



PILLSBURY WINTHROP<sup>LLP</sup>

RECENT DEVELOPMENTS IN CALIFORNIA  
EMPLOYMENT LAW -- 2002

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The materials contained herein are intended to apprise our clients of general developments in rapidly changing areas of the law. They do not necessarily include all information necessary to evaluate any specific case. They are not intended as legal advice or as legal treatises and should not be relied on as such.

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**I.  
STATUTORY DEVELOPMENTS**

**A. Summary of Assembly Bill 1661 (Paid Family Leave)**

**Effective Date:** Payroll deductions from employees' paychecks begin January 1, 2004.

Eligible employees may take paid family leave beginning July 1, 2004.

**Summary:** Creates paid Family Temporary Disability Insurance ("FTDI") program which will enable eligible employees to take up to six weeks paid time off for (1) birth, adoption or placement in foster care of a child of the employee, or child of the employee's spouse or domestic partner; and (2) to care for a sick child of the employee, of the employee's spouse or domestic partner; or (3) to care for a sick spouse or domestic partner or the employee's sick parent.

This program will initially be funded by contributions from employee paychecks. Employees will be eligible to receive up to 55% of their wages, not to exceed a statutory cap (estimated to be about \$720 per week).

**Application:** Applies to all employers covered by the State Disability Insurance Program (basically, all private sector employers).

Unlike FMLA, no minimum length of employment requirement. No minimum number of hours per year for employee eligibility.

All employer facilities are covered regardless of size of facility, if the employer is covered by the State Disability Insurance Program.

**Key Provisions:** Creates a new Family Temporary Disability Insurance Program ("FTDI").

FTDI leave can be taken for 1) the birth of a child or adoption or placement in foster care of a child of the employee, child of the employee's spouse or domestic partner; (2) to care for a sick spouse or domestic partner or parent of the employee; or (3) to care for the sick child of the employee or of the employee's spouse or domestic partner.

Beginning January 1, 2004, employees will start paying for these benefits with contributions from wages, estimated at approximately \$27 per year for the average worker. Benefits will be payable beginning July 1, 2004, up to 55% of the employee's wages, to a maximum estimated to be between \$720 to \$730 in 2004.

An eligible employee must present medical certification establishing a serious health condition of a family member that "warrants the participation of the employee."

If the participation of the employee is needed for "providing psychological comfort and arranging 'third party' care for the child, parent, spouse or domestic partner, as well as directly providing or participating in the medical care," the employee is eligible.

There is no mandatory reinstatement right in this statute, unlike FMLA and CFRA. Some commentators believe that the law will be limited to those who otherwise qualify for CFRA or FMLA leave.

Individuals who are eligible for FMLA or CFRA leave must take FTDI leave concurrent with FMLA/CFRA leave.

There is a one-week “waiting period” before a worker can apply for the program. Presumably, the worker could use Labor Code Section 233 (the “Kin Care Statute”) to take paid sick leave during the one-week period, if the employee has accrued sick leave available.

An employer may require employees, prior to using FTDI, to use up to two full weeks of accrued vacation. This requirement could also be used to provide paid leave (vacation) for the seven-day waiting period.

**Practical Effect:** The bill is not well-coordinated with FMLA/CFRA or with Labor Code Section 233.

There is a major unsettled issue whether the employee must be eligible for FMLA/CFRA to also be eligible for FTDI. (Our reading of the statute is that an employee is eligible for FTDI regardless of his or her eligibility for FMLA/CFRA, but other commentators disagree.)

This bill may encourage additional absenteeism since it will provide a paid benefit for a wide variety of events or conditions.

Employers should adopt policies requiring the employee to use up to two weeks of vacation prior for applying for FTDI. Employers probably will wish to use the mandatory vacation requirement to provide pay for the one-week waiting period.

Many commentators believe that the employee-funded feature will fail and that ultimately, employer contributions will be required. Some analyses indicate that the current funding scheme requires 83 employees continue to work for each employee who is on FTDI leave.

There is no mandatory reinstatement or return to work provision. However, an employee who is not provided reinstatement at the conclusion of FTDI leave might sue for wrongful termination in violation of public policy.

An employee may take this leave if necessary, among other things, to provide “psychological comfort” to a child, parent, spouse or domestic partner. This provision is not currently in the FMLA or CFRA eligibility factors.

There is no provision for intermittent FTDI leave. FMLA/CFRA-eligible employees clearly could take intermittent leave under appropriate circumstances.

**B. Summary of Assembly Bill 2412 (Employee Access to Payroll Records)**

**Effective Date:** January 1, 2003

**Summary:** Requires employers to permit employees to inspect or copy payroll records within twenty-one calendar days from the date of the request. Also provides for penalties in an action by either a current or former employee or the Labor Commissioner.

**Application:** All private sector employers. No exception for small employers. Applies to all employees including part-time or temporary employees.

**Substantive Provisions:** Requires an employer who receives a “written or oral request” to inspect or copy payroll records of a current or former employee to comply with that request no later than twenty-one calendar days from the date of the request.

“Impossibility of performance” is an affirmative defense to a violation, if not caused by or as a result of a violation of law.

“Payroll records” not specifically defined, but statute refers to all items required to be disclosed on the detachable portion of the employee’s itemized statement of wages, as provided in Labor Code Section 226(a).

Either a current or former employee or the Labor Commissioner may recover a penalty of \$750 for any violation. An employee may also bring an action for injunctive relief and reasonable costs and attorneys’ fees in the injunction action.

**Practical Effect:** Creates a new obligation on employers to provide access and right to copy payroll records.

Information identified in Labor Code Section 226(a), as to which access must be permitted, is very specific. Includes amount of wages earned, total hours, piece rate information (for piece workers), all itemized deductions, dates of the payroll period, employee name and social security number, name and address of employing entity, and applicable hourly rates.

Requests for copying and inspection may be verbal or written. Twenty-one day period seems very short, especially where request is verbal and possibly not documented.

**C. Summary of Assembly Bill 2957 (Layoffs/Relocations -- Prior Notification)**

**Effective Date:** January 1, 2003

**Summary:** This statute resembles in many respects to the federal Workers Adjustment and Retraining Notification Act (“WARN Act”), but it also has many important differences.

A covered “employer” must provide 60 days prior written notice prior to ordering a “mass layoff,” “relocation” or “termination of a covered establishment.” An employer who fails to give the required notice is liable to the affected employees or up to 60 days pay and benefits, plus a civil penalty of \$500 per day for each day of the violation.

**Application:** All private sector employers with 75 or more employees, who order a “mass layoff,” “relocation” or “termination” of a “covered establishment”, as defined in the statute.

**Key Provisions:** Applies to all employers with 75 or more employees (full or part time) during the past 12 months (WARN Act applies to employers with 100 or more full time employees or the equivalent).

“Employee” is defined as a person employed by an employer for at least six of the 12 months preceding the date on which a notice is required.

Requires 60 days advanced written notice for a “mass layoff,” “relocation” or “termination” of a covered establishment.

A “covered establishment” is any industrial or commercial facility or part thereof that employs, or has employed, within the preceding 12 months, 75 or more persons.

A “mass layoff” means a layoff during any 30-day period of 50 or more employees at a covered establishment. “Layoff” means a separation from the position for lack of funds or lack of work.

“Relocation” means the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away.

“Termination” means the cessation or substantial cessation of industrial or commercial operations in a covered establishment.

This statute does not apply to employees who are employed in seasonal employment where the employees were hired with the understanding that their employment was seasonal and temporary. It also does not apply to the closing or layoff that is a result of the completion of a particular project or undertaking of an employer subject to Wage Order 11 (broadcasting industry), Wage Order 12 (motion picture industry) or Wage Order 16 (construction, drilling, logging and mining industries), and where employees were hired with the understanding that their employment was limited to the duration of the project or undertaking.

Notice required under the statute must include the elements required by the federal WARN Act.

In addition to the notice to the affected employees, the employer must give written notice to the (1) employment development department; (2) the local workforce investment board; and (3) the chief elected official of each city and county government within which the termination, relocation or mass layoff occurs.

