCRIMINATION LAW DEVELOPMENTS

California Fair Employment and Housing Act ("FEHA")

FEHA Attorneys' Fees May Be Denied If Plaintiff Wins \$25,000 or Less: In Chavez v. City of Los Angeles, 47 Cal.4th 970 (January 14, 2010) the California Supreme Court unanimously held that a plaintiff who files an "unlimited" civil case but obtains judgment for an amount that could have been awarded in a "limited" case, in which damages are limited to \$25,000, may be denied his or her attorneys' fees under the California Fair Employment and Housing Act ("FEHA") by the trial judge. As the threat of having to pay thousands of dollars for the plaintiff's attorney fees often leads employers to pay substantial settlements in even low damage FEHA cases (such as where a terminated employee quickly finds alternative employment at the same or higher pay), this decision should deter plaintiffs' attorneys from pursuing low damages cases through trial.

Trial Court May Vacate FEHA Arbitration Decision Based Upon Legal Error, When Claimant is Denied a Hearing on the Merits: In Pearson Dental Supplies, Inc. v. Superior Court of Los Angeles County (Luis Turcios), 48 Cal.4th 665 (April 26, 2010), the California Supreme Court vacated an arbitrator's award, undermining the notion that arbitration is a final and binding forum for resolving disputes. Here, plaintiff Luis Turcios was 67 years old when terminated and sued his employer for age discrimination under FEHA. The employer did not initially raise Turcios' signed arbitration agreement as an affirmative defense, and did not file a motion to compel arbitration until five months into the court case. The trial court ordered the case to arbitration, however, and the arbitrator determined that Turcios had blown the one-year time limit to request arbitration, and dismissed



labor & employment law 2010: a year-end in review

his case before any hearing on the merits. Upon Turcios' motion, the Superior Court vacated the arbitration award, ruling that the arbitrator had made a clear error of law by misinterpreting the tolling statute. The Court of Appeal agreed that the arbitrator had made a legal error, but held that due to the very limited grounds available for overturning an arbitration award the erroneous decision was "insulated from judicial review." The California Supreme Court's 4-3 majority agreed with the trial court, holding that "when, as here, an employee subject to a mandatory employment-arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award."

Plaintiffs' Social Media Websites Can Be Discoverable Regarding Their Emotional Distress Claims: In *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430 (S.D. Ind. May 11, 2010), two women contended that they were sexually harassed during their employment and had endured "severe emotional distress." The EEOC sued the employer on their behalf. Suspecting that the emotional distress was false or exaggerated, the employer sought discovery of all of their photographs and other postings on Facebook or MySpace. The court granted discovery of any "profiles, postings or messages . . . and [applications from the date of the first allegedly harassing act] through the present that reveal, refer or relate to any emotion, feeling or mental state, as well as communications that reveal, refer or relate to events that could reasonably be expected to produce a significant emotion, feeling or mental state." Also, the court ordered the two women to produce any pictures they had posted on their sites since the "claimants' appearance may reveal [their] emotional or mental status." The court expressly instructed the EEOC to err on the side of production and permitted the employer to ask the claimants in later discovery about the scope of what was, and was not, produced.

"Stray Remarks" Relating to Discrimination Claims Not Excluded in California: The plaintiff in *Reid v. Google, Inc.*, 50 Cal.4th 512 (August 5, 2010), alleged that supervisors and coworkers at Google made derogatory age-related remarks to him, before his termination from the company at age 54. He brought suit against the company, alleging age discrimination under the FEHA. Under federal employment discrimination law, there is a doctrine that "stray remarks," or "remarks made by non-decisionmaking coworkers or remarks made by decisionmaking supervisors outside the decisional process," are categorically excluded from evidence because such evidence is inherently prejudicial to the employer. The California Supreme Court soundly rejected this doctrine, finding stray remarks provide relevant, circumstantial evidence of discrimination.

"Reverse Sexual Harassment" Treated the Same As Sexual Harassment: In *EEOC v. Prospect Airport Services, Inc.*, 621 F.3d 991 (9th Cir. September 3, 2010), a male worker alleged that he was the object of repeated, overt sexual advances made by a female co-worker. When he repeatedly complained about the behavior to managers, his complaints were ignored and one supervisor told him he should be flattered by the unwanted attention. In addition, the plaintiff alleged that the woman recruited other co-workers to pressure him to succumb to her advances and to spread rumors that he was gay when he did not succumb. The trial court dismissed the case, finding that a "reasonable" man would not find the woman's conduct to be harassing. Reiterating that the same rules apply whether the claimant is a woman or a man, the Ninth Circuit reversed summary judgment in favor of the employer.