No notice required if the mass layoff, relocation or termination is necessitated by a physical calamity or act of war.

Employer who fails to give notice is liable to each employee entitled to notice who lost his employment for up to 60 days back pay and value of the cost of any benefits to which the employee would have been entitled (including the cost of any medical expenses incurred by the employee and which would have been insured under an employee benefit plan).

Liability for failing to provide notice is reduced by the amount of wages paid during the 60-day notice period and any voluntary and unconditional payments made by the employer to employees, which were not required to satisfy any legal obligation.

In addition to back pay and benefits, an employer who fails to notify the appropriate governmental agencies is liable for a penalty of up to \$500 per day for each day of the violation. The penalty may be avoided if the employer pays all applicable employees the amount for which it is liable within three weeks of the date the employer orders the mass layoff, relocation or termination.

**Practical Effect and Comparison to Federal WARN Act:**

- Applies to greater number of employers than WARN Act (75 or more employees versus 100 or more fulltime employees).
- Notice required for three types of events (mass layoff, relocation or termination of a covered establishment), as opposed to only two types under the WARN Act (mass layoff or plant closing).
- Definitions of “relocation” or “termination” of a “covered establishment” are similar but not identical to WARN Act definition of “plant closing.”
- Content of notice is essentially the same under both statutes.
- Definition of “mass layoff” is broader under the new Labor Code provision (must only affect 50 or more employees).
- Remedies provisions are similar under both statutes.
- No provision is state law for layoffs caused by strikes or lockouts. WARN Act contains such a provision.

**D. Summary of Assembly Bills 1068 and 2868 (Background Checks/Investigative Consumer Reports)**

**Effective Date:** September 28, 2002

**Summary:** Intended to clarify the currently confusing law regarding an employer's use of an "investigative consumer report." Contains changes to the California Investigative Consumer Reporting Agencies Act both where (1) the employer uses an outside service or agency to obtain a report; and (2) where the employer directly gathers the information itself.

**Application:** All private sector employers. No exception for small employers.

Applies to all employees or applicants. No exception for short-term, temporary or part-time employees.

**Key Provisions:** This statute is designed to simplify the currently confusing law regarding an employer's use of consumer investigative reports. The statute changes the existing law, found at Civil Code Section 1786 *et seq.*, both where (1) the employer uses an outside service or agency to obtain an investigative consumer report; and (2) where the employer directly gathers investigative information itself.

Where the employer obtains a consumer investigative report from a third party agency or service, it must provide the employee or applicant a written form with a check-the-box feature for the employee to indicate whether he or she wishes to receive a copy of the report. If the applicant or employee checks the box, the employer must send a copy of the report within three business days of the date the employer receives the report, even if no adverse action is taken based on the report.

Where the employer gathers information itself, it must only disclose "matters of public record" to the applicant or employee. These are defined as records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment. Such records must be provided to an applicant or employee within seven days after the employer's receipt. This requirement applies whether the public record information is received in written or oral form.

Further, where the employer itself obtains information about the employee or applicant, the employer may obtain a written waiver of the employee or applicant's right to receive "matters of public record." However, even if the waiver is obtained, public records still must be provided in the event the employer takes adverse action against the applicant or employee based on such records.

Further, where an employer obtains a public record while conducting an investigation in connection with the suspicion of an employee's wrongdoing or misconduct, the employer may withhold the information from the individual until the completion of the investigation.

Assembly Bill 2868 clarifies the law of defamation (liable and slander) pertaining to job performance reports or evaluations given by a former or current employer. This statute specifically permits an employer to indicate whether a former employee is eligible for rehire.

NOTE: Neither AB 1068 nor AB 2868 changes the definition of “investigative consumer report.” While reports obtained from third-party providers are almost always covered, it is unclear whether simply checking items on an employee’s application or resume would be covered in many instances.

**Practical Effect:**

- These two statutes simplify to some extent an employer’s duties when obtaining background information about an employee or applicant.
- Neither statute changes the basic definition of “investigative consumer report” under Civil Code section 1786.2(c).
- The check-the-box feature for waiver of public record information or waiver of a written report on the surface seems simple. However, that information must be provided, even if the employee/applicant has waived the right to receive it, if employment is denied in whole or in part based on public record information.
- Strengthens the current provisions in the Act pertaining to investigations taken for suspicion of wrongdoing or misconduct. Under the new statute, public record information may be withheld from the employee suspected of misconduct or wrongdoing, until the investigation is completed.
- Where the employer gathers the information itself directly, the limitation of disclosure to “matters of public record” may be an important exception, in practice. For example, if the employer gathers information regarding the employee’s performance at a prior job, that information would not be a matter of public record.
- The California Investigative Consumer Reporting Act now is significantly different from the federal Fair Credit Reporting Act. Some practices permitted under the California statute will not be permitted under the federal statute.
- Assembly Bill 1068 contains a “savings provision” stating that it is not intended to supercede or affect the attorney-client privilege or attorney work product doctrine and that the statute does not require privileged material to be disclosed or produced to an applicant or employee.
- This statute will probably encourage employers to do more background checks in-house.
- If an employer is going to use a third-party investigative service, the employer should make sure that the investigative service is aware of these laws, and complies with the requirements of both the state and federal acts.
- The employer must also be aware of its obligations to provide the necessary disclosure and check-the-box form to the employee or applicant, where an outside agency is used.

**E. Summary of Senate Bill 1818 (Damage Remedies for Illegal Immigrants)**

**Effective Date:** January 1, 2003

**Summary:** Senate Bill 1818 allows illegal immigrants to recover damages or other monetary remedies for violations of California labor, employments, civil rights, housing or similar statutes, regardless of the person's immigration status. This Bill is designed to avoid or negate the United States Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002), wherein the United States Supreme Court held that federal immigration policy precludes a back pay or monetary remedy under the National Labor Relations Act to a person who was not lawfully in the country.

**Application:** All public and private sector employers, regardless of size of employer. Applies to applicants for employment, employees or former employees.

**Key Provisions:** Amends portions of the Civil Code, Government Code, Labor Code and Health and Safety Code, to state that protections and remedies under state law are available to all individuals regardless of immigration status, except as prohibited by federal law.

Declares that "no inquiry shall be permitted into a person's immigration status except for the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law."

Asserts that the provisions of the new statute are declaratory of existing law.

**Practical Effect:**

1. This statute runs directly contrary to the United States Supreme Court's five-four decision in Hoffman Plastics, supra. It would permit a person, even one who never was legally entitled to be employed in California in the first place, to recover damages in the form of back pay or other monetary relief for wrongful termination, employment discrimination, failure to hire or similar claims.
2. There is an open question whether the federal policy underlying the Immigration Reform and Control Act will preempt this statute. SB 1818 acknowledges that reinstatement would be an inappropriate remedy for a person who is not lawfully entitled to work in this country.
3. The provision prohibiting inquiry into a person's immigration status may mean that it is improper in discovery proceedings to inquire into immigration status, unless the showing required by that section is made.

**F. Summary of Senate Bill 1471 (“No Fault” Attendance Policies)**

**Effective Date:** January 1, 2003

**Summary:** Would make it a per se violation of Labor Code Section 233 for an employer to count sick leave taken to attend to the illness of a child, parent, spouse or domestic partner as a basis for discipline, demotion, discharge or suspension.

**Application:** All private sector employers. All private sector employees.

No exception for short-term, temporary or part-time employees. No small employer exception.

**Key Provisions:**

Creates a new Section 234 of the Labor Code. This Section makes it a “per se violation” of Section 233 of the Labor Code for an employer to discipline, demote, discharge or suspend an employee who uses sick leave, pursuant to Labor Code Section 233, to attend to an illness of a child, parent, spouse or domestic partner.

Contains no enforcement or remedy provision. Enforcement could be by common law wrongful termination claim, or by Labor Commissioner administrative action pursuant to Labor Code Section 233(d) and (e).

**Practical Effect:**

- This statute will make “no fault” attendance policies less effective.
- The employer cannot count as an absence event under such a policy any sick leave used by the employee to care for the illness of a child, parent, spouse or domestic partner.
- Significantly, this statute does not prohibit the employer from counting the employee’s use of sick leave for his own absence as an event of absence under a no fault attendance policy.