labor & employment law 2010: a year-end in review

Heated Rhetoric Regarding Discrimination Can Be Actionable as Defamation: Overhill Farms, Inc. v. Lopez, No. G042984, 2010 WL 46199906 (Cal. Ct. App. 4 Dist. November 15, 2010) (Unpublished / Noncitable). In this case, the employer received a lengthy "no-match" letter concerning the alleged Social Security Numbers of more than 30 of its employees, all of whom were Latino. The employer followed a multi-step procedure in dealing with the affected employees, who were represented by a union not a party in this case. One of the employees was able to demonstrate an error concerning his actual SSN, but the others didn't even try and were ultimately terminated. An activist group and some of the company's employees publicly protested those terminations, a protest that included accusing the company of racism -- terminating them because they were Latino. The employer filed a defamation action against the activists, but the trial court granted an "anti-SLAPP" motion dismissing the case as "strategic litigation against public policy" filed in order to chill free speech. However, finding the activist group and the employees supporting it allegedly went too far in their uttered aspersions against the employer, the Court of Appeals reversed the trial court's granting of the anti-SLAPP motion and held that the employer had a reasonable probability of proving actionable defamation.

New California Pregnancy and Disability Regulations

- The Fair Employment and Housing Commission ("FEHC") is proposing amendments to its regulations on pregnancy, childbirth, and related medical conditions. The new regulations conform to statutory changes in the FEHA in 1999 and 2004, which required employers to reasonably accommodate pregnant employees and eliminated exceptions for employers with five to 14 employees, respectively. The amended regulations also provide guidance to employers about notifying employees about their rights to transfer to less strenuous or hazardous jobs, to take a pregnancy disability leave, or to receive a reasonable accommodation. The next FEHC meeting will be held in early 2011, on a date yet to be determined, and there will be an additional 15-day public comment period afterward. Once finalized, the new regulations will presumably become effective in mid-2011.
- The FEHC is also revising its disability regulations in light of federal changes to the ADA. Once the Commission approves any amendments, they will be noticed for public comment, and this will presumably take place at some point in 2011.

MISCELLANEOUS LEGAL DEVELOPMENTS

The Federal Test for Unpaid Internships Has Become the California Test: In an Opinion Letter dated April 7, 2010, the California Division of Labor Standards Enforcement ("DLSE") embraced the federal six-factor test, rejecting the state's previous (and more onerous) 11-factor test. Under the six-factor test, interns must experience training that is similar to that in a vocational school; they must be the primary beneficiaries of the training; they cannot be entitled to a job at the end of the internship; they must understand that they are not entitled to wages; and they must not displace regular employees, but work under their close observation. Basically, an intern should be someone in an educational program who is required by that program to obtain some work experience. Employers should obtain letters from the intern's educational program stating that the intern is enrolled in its educational program and that his or her internship is a required part of that program.



labor & employment law 2010: a year-end in review

No Violation Of Employee Privacy Rights Where Employer's Written Policy Permits Searches: In *City of Ontario v. Quon*, 130 S.Ct. 2619, 177 L.Ed.2d 216 (June 17, 2010), the Supreme Court addressed employee privacy rights with respect to electronic communications. Here, the City of Ontario, California issued pagers to its police officers. Although there was a written police department policy to the effect that the department could audit text messages sent via the pagers, officers were told by a supervisor that their messages would not be audited as long as they paid any overage charges. The police chief, however, intrigued by why so many officers had exceeded their text-messaging limits, decided to audit the messages, and found that one officer, Jeff Quon, had sent and received a great many personal (and sexually explicit) messages. Quon and others brought suit, alleging that the police department had violated their Fourth Amendment rights. The Ninth Circuit had found a Fourth Amendment violation, but the Supreme Court overturned that decision, and found there was a legitimate reason for the City Police Department's search of the text messages, that the search was reasonable in scope, and therefore, especially in light of the department's written policy permitting such searches, the plaintiffs' Fourth Amendment rights were not violated.

Voluntary Employer Collusion To Respect Invalid Noncompete Agreements Provides a Basis for Wrongful Termination Claims: In *Silguero v. Creteguard, Inc.*, 187 Cal.App.4th 60 (July 30, 2010), the plaintiff worked as a sales representative for FST, which had threatened her with termination unless she signed an agreement that barred her "from all sales activities for 18 months following either departure or termination." The plaintiff signed this covenant not to compete and was terminated two months later. Shortly afterwards, she found a new job with Creteguard, but FST contacted Creteguard and requested Creteguard's cooperation in enforcing the agreement, including the ban on the plaintiff's participation in sales activities. Creteguard agreed, and terminated the plaintiff. In its termination letter, Creteguard explained that although non-compete clauses are void in California, Creteguard wanted "to keep the same respect and understanding with colleagues in the same industry." The plaintiff brought a claim for wrongful termination in violation of public policy, predicated on California statutes banning unlawful constraints upon trade. Although the trial court sustained Creteguard's demurrer dismissing the complaint, the Court of Appeal reversed, holding that the allegations were sufficient to allege a claim for wrongful termination in violation of public policy.

Mutual Aid Pacts By Employers In Labor Disputes Subject to Antitrust Liability: A grocery store chain mutual aid pact during a strike was the subject of *California v. Safeway, Inc.*, 615 F.3d 1171 (9th Cir. August 17, 2010). Because the grocery chains' mutual aid pact required their profits to be shared among them during a strike or lockout of union-represented employees, it was ruled not exempted from antitrust liability by a non-statutory exemption for employer actions in labor disputes. Safeway is seeking Supreme Court review of this decision, which limits what employers who are members of a multi-employer bargaining unit can do for mutual aid and protection during a strike or lockout affecting some but not all of the employers in that unit.

"Take It Or Leave It" Arbitration Agreements Held Procedurally Unconscionable: In *Trivedi v. Curexo Technology Corporation*, 189 Cal.App.4th 387 (September 28, 2010), the arbitration provision in a highly paid CEO's employment agreement was held to be procedurally unconscionable because it was presented on a "take it or leave it" basis, *i.e.*, without any offer to negotiate it, and because the clause's referenced Rules of the American Arbitration Association were not attached to the Agreement. The court also found the arbitration clause to be substantively unconscionable because it provided that the prevailing party could recover its attorneys' fees and



labor & employment law 2010: a year-end in review

costs incurred in the arbitration in circumstances not always available to an employer under the FEHA and because the provision exempting injunctive relief claims from arbitration would likely be more beneficial to the employer than the executive.

Implying That Employee Was Fired Because of Incompetence Opens Door to Defamation Per Se: Silence is golden, especially for employers. In *Goodrick v. Hertz Equipment Rental Corp.*, No. A126741, 2010 WL 4113812 (Cal. Ct. App. 1 Dist. October 20, 2010) (Unpublished / Noncitable), the Court of Appeal held that the former manager of the equipment rental facility established defamation per se due to the employer's telling customers he had been fired because equipment was missing, which conveyed a lack of competence in the performance of his manager duties. Since defamation per se was established, the former manager did not need to present evidence of actual damage to his reputation.

CLASS ACTION AND WAGE AND HOUR LAW DEVELOPMENTS

Ninth Circuit Certifies Class of Over 1.5 Million Female Wal-Mart Employees: Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. April 26, 2010) (en banc). In a 6-5 decision, the Ninth Circuit sitting en banc permitted a nationwide class of approximately 500,000 current female employees and 1,100,000 former female employees of Wal-Mart to proceed with their claims for alleged sex discrimination in pay and promotion. The issue of whether separate classes of current employees seeking punitive damages and of former female employees are required was sent back to the federal district court. Wal-Mart's monetary exposure in this gigantic case could exceed a billion dollars. Wal-Mart's lawyers sought Supreme Court review, pointing out that the class certified by the district court "is larger than the active-duty personnel in the Army, Navy, Air Force, Marines, and Coast Guard - combined - making it the largest employment class action in history by several orders of magnitude." On December 6, 2010, the Supreme Court decided to review the appropriateness of such a huge class action. A decision is expected in late spring 2011.

Class Certified Regarding Employer's Automatic Deduction of Meal Period Time: Dilts v. Penske Logistics, LLC, 267 F. R.D. 625 (S.D. Cal. April 26, 2010). In this case, plaintiffs were drivers and installers of appliances, who typically worked shifts exceeding 10 hours. Delivery schedules were organized by a computer program. Plaintiffs were required to schedule and document their own meal periods, but the payroll system automatically deducted 30-minute meal periods, without any inquiry into whether meal periods were taken or not. The District Court certified the class because common issues (primarily involving the automatic deduction practice) predominated. The Court also found that even though the California Supreme Court has not yet decided *Brinker*, California meal break law requires an employer to "affirmatively act to make a meal period available" where the employees are "relieved of all duty."

Federal Definition of "Employer" Does Not Apply to California Wage/Hour Claims, Which Are Governed By the Broader Industrial Welfare Commission ("IWC") Definition: Martinez v. Combs, 49 Cal.4th 35 (May 20, 2010). The plaintiffs in this case were seasonal agricultural workers who sued their employer, along with produce merchants to whom their employer sold strawberries, for unpaid minimum wages. The Superior Court granted summary judgment to the produce merchants, on the ground they were not the plaintiffs' employers. The Court of Appeal affirmed, applying the "economic reality" test for employment developed under the FLSA. The California Supreme Court affirmed the Court of Appeal's judgment, but on the grounds that the IWC Wage Orders generally



labor & employment law 2010: a year-end in review

define the employment relationship.