**G. Summary of Senate Bill 688 (Statute of Limitations for Personal Injury Actions)**

**Effective Date:** January 1, 2003

**Summary:** Extends the current one-year statute of limitations for personal injury actions to two-years. Applies to claims for assault, battery, injury to or death of an individual caused by the wrongful act or neglect of another.

Does not apply to employment discrimination actions under the Fair Employment and Housing Act.

Also increases from twenty-eight to seventy-five days the length of time required for notice of filing of a motion for summary judgment. Makes it easier for a party opposing summary judgment to obtain a continuance and permits a court of appeal, in reviewing a summary judgment, to order additional briefing on any issue not relied upon by the trial court.

**Application:** Applies to all private sector employers; applies to all applicants, employees or former employees.

As to claims of victims or families of victims of September 11, 2001 terrorist acts, goes into effect September 10, 2002.

**Key Provisions:** Extends the current one-year statute of limitations for many personal injury actions to two-years. Actions for intentional infliction of emotional distress, negligent infliction of emotional distress and defamation will be affected.

Does not affect the one-year statute in the Fair Employment and Housing Act.

Increases the time that is required for the filing of a summary judgment motion, from twenty-eight to seventy-five days. Makes it easier for a party opposing summary judgment to obtain a continuance of the hearing on the motion, in order to enable that party to obtain additional discovery. Permits the court to deny summary judgment where the party seeking summary judgment has “unreasonably failed to allow discovery to be conducted.” Requires that a court of appeal allow parties to submit supplemental briefs before affirming an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court.

**Practical Effect:**

- Will extend statute of limitations for some common law claims which frequently arise in employment cases: intentional infliction of emotional distress, negligent infliction of emotional distress and defamation.
- Will not effect claims for breach of implied contract, breach of express or written contract and wrongful termination in violation of public policy, all of which are governed by statutes of two-years or longer already.
- Will not effect the one-year statute in the Fair Employment and Housing Act.

- Will make it more challenging for an employer to obtain summary judgment, by lengthening the time between the filing and hearing on the motion, and by permitting more continuances by the plaintiff/opposing party. Some courts may even deny summary judgment if the court finds that the employer did not reasonably permit discovery to be conducted.
- Also will make it easier for a Court of Appeal to reverse a summary judgment for an employer.
- If the appellate court is going to uphold summary judgment on a ground not relied upon the by the trial court, it must allow additional briefing, which could result in a reversal if material issues of fact appear from the briefing.

**H. Summary of Assembly Bill 1599 (Expansion of Age Discrimination Protections)**

**Effective Date:** January 1, 2003

**Summary:** Overrules the California Supreme Court's decision in Esberg v. Union Oil Co. of California, 28 Cal. 4<sup>th</sup> 262 (2002), which held that age discrimination under the Fair Employment and Housing Act was not prohibited with respect to terms, conditions and privileges of employment.

**Application:** All employers covered by FEHA (5 or more employees). Applies to all employees of covered employers.

**Key Provisions:** Expands the age discrimination provisions of FEHA to include and apply to employee benefits programs and training programs. Would make unlawful any refusal to select a person for a training program based on that person's age.

**Practical Effect:** This legislation was designed to fill a loophole in the California FEHA. Most employers would not have discriminated against an employee based on age in the selection of persons for training programs or benefit programs.

Practical effect is probably not great.

**I. Summary of Employment/Retaliation Provisions of the Sarbanes-Oxley Act of 2002**  
**[18 U.S.C. § 1514a]**

**Effective Date:** Employment/Whistleblower provisions became effective immediately upon the Act's enactment on July 30, 2002.

**Summary:** Provides protection for whistleblowers who report alleged violations of the federal securities laws or who provide information to the Securities and Exchange Commission, Congress (or a committee of Congress), or "a person with supervisory authority over the employee." Creates new cause of action including possible enforcement by the United States Secretary of Labor.

**Application:** Applies only to companies whose equity or debt securities are publicly traded. Also applies to certain foreign companies as long as their securities are registered pursuant to federal law, to all companies who are required to file reports under Section 15(d) of the Securities Exchange Act of 1934, or that have filed a registration statement for a public offering under the Securities Act of 1933. Anti-retaliation provision also applies to any officer, employee, contractor or agent of a covered entity.

Protects any employee against discharge, discrimination or other adverse action where the employee provides information or assists in an investigation regarding any violation of the federal securities laws, or violation of any rule or regulation of the SEC, or of any provision of federal law "relating to fraud against shareholders." Employee is protected when the information or assistance is provided to, or the investigation is conducted by, a federal regulatory or law enforcement agency, a member of Congress or committee of Congress, or "a person with supervisory authority over the employee (or such other person working for the employer who has authority to investigate, discover or terminate misconduct)."

**Key Provisions:** Creates broad protection for whistleblowers who report alleged securities fraud or any violation of federal law "relating to fraud against shareholders."

Protects not only persons who report securities violations to the SEC or other federal agencies (or to Congress or a committee of Congress), but also where the report is made to the employee's supervisor, or to "such other person working for the employer who has the authority to investigate, discover or terminate misconduct." This would create whistleblower protection for persons who report suspected securities fraud or other corporate misconduct to, for example, the company's legal staff, its audit committee, members of the board of directors, corporate officers, or even mid-level supervisors.

Creates a private right of action whereby the employee may file a complaint with the Secretary of Labor. If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint, the employee has the right to bring a private civil action in federal court.

As to the proceedings before the Department of Labor, the Sarbanes-Oxley Act incorporates rules created under the Aviation Investment and Reform Act, 49 U.S.C. section 42121.

Complaint with Department of Labor must be made within 90 days after the alleged violation occurred.

Within 60 days after the filing with the Department of Labor, the employer/respondent may submit a written response, including witness statements, to the Department of Labor. The Department of Labor must conduct an investigation into the alleged violation.

Before investigating, the Department of Labor will require a prima facie case that protected activity was a contributing factor in an adverse employment action.

Decisions under the Aviation Investment and Reform Act, upon whose enforcement provisions the Sarbanes-Oxley provisions are modeled, require only that the whistle blowing conduct be a “contributing factor” in the adverse employment action. The causation standard appears to be very low under Sarbanes-Oxley.

The Department of Labor, if it determines there is “reasonable cause” to believe that a complaint has merit, may issue a preliminary order requiring the company to reinstate the complaining employee with back pay, prior to an evidentiary hearing. The reinstatement order is not stayed pending resolution of the matter at a formal hearing.

Once the Department of Labor makes its findings, the employer/respondent may request a formal hearing before an administrative law judge within 30 days of the Department’s findings. At the hearing before the ALJ, the complainant/whistleblower must prove, by a preponderance of the evidence, that the employer retaliated against him for engaging in protected activity.

An adverse finding by the Department of Labor, after the ALJ hearing, may be appealed to the United States Court of Appeals in which the alleged violation occurred or in the Circuit in which the complainant resided on the date of the violation. Sarbanes-Oxley does not contain any specific provision regarding the standard for review by the Court of Appeals. Generally, the standard will be that found in the Administrative Procedures Act, which permits the Court of Appeals to set aside the finding of the Department only where the findings and conclusions are “arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. section 706(2)(a).

An alternative remedy is a private civil action in federal court, where the Secretary of Labor has not issued a final decision within 180 days of the filing of the administrative complaint.

It is unclear at this point whether the Secretary of Labor will act on these cases within 180 days, or whether most such cases will end up in federal court, or in state court under a public policy/wrongful termination theory.

The Act is silent on the burdens of proof or other procedural issues for private civil actions in federal court. Would the administrative burden-shifting scheme in the Act apply in court? Or would the traditional burdens of proof applicable to other whistleblower statutes apply?

Sarbanes-Oxley does not preempt state or other federal whistleblower statutes. However, the exclusive jurisdiction for whistleblower claims under Sarbanes-Oxley lies in the federal courts.