No Explicit Statement of Maximum Value of Plaintiffs' Claims Required To Approve Class Action Settlement: Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles, 186 Cal.App.4th 399 (June 10, 2010). The plaintiffs here brought a wage and hour class action, which was settled such that the average class member would receive a payment of about \$4,300. The trial court approved the settlement, but an objector argued that the record before the trial court contained no explicit statement of the maximum value of the plaintiffs' claims. The Court of Appeal affirmed the settlement approval, however, because it had no doubt that the trial court had a general understanding of the amount in controversy.

Class Action Settlement Need Not Allocate Portion to PAGA Penalties, and Store Coupons Acceptable In Place of Cash: In Nordstrom Commission Cases, 186 Cal.App.4th 576 (June 10, 2010), the plaintiffs filed separate class action lawsuits against Nordstrom's, alleging that the retailer's policy of paying net sales commissions to commissioned sales employees violated the Labor Code. The parties reached a settlement, which the trial court approved. On appeal, an objector contended that the settlement was not fair or reasonable because it allocated no portion of the damages to the class's claims under the Private Attorneys General Act of 2004 ("PAGA"), and that the settlement providing for in-store merchandise vouchers violated California law. The Court of Appeal affirmed the settlement approval, noting that though the PAGA penalty claims were at issue, they were resolved as part of the overall settlement of the case. The Court of Appeal also noted that the in-store merchandise vouchers only constituted 20 percent of the settlement, and were intended to allow class members with a claim of less than \$20 to receive the full value of their claims.

Wage Statements Need Not Add Regular and Overtime Totals Together: Morgan v. United Retail Inc., 186 Cal.App.4th 1136 (June 23, 2010). In this case, a former employee brought an action against her employer under California Labor Code Section 226, which requires accurate wage statements. Her complaint focused on the fact that her wage statements listed total regular hours worked, and total overtime hours worked, but did not add the two lines together and list the sum of those hours in a separate line. The Court of Appeal affirmed summary judgment for the employer, holding that these wage statements satisfied the requirement in Section 226 to show "total hours worked."

Class Suitability Not Ordinarily Determined At the Pleading Stage: In Gutierrez v. California Commerce Club, Inc., 187 Cal.App.4th 969 (August 2, 2010), the plaintiffs brought a class action against a casino for not providing meal and rest breaks. The Superior Court sustained the employer's demurrer without leave to amend, on the ground that plaintiffs had failed to show the existence of a class. The Court of Appeal reversed, holding that class suitability in wage and hour disputes should not normally be determined on demurrer.

Independent Contractors in California Must Meet California Test, Not a Test From Another State: In Narayan v. EGL, Inc., 616 F.3d 895 (9th Cir. July 13, 2010, amended August 5, 2010), the federal Court of Appeals ruled that the trucking company employer could not avoid its California wage/hour obligations by stating in its driver agreements that they must be interpreted in accordance with the laws of another state. Texas-based Eagle Freight Systems wrote into those agreements acknowledgments that its California drivers were independent contractors and that the agreement had to be interpreted according to Texas law, which is more favorable to claims of independent contractor status than California law. The Court of Appeals concluded that workers in



labor & employment law 2010: a year-end in review

California fall under California law and that, once workers are hired, they are presumed to be employees unless the company proves that they are actually independent contractors under California's more restrictive view of that status.

Statute Prohibiting Employers From Taking Employees' Gratuities Does Not Contain a Private Right to Sue: Lu v. Hawaiian Gardens Casino, Inc., 50 Cal.4th 592 (August 9, 2010). In this case, a dealer at a casino brought a class action, alleging that the casino's mandatory tip pooling policy violated California Labor Code Section 351 (which prohibits employers from taking any gratuities patrons leave for employees) and also constituted conversion. The California Supreme Court determined that Section 351 does not contain a private cause of action, but noted that a common law action for conversion may be appropriate in certain circumstances.

Most Newspaper Reporters Unlikely to Qualify For "Creative Professional" Exemption From Overtime Requirements: Wang v. Chinese Daily News, Inc., 623 F.3d 743 (9th Cir. September 27, 2010), concerned a variety of wage/hour class action issues. In this class action, the plaintiff journalists contended that they were not paid overtime, that they were denied meal and rest breaks, and that they were not provided with accurate paycheck statements. The Court of Appeals affirmed the trial court's decision to (A) certify a class for the state law claims, (B) invalidate class member opt-outs from the case due to the employer's coercive acts, (C) hold California's Business and Professions Code section 17200, which essentially adds a full year to the claims period, as valid and not preempted by the federal Fair Labor Standards Act (FLSA), (D) allow both an FLSA opt-in collective action along with an opt-out state law claims class action, and (E) hold that the class member journalists were non-exempt employees and were not subject to the creative professional exemption from overtime. This decision means that journalists who do not research, investigate, and prepare their own regular by-line columns are unlikely to be considered exempt from overtime, especially those who work for smaller newspapers, where their reporting tends to be more routine.

Employees May Sue Employer Under PAGA For Failure to Provide Suitable Seating: Bright v. 99¢ Only Stores, 189 Cal. App.4th 1472 (November 12, 2010). This decision held that employees may sue their employer for civil penalties under the California Private Attorneys General Act of 2004 (PAGA) for violation of the Industrial Welfare Commission (IWC) wage/hour orders requiring employers to provide suitable seating for employees when the nature of the work reasonably permits the use of seats. The civil penalties permitted by Labor Code section 2699 (f) were held potentially applicable. Those penalties are \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each such employee per pay period for each subsequent violation. For an employer with 100 employees, a weekly pay period, and a four-year claim period, those penalties could add up to \$4,150,000. We expect to see similar class actions seeking those penalties for alleged violations of other provisions of the IWC wage/hour orders.

Unpublished Case Holds That Employee May Volunteer to Perform Tasks Without Pay: Helsley v. Williams, No. E048796, 2010 WL 4630862 (Cal. Ct. App. 4 Dist. November 17, 2010) (Unpublished/ Noncitable). This decision affirmed the trial court's finding that the plaintiff employee was not entitled to additional overtime pay for time she voluntarily spent performing a certain task because she was unable to prove an agreement with her employer to pay her for that time. This is a rare, if not unique, decision holding that an employee may volunteer to spend time performing a specific work task without additional pay. However, since this decision is unpublished, it



labor & employment law 2010: a year-end in review

is not citable precedent unless and until the court later decides that it should be published.

Three-Year Statute of Limitations Applies to Claims Solely for Waiting Time Penalties Under Labor Code Section 203: Pineda v. Bank of America, N.A., 50 Cal.4th 1389 (November 18, 2010). California Labor Code Section 203 requires employers to pay an employee's final wages within 72 hours of an employee's termination or resignation. The plaintiff in this case did not receive his final wages until four days after his resignation became effective, and over a year later, he filed a class action lawsuit regarding untimely payment of final wages. The California Supreme Court held that the three-year limitations period governs all actions for Section 203 penalties, regardless of whether the claim also includes a claim for unpaid wages.

PENDING CALIFORNIA SUPREME COURT CASES

Harris v. Superior Court of Los Angeles County (Liberty Mut. Ins. Co.), No. S156555 (review granted 11/28/07)

Issue: Do claims adjusters employed by insurance companies fall within the administrative exemption (Cal. Code Regs. tit. 8, § 11040) to the requirement that employees are entitled to overtime compensation?

Court of Appeal opinion: *Harris v. Superior Court of Los Angeles County (Liberty Mut. Ins. Co.)*, 154 Cal.App.4th 164 (2007)

Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum), No. S166350 (review granted 10/22/08):

Issues: "This case presents issues concerning the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly workers." The case also raises issues concerning class certification of meal and rest break claims.

Court of Appeal Opinion: *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, 165 Cal. App.4th 25 (2008).

Sullivan v. Oracle Corp., No. S170577 (questions accepted 04/22/09):

Issues: (1) First, 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) Second, does Business and Professions Code section 17200 apply to the overtime work described in question one? and (3) Third, does section 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?

Ninth Circuit Opinion: *Sullivan v. Oracle Corp.*, 547 F.3d 1177 (9th Cir. 2008) (withdrawn).

Sonic-Calabasas A, Inc. v. Moreno, No. S174475 (review granted 09/09/09):



labor & employment law 2010: a year-end in review

Issue: Can an employee arbitration agreement be enforced before conclusion of a Labor Commissioner proceeding concerning a statutory wage claim?

Court of Appeal opinion: *Sonic-Calabasas A, Inc. v. Moreno*, 174, Cal.App.4th 546 (2009).

California Grocers Ass'n v. City of Los Angeles, No. S176099 (review granted 11/10/09):

Issue: Do California's food safety laws, or the National Labor Relations Act (the "NLRA"), preempt a local ordinance requiring a grocery store to retain the former owner's employees for 90 days after a change of ownership?

Court of Appeal opinion: *California Grocers Ass'n v. City of Los Angeles*, 176 Cal.App.4th 51 (2009).

Harris v. City of Santa Monica, No. S181004 (review granted 04/22/10):

Issue: Does the "mixed-motive" defense apply to FEHA claims?

Court of Appeal opinion: *Harris v. City of Santa Monica*, 181 Cal.App.4th 1094 (2010).