It is unclear whether, if no finding by the Department of Labor is made in 180 days, the Department of Labor would lose jurisdiction if the employee/whistleblower brings a private civil claim in federal court. Remedies available under the Sarbanes-Oxley whistleblower provisions

include reinstatement, back pay, and compensation for “special damages” including litigation costs, expert witness fees and attorney’s fees. The statute states that an employee who establishes a violation of the Act is entitled to “all relief necessary to make the employee whole.” It is unclear whether emotional distress damages would be recoverable. However, two recent federal court decisions, both under the False Claims Act, permitted damages for emotional distress even though the False Claims Act is silent on such damages. Hammond v. Northland Counseling Center Inc., 218 F.3d 886 (8th Cir. 2000); Neal v. Honeywell Inc., 191 F.3d 827 (7th Cir. 1999).

There is no provision for punitive damages in Sarbanes-Oxley.

**II.**  
**EIGHT IMPORTANT EMPLOYMENT CASES PENDING  
BEFORE THE CALIFORNIA SUPREME COURT**

As of early November 2002, the California Supreme Court is considering at least eight important employment cases. Several of these decisions are expected within the next few months and most, if not all, should be issued within the next twelve months. They are:

1. Advanced Bionics Corp. v. Medtronic, Inc., 87 Cal. App. 4th 1235 (2001), review granted, 108 Cal. Rptr. 2d 595.

This decision will address whether a California state court can enjoin out-of-state court proceedings seeking to enforce a covenant not to compete against a California resident. The case involved a declaratory relief action brought by Advanced Bionics Corp., which employed a former Medtronic, Inc. employee who had signed a covenant not to compete in Minnesota. Medtronic brought an injunction action in Minnesota against the employee, seeking to enforce the covenant not to compete. The covenant would have been enforceable in Minnesota, where it was signed, but not in California, where the employee had moved. The case was orally argued in October, 2002.

Advanced Bionics will address when a California court can stop an out-of-state company from seeking to enforce against a California resident a covenant not to compete signed in a different state. But it also may address whether the out-of-state covenant could be enforced in California courts, as well.

The California Supreme Court also granted review in Walia v. Aetna, 93 Cal. App. 4th 1213 (2001), review granted, 117 Cal. Rptr. 2d 541, which also involves a covenant not to compete. Many observers believe that the Supreme Court will remand Walia to the Court of Appeal after it has decided Advanced Bionics.

2. Colmenares v. Braemar Country Club, 89 Cal. App. 4th 778 (2001), review granted, 111 Cal. Rptr. 2d 336.

This case will address whether the recent amendments to the California version of the Americans With Disabilities Act are retroactive. In Assembly Bill 2222, effective January 1, 2001, the Legislature greatly expanded the California version of the Americans With Disabilities Act. The Court of Appeal in Colmenares held that these expansive amendments were not retroactive to cases arising before their effective date. The case is set for oral argument in early December, 2002.

3. Smith v. Rae-Venter, 89 Cal. App. 4th 239, (2001), review granted, 111 Cal. Rptr. 2d 687.

This case involves waiting time penalties under Labor Code Section 203 and under what circumstances a party may be assessed attorneys' fees if it files an appeal *de novo* from an adverse Labor Commissioner ruling.

4. Department of Health Services, etc. v. Superior Court (McGinnis), 94 Cal. App. 4th 14 (2001), review granted, 117 Cal. Rptr. 2d 166.

Is the federal affirmative defense established by the U.S. Supreme Court in Burlington Industries v. Ellerth, 524 U.S. 951, 118 S. Ct. 2365, 141 L. Ed. 2d 734 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) applicable to state law sexual harassment claims under the Fair Employment and Housing Act? If so, the Faragher/Ellerth affirmative defense may undercut the “strict liability” rule adopted by several California Courts of Appeals for employer liability in sexual harassment cases. The strict liability rule has never before been before the California Supreme Court in a sexual harassment case. Numerous amici have appeared in this case.

5. Intel Corp. v. Hamidi, 94 Cal. App. 4th 325 (2001), review granted, 118 Cal. Rptr. 2d 546.

Intel Corp. obtained an injunction against an employee who sent thousands of harassing and offensive e-mails over the company e-mail system. The case presents significant First Amendment issues.

6. Sav-On Drug Stores, Inc. v. Superior Court, 97 Cal. App. 4th 1070 (2002), review granted, 125 Cal. Rptr. 2d 439.

A critical case for the several hundred wage/hour class actions pending in California state courts under the California Labor Code and Industrial Welfare Commission Orders. The Court of Appeal in Sav-On held that class action treatment was not appropriate because of the presence of numerous, individual issues pertaining to the exempt status of store managers and assistant managers. Appellate courts have issued conflicting rulings in other unpublished decisions. There is currently no published California decision on point in a “duties” overtime class action.

7. Little v. Auto Stiegler, Inc., 92 Cal. App. 4th 329 (2001), review granted, 114 Cal. Rptr. 2d 612.

Do the requirements for mandatory arbitration clauses established in Armendariz v. Foundation Health Psych Care Centers, 24 Cal. 4th 83 (2000), review granted, 83 Cal. Rptr. 2d 274 apply to employment claims for breach of contract for common law wrongful termination? The Armendariz holding itself addressed only claims under the Fair Employment and Housing Act. This case may also result in a holding whether the employee can ever be required to bear part of the cost of private arbitration for claims not arising under the FEHA.

**III.  
EMPLOYMENT DISCRIMINATION**

**A. Discrimination/harassment – General and Procedural Issues**

**National Railroad Passenger Corp. v. Morgan**, \_\_\_ U.S. \_\_\_, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); and

**Richards v. CH2M Hill, Inc.**, 26 Cal. 4<sup>th</sup> 798 (2001)

Both the U.S. Supreme Court decision in National Railroad Passenger Corp., and the California Supreme Court decision in Richards discuss the continuing violation theory in the context of employment discrimination claims. Both cases generally hold that an employee may use unlawful actions occurring outside the pertinent statute of limitations period as a basis of employer’s liability. The U.S. Supreme Court in National Railroad, takes an expansive approach in applying the continuing violation theory to hostile work environment claims, so long as one of the acts constituting the hostile environment takes place within the statutory period. By contrast, in Richards, the California Supreme Court takes a limiting approach, applying the continuing violation theory only so long as the unlawful conduct is sufficiently connected and is not permanent.

In National Railroad, a former employee brought action against railroad for racial discrimination and retaliation under Title VII alleging that he had been the subject of both discrete discriminatory and retaliatory acts, and experienced a racially hostile work environment throughout his employment. The Supreme Court held that there can be no recovery for discrete acts of discrimination outside the statutory time period, because each discrete act constitutes a separate actionable “unlawful employment practice” which starts a new “clock” for purposes of timely filing charges. However, in the context of a hostile environment claim, the Court held that because the hostile work environment claim involves separate acts that collectively constitute one “unlawful employment practice,” the continuing violation theory is applicable. Title VII does not separate individual acts within the hostile environment claim from the whole for purposes of timely filing and liability. Provided that an act contributing to the claim occurs within the filing period, the entire hostile environment claim may be considered by a court for purposes of determining liability. Additionally, the statute allows a plaintiff to recover damages for that portion of the hostile environment that falls outside of the period for filing a timely charge.

In Richards, a disabled former employee brought action against former employer for disability discrimination and harassment and for failing to accommodate her disability. The employee sought to prove actions occurring outside the statute of limitations period. The California Supreme Court held that Employer’s failure to reasonably accommodate a disability is a continuing violation for purposes of the FEHA statute of limitations if (1) the actions are sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) are not permanent, in the sense that “employees are on notice that further efforts at informal conciliation with the employer to obtain an accommodation or end harassment would be futile.”

**Jefferson v. California Department of Youth Authority**, 28 Cal. App. 4<sup>th</sup> 299 (2002)).

Plaintiff, a female teacher's assistant, brought a sex discrimination and harassment claim under the Fair Employment and Housing Act. Prior to filing suit, Plaintiff signed a compromise and release in settlement of her workers' compensation claim in which she alleged damages stemming from the same alleged discrimination. The court affirmed the trial court's award of summary judgment to the defendants, holding that Plaintiff's release of all claims and causes of action stemming from the alleged discrimination in the workers' compensation proceeding barred her FEHA claim as well.

**Colarossi v. Coty U.S., Inc.**, 97 Cal. App. 4<sup>th</sup> 1142 (2002).

Hearsay statement of a fellow employee, purporting to quote a supervisor's retaliatory comment, is admissible to oppose summary judgment. A fellow employee quoted a second employee who in turn quoted a supervisor. The supervisor supposedly said she was "going to get revenge on every one of the people" involved in an investigation. This was held sufficient evidence of retaliation to reverse summary judgment in favor of the employer.

**Guz v. Bechtel National, Inc.**, 24 Cal. 4<sup>th</sup> 317 (2000).

This important California Supreme Court decision contains holdings on burdens of proof and age discrimination issues, as well as implied contract issues.

Plaintiff was 49 years old when his work unit was eliminated and he was laid off along with other employees. He had worked for the company 22 years at that time.

In rejecting the age discrimination claim, the California Supreme Court considered the United States Supreme Court's recent holding in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (discussed below). The California Supreme Court held:

"Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests that the employer had cause to hide its true reasons. Still, there must be evidence supporting a rational inference that intentional discrimination, on grounds prohibited by the statute, was the true cause of the employer's action. Accordingly, the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." Guz, Cal. 4<sup>th</sup> at 361.

Guz attempted to prove that a stated reason, a layoff of the entire department, was a pretext because several younger employees were placed elsewhere within the company. He also claimed that the company did not strictly follow its layoff policy. The California Supreme Court held that these facts, without more, did not raise a triable issue on the

issue of age discrimination. See additional discussion of Guz on the implied contract issues, below.

**Walrath v. Sprinkel**, 99 Cal. App. 4<sup>th</sup> 1237 (2002).

Plaintiff, an older employee, brought suit against his employer and his direct supervisor for wrongful termination and age discrimination in violation of FEHA, retaliation, and intentional infliction of emotional distress after his office was replaced with a cubicle and his department was phased out. The trial court granted the supervisor summary judgment. The court of appeal reversed, holding that Plaintiff could bring a retaliation claim against the supervisor personally and that Plaintiff need not exhaust his administrative remedies as to his retaliation in violation of public policy claim even though the public policy at issue was that in FEHA.

**Costa v. Desert Palace, Inc.**, 299 F.3d 838 (9<sup>th</sup> Cir. 2002) (en banc).

Plaintiff, the only female warehouse worker for defendant Caesars Palace Hotel and Casino, brought a Title VII action alleging that her termination was due, in part, to her gender. Following a jury verdict in Plaintiff's favor, the Ninth Circuit considered the narrow issue of the legal standard for proof of a violation of Title VII. The employer argued that Plaintiff should have had to produce "direct evidence" that sex was a motivating factor in her termination. The Ninth Circuit rejected this argument, holding that Title VII imposes no special or heightened burden on a plaintiff in a "mixed motive" case and that Plaintiff need only show that her gender was, at least in part, a motivating factor in her termination.

**Aragon v. Republic Silver State**, 292 F.3d 654 (9<sup>th</sup> Cir. 2002).

Plaintiff, a Caucasian male, alleged in a Title VII action that his employer illegally selected white and "white-looking" employees for layoff while retaining African-American employees. The trial court granted the defendant's motion for summary judgment. The Ninth Circuit that the employer asserted a legitimate, non discriminatory reason for laying Plaintiff off; namely, that there was a seasonal downturn in demand for the employer's services and Plaintiff's performance was "less than stellar." Because Plaintiff could not come forward with specific and substantial evidence that the reasons asserted by the defendant were pretextual, the court affirmed summary judgment for the defendant.

**Reeves v. Sanderson Plumbing Products, Inc.**, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

The Supreme Court held that an employment discrimination plaintiff may meet her burden of proof by submitting two categories of evidence: first, evidence establishing a "prima face case", and second, evidence from which a rational fact finder could conclude that the employer's proffered explanation for its actions were false. In other words, employees can prove on-the-job discrimination cases without direct evidence of an employer's illegal intent. In this case, given that the appellant had established a prima facie case, introduced enough evidence for the jury to reject the respondent's explanation,

produced additional evidence that the respondent was motivated by age-based animus, and was principally responsible for appellant's firing, there was sufficient evidence for the jury to conclude that there was intentional discrimination.

**Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro**, 91 Cal. App. 4<sup>th</sup> 859 (2001).

When awarding attorney fees to a defendant/employer in a state-law employment discrimination action, a trial court is required to make written findings as to whether plaintiff's discrimination case was frivolous, unreasonable, or without merit. Failure to make such written findings requires reversal of the attorney fee award to the employer, unless the appellate court determines that no such findings reasonably could be made from the record.

**Shaw v. City of Sacramento**, 250 F.3d 1289 (9th Cir. 2001).

An employee is not entitled to attorneys' fees under California's Fair Employment and Housing Act if a meritorious discrimination claim is barred by a waiver of claims. A jury found that the City had discriminated against a deputy chief police officer. However, the jury found that officer's relief was barred by a validly executed waiver agreement. The Ninth Circuit upheld the lower court's refusal to grant the officer's motion for attorneys' fees on the ground that the officer was not the prevailing party because he did not obtain actual relief.

**Kortan v. State of California Youth Authority**, 217 F.3d 1104 (9th Cir. 2000).

Appellate court upheld summary judgment in favor of employer in an action alleging hostile work environment, retaliation, and gender discrimination. However, the appellate court found it was improper to disregard evidence of harassment not mentioned in the complaint or in the plaintiff's charge with the California Department of Fair Employment and Housing. Pursuant to Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999), "regardless of whether actionable in and of themselves, untimely claims serve as relevant background evidence to put timely claims in context." Although evidence outside the limitation period should have been considered as relevant to background, it would not have changed the final result in this case.

**Thomas v. Department of Corrections**, 77 Cal. App. 4th 507 (2000).

An employee of the Department of Corrections brought suit against her employer under the Fair Employment and Housing Act, asserting claims based on alleged racial and gender discrimination, and for retaliation after she complained of discriminatory acts. The court found that retaliatory acts alleged by employee did not constitute "adverse employment action" sufficient to support the retaliation claim under FEHA. Adverse employment actions require material change in employment terms, cognizable impairment of employment, or employment injury.

**B. Discrimination - Age**

**Kimel v. Florida Board of Regents**, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

In this potentially very important decision, the United States Supreme Court held that states cannot be sued under the Federal Age Discrimination in Employment Act, since Congress has no power to subject states to lawsuits by private individuals. Age is not a suspect classification under the Federal Equal Protection Clause. The decision does not affect claims under state statutes, such as FEHA, but may preclude claims against states or their political subdivisions under other federal employment statutes such as the Americans with Disabilities Act and at least some provisions of Title VII of the Civil Rights Act of 1964.

**Muzquiz v. City of Emeryville**, 79 Cal. App. 4th 1106 (2000)

Employee must show that city's legitimate, nondiscriminatory reasons for eliminating her job were pretext for age-based discrimination. Employee failed to meet this burden because there was no evidence that the elimination of her position and the retention of another employee to fill the resulting new combined position were based on discrimination against appellate on the basis of age.

C. **Discrimination - Sexual Harassment/ Pregnancy**

**Department of Health Services etc. v. Superior Court (McGinnis)**, 94 Cal. App. 4th 14 (2001), review granted, 117 Cal. Rptr. 2d 166.

See discussion in Section II, above. The California Supreme Court will decide whether the affirmative defense established by the U.S. Supreme Court in Burlington Industries v. Ellerth, and Faragher v. City of Boca Raton, applies to state law sexual harassment claims under the Fair Employment and Housing Act.