Pellegrino v. Robert Half International, Inc., No. S180849 (review granted 04/28/10):

Issues: The Court ordered briefing deferred pending decision in *Harris v. Superior Court*, S156555 (#07-443), which presents the following issue: Do claims adjusters employed by insurance companies fall within the administrative exemption to the requirement that employees are entitled to overtime compensation?

Court of Appeal opinion: *Pellegrino v. Robert Half International, Inc.*, 181 Cal.App.4th 713 (2010).

Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, No. S185544 (review granted 09/29/10):

Issues: (1) Is the parking area and walkway in front of the store's entrance, which is part of a larger shopping center, private property or a public forum property under *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979), and its progeny? and (2) Are the Moscone Act, Code of Civil Procedure section 527.3, and Labor Code section 1138.1 unconstitutional because they afford preferential treatment to speech concerning labor disputes over speech about other issues?

Court of Appeal opinion: *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 186 Cal.App.4th 1078 (2010).

Aryeh v. Canon Business Solutions, Inc., No. S184929 (review granted 10/20/10):

Issues: (1) May the continuing violation doctrine, under which a defendant may be held liable for actions that take place outside the limitations period if those actions are sufficiently linked to unlawful conduct within the limitations period, be asserted in an action under the Unfair Competition Law (Bus. & Prof. Code section 17200, et seq.)? (2) May the continuous accrual doctrine, under which each violation of a periodic obligation or duty is deemed to give rise to a separate cause of action that accrues at the time of the individual wrong, be asserted in



labor & employment law 2010: a year-end in review

such an action? (3) May the delayed discovery rule, under which a cause of action does not accrue until a reasonable person in the plaintiff's position has actual or constructive knowledge of facts giving rise to a claim, be asserted in such an action?

Court of Appeal Opinion: *Aryeh v. Canon Business Solutions, Inc.*, 185 Cal.App.4th 1159 (2010).

Kirby v. Immoos Fire Protection, Inc., No. S185827 (review granted 11/17/10):

Issues: (1) Does Labor Code section 1194, which permits attorneys' fees for unpaid minimum wage and overtime, apply to meal and rest period violation claims, or may attorney's fees be awarded to the meal and rest period claimants under Labor Code section 218.5, which permits attorneys' fees for unpaid wages? and (2) Will the Court's analysis be affected by whether the claims for meal and rest periods are brought alone, or together with minimum wage and overtime claims?

Court of Appeal opinion: *Kirby v. Immoos Fire Protection, Inc.*, 186 Cal.App.4th 1361 (2010).

STATUTORY AND REGULATORY DEVELOPMENTS

New Regulatory Scheme Will Require Proactive Steps By Employers to Ensure Compliance

"Plan, Prevent, Protect": In May 2010, the U.S. Department of Labor (DOL) announced its intention to issue regulations in 2011 requiring employers to take affirmative steps to ensure compliance with federal wage/hour, safety, and anti-discrimination laws. The intent here is to require employers to demonstrate to the DOL, and to their own employees, that they are in fact in legal compliance, rather than waiting to get sued or audited by the government.

This proposed regulatory push is referred to by DOL as "Plan, Prevent, Protect" [although the more accurate title as far as employers are concerned might be "Pile On, Prosecute, Penalize"]. The "Plan" part will require employers to create plans and processes to demonstrate compliance. The "Prevent" part means that employers will be obligated to implement their plans and demonstrate the implementation to their employees. The "Protect" part means that employers will be compelled to designate certain employees to be charged with plan implementation and evaluating its effectiveness.

The intention apparently is to force employers, among other things, to self-audit and carefully document their employees' overtime exemptions, do the same with employee health and safety practices, and conduct management training concerning anti-discrimination laws, similar to California's bi-annual requirement for sexual harassment prevention training.

Protections for Genetic Information

Genetic Information Non-Discrimination Act: On November 9, 2010, the EEOC published regulations implementing the sections of the Genetic Information Non-Discrimination Act of 2008 ("GINA") applicable to employers. According to these regulations, employers may be liable if they receive "genetic information" (broadly defined to include, among other things, any family medical history) in response to an otherwise lawful request for medical



labor & employment law 2010: a year-end in review

information, including information sought in response to a request for FMLA leave or a reasonable accommodation. The regulations do provide a safe harbor to employers who inadvertently receive genetic information in response to a lawful request for medical information. However, to take advantage of this "safe harbor," the employer's request for medical information must contain the following language:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information.

Genetic information, as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

Employers should add this GINA "safe harbor" language to all their forms that request medical information of any kind, including FMLA forms, other medical leave forms, requests to health care providers for information, etc.

Organ Donation Leave

Paid Leave For Organ and Bone Marrow Donations in California: While GINA looks like a federal solution in search of a problem, California is seldom far behind in similar unnecessary legislative endeavors. California Senate Bill 1304 enacted Part 5.5 of Labor Code section 1508, et seq., effective January 1, 2011, which requires employers with 15 or more employees to provide paid leave for employees who are donating an organ or bone marrow to another person (really). The paid leave is up to 30 days per year for organ donation and up to five days for bone marrow donation.

This bill is called the "Michelle Maykin Memorial Donation Protection Act." Ms. Maykin was a young woman who was diagnosed with leukemia. Although she received a stem cell transplant from donors, she died in 2009. To honor her memory, her friends and family lobbied for this legislation in order to encourage donors by reducing the financial burden on them.

SB 1304 permits employers to require their employees to use up to two weeks' accrued paid leave (including vacation time) for organ donation and up to five days' accrued paid leave for bone marrow donation. Health care benefits must be maintained during these leaves, which cannot count as a break in service. Reinstatement after the leave is required unless the job would not otherwise be available absent the leave, such as end of a temporary project or a reduction in force. Finally, these leaves do not count as FMLA/CFRA leave, and, of course, the usual anti-discrimination provisions apply.

California employers should accordingly prepare a Donor Leave of Absence Policy to cover these new leaves of absence.



Access to Digital Information for People with Disabilities

Proposed ADA Regulations Regarding Commercial Websites: The U.S. Department of Justice held hearings in Chicago (on November 18, 2010), Washington, D.C. (on December 16, 2010), and San Francisco (on January 10, 2011) about expanding the Americans with Disabilities Act (ADA) public access regulations to cover cyberspace and personal technology. Current DOJ regulations have interpreted the ADA to apply to websites that sell goods or services, so blind people will be able to access those commercial websites. For example, Target Corporation in 2008 settled a California class action lawsuit by agreeing to pay \$6 million to blind people who were unable to use its website.

The expansion of these regulations to non-commercial websites and personal technology (e.g., PDA's and cell phones) will have some obvious limitations, since visual images, such as photographs and video clips, cannot be made accessible to the blind other than by having an audio description of them. Facebook presumably will not be required to provide audio descriptions of the personal photos on someone's Facebook page.

DOJ is also considering expanding its ADA regulations to require more accessible medical devices, such as mammography equipment for women unable to stand, height-adjustable examination tables, and mechanical lifting devices.

A formal cost-benefit analysis is required if the impact on the economy of expanded ADA regulations is likely to exceed \$100 million. That threshold presumably will be reached at least for the entertainment industry if theatres are required to install access equipment for the blind and deaf. Some U.S. movie screens already have this access technology, but the current penetration rate is low (perhaps 1 percent). Seeing where the law is likely to go, many movie studios already pay for captioning and audio descriptions of at least their major movies.

What about emergency 911 phone systems? Some are already updating their technology to accept text messages. The bottom line is that as society becomes increasingly reliant on particular new technology, the ADA enforcers will eventually get around to requiring its accessibility for people who are blind or deaf or have other disabilities.

Recent and Pending Labor Law Developments

Union Organizers on Employer Premises: The NLRB has invited legal briefs about employers barring union organizers from employer premises while permitting other individuals, groups, or organizations to visit the employer's premises for their activities. *Roundy's Inc.*, 356 NLRB No. 27, released November 12, 2010. The current NLRB (3 Democrats, 1 Republican, and 1 Republican vacancy) is likely to find such employer action to be "discrimination" in violation of section 8(a)(1) of the NLRA, which prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights under that statute, despite the U.S. Court of Appeals for the Sixth Circuit's reversing a similar NLRB "discrimination" decision in *Sandusky Mall Co.*, 329 NLRB 618 (1999); see *Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001).

Union Members and Social Media: The NLRB has issued an unfair labor practice complaint against an employer that terminated an employee for violating its Internet policy because she posted caustic comments about her



labor & employment law 2010: a year-end in review

supervisor on her Facebook page, which among other remarks referred to her supervisor as being psychotic and calling him a "dick" and a "scumbag." *American Medical Response of Connecticut, Inc.*, NLRB Region 34, No. 34-CA-12576, issued October 27, 2010.

Implementing "Card Check" Through the Back Door: The NLRB in two pending union representation election cases is likely to overturn the 2007 Dana Corp. ruling, in which the Board recognized that a "card check" was an inferior substitute to a secret ballot election. The Board held in *Dana Corp.* that, when a company recognizes a union based on an inspection of signed union authorization cards, the employees may compel a prompt secret ballot vote on whether they really want to join that union. Since the labor movement cannot get the Orwellian-named "Employee Free Choice Act" through Congress, which would effectively do away with secret ballot elections in favor of large men handing employees union authorization cards to sign, the Democratic-majority NLRB apparently will be doing whatever it can to elevate card check over secret ballot elections. The two cases are *Rite Aid Store #6473*, No. 31-RD-1578, and *Lamons Gasket Co.*, No. 16-RD-1597.