**Kohler v. Inter-Tel Technologies**, 244 F.3d 1167 (9th Cir. 2001).

The federal Court of Appeals for the Ninth Circuit held that a California employer may defend a sexual harassment claim brought under FEHA by using the “Faragher” defense developed under the federal discrimination statute, Title VII of the Civil Rights Act of 1964. The United States Supreme Court had created an affirmative defense in the case of Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L.Ed.2d 662 (1998). The Ninth Circuit held that the federal affirmative is available under FEHA. To establish the affirmative defense, the employer must show (1) it exercised reasonable care to prevent and correct harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities or otherwise failed to avoid harm. Faragher, supra at 807-808. The California Supreme Court’s decision in Department of Health Services, etc. v. Superior Court (McGinnis), supra, will decide this issue as a matter of state law.

**Salazar v. Diversified Paratransit, Inc.**, \_\_ Cal. App. 4<sup>th</sup> \_\_\_, 2002 WL 31412544 (2002).

An employer is not liable for sexual harassment committed against an employee by a non-employee client. In analyzing the pertinent statute and legislative history, the court found that the Legislature had previously considered and rejected an amendment which would have made an employer liable for harassment by clients.

**Herberg v. California Institute of the Arts Cal.**, 101 Cal. App. 4<sup>th</sup> 142 (2002).

The display of a drawing depicting the employee partially naked and engaging in a sexual act did not constitute sexual harassment under the FEHA. The court held that liability under the FEHA could not be predicated on a single incident not involving egregious conduct akin to physical assault or threat of physical assault. In order for a single incident to be severe and pervasive enough for it to be found sufficient to form a basis for a charge of sexual harassment, the conduct must generally involve violence or the threat of violence.

**Birshtein v. New United Motor Manufacturing Inc.**, 92 Cal. App. 4<sup>th</sup> 994 (2001).

Staring at a fellow employee may constitute sexual harassment under FEHA. The appellate court reversed a decision that an employee’s conduct in staring at plaintiff at her workstation on an automotive assembly line was not actionable as a matter of law.

Although a significant part of the coworker's behavior consisted of staring at plaintiff, hostile environment sexual harassment need not involve sexual advances. Sexual harassment, the court opined, shows itself in the form of intimidation and hostility for the purpose of interfering with an individual's work performance. What began as the coworker's overt acts of sexual harassment were later transmuted by plaintiff's reaction (her complaints to management about the offensive conduct) into a daily series of retaliatory acts; in this case, the prolonged staring at plaintiff. The court decided that the subsequent acts that were directly related to the antecedent unlawful harassment.

**Nichols v. Azteca Restaurant**, 256 F.3d 864 (9th Cir. 2001).

A claim of harassment for failure to conform to a sex stereotype is available to men who are discriminated against for acting too feminine. The Ninth Circuit held that an employee who suffered years of verbal abuse by co-workers and a supervisor for his perceived effeminate behavior had a valid hostile environment claim. The court stated that harassment of a male employee based on the employee's failure to conform to a male stereotype is harassment based on sex. Because the employee satisfied each element of the hostile environment claim, his co-workers' and supervisor's conduct was actionable harassment under both Title VII and state law.

**Leibovitz v. New York City Transit Authority**, 252 F.3d 179 (2d Cir. 2001).

Plaintiff cannot base a sexual harassment claim on her belief that other women, who did not work in her immediate presence, were being harassed and that the employer was not vigorously investigating the complaints. "We hold that Title VII's prohibition against hostile work environment affords no claim to a person who experiences it by hearsay," the court states.

**Clark County School Dist v. Breeden**, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam).

United States Supreme Court summarily reverses the Ninth Circuit and orders judgment for the employer in a retaliation case. Plaintiff claims she was retaliated against for reporting "sexual harassment," but the "harassment" she reported consisted solely of one sexually explicit remark. According to the Supreme Court, a single sexually explicit remark could not as a matter of law constitute sexual harassment because it is not "severe and pervasive." The employer had been contemplating a transfer of plaintiff prior to receiving notice of plaintiff's filing with the EEOC.

**Fielder v. UAL Corporation**, 218 F.3d 973 (9th Cir. 2000), cert. granted **UAL Corp. v. Fielder**, \_\_\_ U.S. \_\_\_, 122 S. Ct. 2583, 153 L. Ed. 2d 773 (2002).

Protection against retaliatory discrimination extends to employer liability for coworker retaliation that rises to level of adverse employment action. It has long been held that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate authority over the employee. Such protection under Title VII against retaliatory discrimination is now extended to

employer liability for co-worker retaliation that rises to the level of tangible employment action.

**Brooks v. City of San Mateo**, 229 F.3d 917 (9th Cir. 2000).

On one occasion, a male senior telephone dispatcher for a city touched his co-worker, a female dispatcher, on her stomach and put his hand under her shirt and bra to fondle her breast. The female employee reported the incident, and the city immediately placed the male employee on leave pending an investigation, at which time he resigned his employment. The female dispatcher sued the city, the police department, and its chief for sexual harassment.

The Ninth Circuit affirmed the District Court's grant of summary judgment for the employer. The court held that a single incident as the one in this case, while very offensive, did not rise to the level of harassment for which Title VII provides a remedy, especially in light of the city's swift removal of the male employee.

**Tennison v. Circus Circus Enterprises**, 244 F.3d 684 (9th Cir. 2001).

A trial judge properly excluded evidence of incidents of harassment against two non-plaintiffs, even though the alleged harassment was by the same person who allegedly harassed the plaintiffs. The two incidents that were excluded did not involve either plaintiff and occurred over five years prior to the events in question. The trial court also properly excluded evidence that the harasser kept pictures of women in bikinis on the inside of his locker. There was no evidence that anyone in management of the company knew of the pictures. The Ninth Circuit held that exclusion of this evidence was within the discretion of the trial judge.

**Schreiner v. Caterpillar Inc.**, 250 F.3d 1096 (7th Cir. 2001).

Comments by a supervisor that his section was "not a women's area" was properly excluded in evidence at the trial of a sex discrimination claim. The supervisor who made the comments had no authority over the decision (failure to promote) in question. According to the Seventh Circuit, derogatory comments are relevant only when attributable to the person who made the adverse employment decision and even then must be "related to the adverse decision."

**D. Discrimination - Disability**

**Note:** The recent enactment of Assembly Bill 2222, effective January 1, 2001, *infra*, means that many federal court decisions interpreting the Americans With Disabilities Act will be of limited, if any, assistance in the future under California law.

**Colmenares v. Braemar Country Club, Inc.**, 89 Cal. App. 4th 778 (2001), review granted, 111 Cal. Rptr. 2d 336.

See discussion of this important case in Section II, *infra*. The California Supreme Court will decide whether the changes made by Assembly Bill 2222 are retroactive or whether, as the plaintiff and disability rights advocates contend, Assembly Bill 2222 did not change the law with respect to the definition of “physical disability.”

The California Supreme Court will shortly resolve the conflict between Colmenares and Wittkopf, as it has scheduled oral arguments in Colmenares.

In Colmenares, the court of appeal refused to apply retroactively the recent disability amendments to FEHA. First, the court focused on the language of section 12926.1, which “tells us not what the law already says but that, in a time yet to come, the statute is intended to result in broader coverage, that state law *is to be* interpreted to require only a limitation that makes a major life activity “difficult,” not a “substantial limitation” and that, notwithstanding the Supreme Court’s decision in Cassista v. Community Foods, Inc., 5 Cal. 4<sup>th</sup> 1050 (1993), the Legislature’s present intent is to require a different interpretation in the future.” Second, the revisions show more than simply an attempt to clarify the existing law. “These amendments substantially change existing law so that an employer must now make accommodations for not only those employees who met the “substantial limitation” test articulated in Cassista, but also for those with limitations that are not substantial but merely make “the achievement of [a] major life activity difficult.” Third, the court opined that it is simply unfair to change the rules of the game in the middle of the contest. Until these recent amendments, both federal and California law “required accommodations by employers for only those employees and applicants whose disabilities *substantially limited* a major life activity.” If the amendments were applied retroactively, they would cover employees who had previously been determined not to be disabled. Finally, “the Legislature’s ‘declaration of an existing statute’s meaning is neither binding nor conclusive in construing the statute,’ and the courts have the final word when it comes to the interpretation of a statute.” For all of these reasons, the court held that AB 2222 is prospective and should not be applied retroactively.