Posting Notice of NLRA Rights: The NLRB has proposed a new rule that would require employers to post a notice of employee rights under the NLRA in a place where other workplace notices are typically posted. The notice would state that employees have the right to act together to improve wages and working conditions, to form, join, and assist a union, to bargain collectively with their employer, and to choose not to do any of those activities. It would also provide examples of unlawful employer and union conduct and would instruct employees how to contact the NLRB with questions or complaints. Similar employee rights postings are already required under other federal and state employment laws. Public comments are invited on all aspects of the NLRB's proposed rule and should be submitted by February 18, 2011, either electronically to www.regulations.gov or by mail or hand-delivery to Lester Heltzer, Executive Secretary, NLRB, 1099 14th Street NW, Washington, DC 20570.

State Laws Encroaching on Federal Labor Law: When in doubt, read the Constitution. A Wisconsin statute enacted in 2009 prohibited employers from requiring employees to attend meetings designed to communicate the employer's views about "religious matters or political matters." However, the legislator who introduced this measure candidly said that it "was drafted to prevent employers from taking punitive action against employees who did not want to attend mandatory meetings that were designed to discourage employees from organizing or joining a union." The NLRA permits employers to give "captive audience" speeches to their employees about facts concerning unionization, other than within the 24 hours preceding an NLRB-conducted union representation election on the employer's premises. A federal court enjoined enforcement of this Wisconsin law, declaring it preempted by the NLRA and void under the Constitution's Supremacy Clause. *Metro. Milwaukee Ass'n of Commerce v. Doyle*, No. 10-C-0760 (E.D. Wis. November 15, 2010). A similar law enacted in Oregon is also being contested in court and presumably will meet the same fate. See 245 *Daily Labor Report* page AA-1, December 24, 2009.

"Bannering" a Neutral Employer Permissible: In *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506*, 355 NLRB No. 159 (August 27, 2010), the NLRB held that a union may display large stationary banners in front of a neutral employer's place of business in order to alert the public that the neutral is doing business with a non-union employer with whom the union has a dispute. The banners were 15 to 20 feet long and 3 to 4 feet high. The union also handed out handbills about its dispute with the non-union employer. The NLRB in a 3-2 vote



labor & employment law 2010: a year-end in review

concluded that the "bannering" of the neutral was more like lawful handbilling rather than unlawful secondary picketing of a neutral employer, since there was no chanting, yelling, marching, or blocking of traffic or sidewalks.

New California Employment Laws on the Horizon

Since incoming California Governor Jerry Brown is not Arnold Schwarzenegger, the Gubernator's veto of the following bills that passed the California Legislature might soon become law. While Mr. Brown in his earlier period as Governor was famous for explaining why he had reversed his public position on an issue by stating "then was then, now is now," he also apparently vetoed the fewest bills (by both number and percentage) of any Governor of California. Here are the bills that Governor Schwarzenegger vetoed:

- Assembly Bill 482, which would have prohibited employers from requiring job applicants or current employees to submit to credit checks except for law enforcement positions or when job duties require access to cash or other valuable property or information;
- Assembly Bill 3063, which would have further restricted employers' pre-employment inquiry into criminal convictions;
- Assembly Bill 1043, which would have invalidated venue and choice of law provisions in employment agreements;
- Assembly Bill 2340, which would have required employers to provide bereavement leave of up to three days;
- Expansion of the California Family Rights Act to employers with 25 or more employees, instead of the current threshold of at least 50 employees;
- Assembly Bill 1881, which would have doubled the amount of liquidated damages assessable against employers for not paying minimum wage;
- Assembly Bill 2187, which would have imposed criminal sanctions for a person's or employer's failure to pay all wages due a departing employee within 90 days of the last day of work;
- Assembly Bill 1707, which would have required employers to provide current and former employees with a copy of their personnel files, required the retention of those files for at least three years post-termination, and provided a \$750 penalty for each incident of non-compliance;



labor & employment law 2010: a year-end in review

- Prohibiting the arbitration of employee claims, which presumably would violate the Federal Arbitration Act, or piling on onerous requirements for valid employee arbitration agreements;
- Senate Bill 1583, which would have imposed penalties on non-lawyer consultants who advise employers concerning independent contractor classifications that turn out to be wrong. Other measures could further restrict independent contractor status;
- Assembly Bill 2279, which would have overturned the unanimous decision of the California Supreme Court in *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal.4th 920 (2008), which held that there is no FEHA obligation to "reasonably accommodate" medical marijuana use as treatment for a "disability." That decision permits California employers to refuse to hire job applicants who test positive for marijuana, even though they have a prescription for it.