**Wittkopf v. County of Los Angeles**, 90 Cal. App. 4th 1205 (2001), review granted 113 Cal. Rptr. 2d 23.

Two months after the Colmenares decision, the Court of Appeal, Second District, Division 7, reached the opposite conclusion in Wittkopf v. County of Los Angeles, 90 Cal. App. 4th 1205 (2nd Dist., Div. 7 July 24, 2001). Rejecting the Colmenares holding, the Wittkopf court found that the recent disability amendments to FEHA were intended only to clarify existing law and therefore the amendments apply retroactively. In

reaching this conclusion, the court relied on two points. First, “since 1995, this state’s administrative regulations have defined a ‘physical disability’ as a physiological condition, etc., which affects an enumerated body system and ‘[l]imits an individual’s ability to participate in major life activities.’” *Id.* at 550 (citing Cal. Code Regs. tit. 2, § 7293.6, subd. (e)(1)(A)(1)-(2)). Second, the 2000 amendments to FEHA did not change the definition of physical disability. Both before and after the amendments, physical disability requires only a mere limitation, not a substantial one. As such, it is clear to the court that “the amendments and addition of section 12926.1 were intended only to clarify existing law on these points.” *Id.* at 551.

**U.S. Airways, Inc. v. Barnett**, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).

Plaintiff, a disabled employee, claimed that the reasonable accommodation provision of the ADA provides for a disabled employee to be awarded an alternative position, even if the employer’s well-established seniority system would be violated in so doing. The Supreme Court held that the ADA does not require an employer to assign a disabled employee to a particular position if another employee is entitled to that position under the employer’s established seniority system.

**Zivkovick v. Southern California Edison Co.**, 302 F.3d 1080 (9th Cir. 2002).

The Ninth Circuit held that when an employee or an applicant requests an accommodation, or an employer recognizes that the employee needs an accommodation, but the employee cannot request it because of a disability, the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation. The interactive process requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee’s request; (3) offering an accommodation (not necessarily the one requested) that is reasonable and effective. The employer faces liability only where the employer is responsible for the breakdown in the interactive process.

**Hernandez v. Huges Missile Systems Company**, 298 F.3d 1030 (9th Cir. 2002).

An employment policy barring re-employment of a rehabilitated drug addict violates the Americans with Disabilities Act (“ADA”). The plaintiff, a former employee who resigned in lieu of termination after testing positive for cocaine, re-applied for employment following the successful completion of a rehabilitation program. The employer refused to consider the plaintiff’s application due to an unwritten policy of not re-hiring former employees whose employment ended due to termination or resignation in lieu of termination. The Ninth Circuit, in reversing the district court’s ruling granting summary judgment for the employer, held that a policy serving to bar re-employment of a drug addict, despite successful rehabilitation, violates the ADA. Finally, the court noted that it had not considered the availability of the business necessity defense with respect to the rehiring of a rehabilitated drug addict.

**Jensen v. Wells Fargo Bank**, 85 Cal. App. 4th 245 (2000).

Bank teller who suffered post-traumatic stress disorder as a result of an attempted bank robbery could proceed to trial with her ADA claim. Following the Ninth Circuit's now-reversed holding in Barnett v. U.S. Airways, 228 F.3d 1105 (9th Cir. 2000) the California Court of Appeal holds that the employer's duty to engage in a "interactive process" can mean granting a disabled employee preferential consideration for an open position over other qualified applicants. It is not sufficient that the employer merely consider the employee for positions that she identified. The opinion suggest that the employer must identify for the employee other suitable, vacant positions for which the disabled employee may be qualified.

**Humphrey v. Memorial Hospital Association**, 239 F.3d 1128 (9th Cir. 2001).

Employee with obsessive compulsive disorder, who repeatedly failed to arrive for work on time, could bring claim that employer unreasonably refused to accommodate her by permitting her to work at home. This was so even though the employer had repeatedly accommodated the employee by offering to change her starting time and even permitting her to set her own starting time. The employee in question had a compulsive disorder that resulted in her spending hours (sometimes an entire day) washing and re-washing her hair in preparation for going to work. The court holds that a leave of absence could also have been a reasonable accommodation to which the employee was entitled. Further, the employee can bring a wrongful termination claim because "a jury could reasonably find the requisite causal link between the disability of obsessive compulsive disorder and Humphrey's absenteeism and conclude that [the employer] fired Humphrey because of her disability."

**Henderson v. Ardco Inc.**, 247 F.3d 645 (6th Cir. 2001).

Employer "regarded" an employee as disabled, and therefore discriminated against her unlawfully, where it refused to reinstate her until she was "100% healed." Excluding the employee on the basis of the "100% healed" rule, without examining she in fact was disabled or not, amounted to "regarding" her as disabled.

**Brown v. Lucky Stores, Inc.**, 246 F.3d 1182 (9th Cir. 2001).

The employee missed several days work because she was undergoing a court ordered drug and alcohol rehabilitation program. She had been arrested for drunk driving and possession of an illegal drug and spent five days in jail. After she was convicted she also participated in a 90-day drug and alcohol rehabilitation program as a result of a court order. Her employer did not violate ADA by terminating her. Although ADA contains a "safe harbor" provision for addicts in recovery, the court holds that the "safe harbor" provision is only available to persons who are no longer engaged in the illegal use of drugs. Plaintiff's participation in the rehabilitation program was at a result of her own active use of drugs and therefore she was not within the "safe harbor" provision.

**Spitzer v. The Good Guys, Inc.**, 80 Cal. App. 4th 1376 (2000).

A manager of a large electronics store who suffered from a degenerative disc disease sued her employer for disability discrimination under FEHA, claiming that the employer failed to accommodate her disability. The Court of Appeals, reversing a summary judgment for the employer, held that an employer should reassign a disabled employee to an open alternative position (unless to do so would cause the employer “undue hardship”) when the employer learns that the restructuring of the employee’s current job has failed to reasonably accommodate the employee’s disability.

**Willis v. Pacific Maritime Assoc.**, 236 F.3d 1160 (9th Cir. 2001).

Employer’s duty to accommodate a disabled employee does not extend to violating or altering a collectively bargained seniority system in a collective bargaining agreement. The Ninth Circuit joins eight other circuits in holding that an accommodation that requires an employer to violate a collective bargaining agreement’s seniority system is per se unreasonable.

**McLean v. Runyon**, 222 F.3d 1150 (9th Cir. 2000).

Another Ninth Circuit decision regarding when a disabled employee must be given an alternative job. This case holds that, under its facts, a jury would have to determine whether a vacant position the disabled employee requested was equivalent to the position he held. The Ninth Circuit did sustain, however, an offset against the ultimate jury award for workers’ compensation payments the disabled employee received for the same alleged injury.

**Harris v. Harris & Hart, Inc.**, 206 F.3d 838 (9th Cir. 2000).

Employer was justified in refusing to rehire plaintiff who had been on a medical leave when plaintiff failed to provide a medical release. ADA permits the employer to make a medical inquiry, such as requiring a medical release, where the employee has a known disability. Employer justified in refusing to reemploy plaintiff, absent a medical release, since it had no evidence that he had recovered from his disability.

**Braunling v. Countrywide Home Loans, Inc.**, 220 F.3d 1154 (9th Cir. 2000).

Disabled worker who is not qualified for present position, with or without reasonable accommodation, may not maintain an ADA claim. Employee was transferred, per her request, to a much more demanding position, but continued to perform at a substandard level. Employee was experiencing difficulty with the job before her transfer and, hence, cannot show that she could perform the essential functions of her position even with the accommodation she suggested to her employer.

**E. Discrimination - Family & Medical Leave Act**

**Ragsdale v. Wolverine World Wide**, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002).

The Supreme Court found that the federal regulation which imposed a penalty against employers for failing to provide prompt notice of an employee's FMLA rights was invalid and exceeded the Secretary of Labor's authority. A regulation adopted by the United States Department of Labor held that, where the employer fails to give prompt notice that the employee is entitled to FMLA leave, the 12-week period does not run until notice is given. This could result in FMLA leaves far longer than 12 weeks. The Supreme Court held that the regulation created an irrebuttable presumption that the employee was harmed by lack of notice. Whether this case will be followed by the California courts is open to question. However, the California regulation on FMLA notice incorporates by reference the same federal regulations found invalid in Ragsdale.

**Tomlinson v. Qualcomm, Inc.**, 97 Cal. App. 4<sup>th</sup> 934 (2002).

Former employee sued employer for, among other claims, breach of contract and retaliation in violation of California Government Code Sections 12945.1 and 12945.2, after she was laid off by her employer while on authorized family medical leave under the California Family Rights Act ("CFRA"). The court held that the CFRA's guarantee of reinstatement after such family leave does not preclude an employer from terminating the employee as part of a general work force reduction. The court further held that employer did not breach an implied agreement by including the employee in its workforce reduction because, the employer's personnel handbook and policies guaranteeing the employee's reinstatement after completion of the employee's leave did not supersede the employee's express at-will employment agreement. This is especially true where, as here, the employee agreed to both the at-will employment relationship and the exclusive method for amending the at-will nature of the employment.

**Spangler v. Federal Home Loan Bank of Des Moines**, 278 F.3d 847 (8<sup>th</sup> Cir. 2002).

The Eighth Circuit found that an employee's request for time off because she was "depressed again" could satisfy the valid request criteria necessary under the FMLA. Because the employer knew that the employee suffered from depression and knew that she had needed leave in the past for depression, the employer may have been put on sufficient notice that the employee was in need of FMLA leave.

**Bachelder v. America West Airlines, Inc.**, 259 F. 3d 1112 (9<sup>th</sup> Cir. 2001).

The burden-shifting and pretext analysis used in job bias cases under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) does not apply to claims for interference with an employee's FMLA rights. In order for a plaintiff to satisfy the burden of proving interference, the plaintiff need only prove by a preponderance of the evidence that the taking of FMLA-protected leave constituted a negative factor in the termination decision. The court further held that an employer interferes with an employee's FMLA rights any time that it uses an employee's absence

as a negative factor in adverse employment action. Additionally, when an employer does not specify a method of calculating employee eligibility for FMLA leave, the employer must allow its employees to use the calculation that is most beneficial to them.

**Hatchett v. Philander Smith College**, 251 F.3d 670 (8th Cir. 2001).

An employee who was unable to perform the essential functions of her job was not entitled to intermittent or reduced schedule leave under the Family and Medical Leave Act. The court denied the plaintiff's claim that she was entitled to a reduced schedule, finding that she was unable, due to a head injury, to continue to carry out the essential aspects of her position. The court concluded that the legislative history of the Family and Medical Leave Act supported the premise that in order to qualify for a reduced schedule under the Act, the employee must be able to perform the essential functions of the job.

**Pang v. Beverly Hospital Inc.**, 79 Cal. App. 4th 986 (2000).

Helping an elderly mother move from one home to another did not qualify as leave to care for a parent under the California Family Rights Act because, "plaintiff was not there to directly or indirectly provide or participate in her mother's medical care, instead, she was there to help her mother pack her belongings and tell the movers where to place her mother's furniture." Any psychological comfort plaintiff may have provided her mother was merely a collateral benefit of activities not encompassed by the commission's regulations. The court stated that the same result would occur under federal FMLA regulations because it requires some level of participation in ongoing treatment of a medical condition.

**IV.  
LABOR CODE/WAGE-HOUR**

**Sav-On Drug Stores, Inc. v. Superior Court**, 97 Cal. App. 4th 1070 (2002), review granted, 125 Cal. Rptr. 2d 439.

See discussion in Section II, above. This very important case involves whether class action treatment is appropriate in “duties” class actions seeking alleged unpaid overtime compensation.

**Smith v. Rae-Venter**, 89 Cal. App. 4th 239 (2001), review granted, 111 Cal. Rptr. 687 (2001).

See discussion in Section II, above. This case involves attorney’s fees awards where a party appeals de novo from an adverse Labor Commissioner ruling, and also involves waiting time penalties under Labor Code section 203.

**Bell v. Farmers Insurance Exchange**, 87 Cal. App. 4th 805 (2001).

Plaintiffs were a class of claims adjusters working for Farmers Insurance Group. They had been classified as exempt employees by Farmers and argued they were not exempt. The court found that the claims adjusters were not exempt, because they were not administrative personnel but “production” workers whose duties did not qualify them for any exemption. This case has extensive discussion of the requirements for the administrative exemption under the California Wage Orders. Subsequently, the case went to trial and the class recovered approximately \$90 million in unpaid overtime. The class is claiming approximately an additional \$30 million in interest plus several million dollars in attorneys fees.

**Lolley v. Campbell**, 28 Cal. 4th 367 (2002).

An employee who was represented by the Labor Commissioner free of charge on the employer’s appeal from an administrative order awarding the employee unpaid overtime wages claimed he “incurred” attorney fees within the meaning of California Labor Code section 98.2, which requires the superior court to award attorney fees to the party prevailing on appeal. The Supreme Court of California held that the employee did “incur” and was entitled to an award of reasonable attorney fees. The Court also held that the employer was not deprived of due process by such an award.

**Bothell v. Phase Metrics**, 299 F.3d 1120 (9th Cir. 2002).

An employee with computer and information technology skills sought overtime compensation and other damages under the Fair Labor Standards Act and California law. The Court of Appeals reversed the lower court’s grant of summary judgment for the employer, holding that issues of fact regarding the exempt or nonexempt nature of the employee’s duties precluded summary judgment.

**Palacio v. Progressive Insurance**, \_\_\_ F.3d \_\_\_; 2002 WL 31046057 (9th Cir. 2002).

The United States District Court for the Central District of California ruled that a California insurance claims adjuster is not entitled to overtime pay under the Fair Labor Standards Act because she satisfied the federal administrative exemption. The court, however, refused to throw out the adjuster's state law claim, holding that whether her duties fell under the state law administrative exemption was a triable issue of fact.

**Webster v. Public School Employees of Washington**, 247 F.3d 910 (2001).

A union field representative, employed by a union representing public school employees in Washington State, is held exempt from overtime under federal law. The court remands the case to the district court to determine whether the person in question was paid on a "salaried" basis under Washington state law. This case addresses some of the same issues as the Farmers Insurance case and generally is more favorable to employees. It recognizes that the dichotomy between "production" and "administrative" work is not always clear in a service-oriented business.

**Gieg v. Howarth**, 244 F.3d 775 (9th Cir. 2001).

Automotive "finance writer" employed by an automotive dealer was not exempt from overtime requirements of the Fair Labor Standards Act. The FLSA Act contains an exemption for automotive salesmen, parts men and mechanics, but that exemption does not extend to finance writers who do not themselves directly sell vehicles.

**Rowe v. Laidlaw Transit, Inc.**, 244 F.3d 1115 (9th Cir. 2001).

Deductions made from a salaried employee's salary due to time off for Family and Medical Act leave do not destroy overtime exemption. This is so even if the employer granted FMLA leave but failed to designate it as such.

**Asmus v. Pacific Bell**, 23 Cal. 4th 1 (2000).

Pacific Bell issued an employment security policy which stated that if a manager's position was eliminated, that manager would be reassigned within the company. Approximately five years later, Pacific Bell rescinded the policy. Sixty former Pacific Bell managers, who stayed with the company after the employment security policy was rescinded, later sued.

The Supreme Court of California held that an employer may unilaterally terminate a unilaterally-implemented policy, but must wait a reasonable time after the implementation of the policy to terminate or make any or changes and must also provide employees with reasonable notice of the termination or change. The termination of the policy or the replacement of the policy with another policy does not require additional consideration and acceptance by affected employees, other than the employees' continued employment.

**Jacobus v. Krambo Corporation**, 78 Cal. App. 4th 1096 (2000).

Employee who successfully defended himself against claim of sexual harassment is entitled to indemnification for his defense costs including legal fees and expenses under Labor Code § 2802. See discussion, *infra*, of recent amendments to Labor Code § 2802.

**Block v. City of Los Angeles**, 253 F.3d 410 (9th Cir. 2001).

Unpaid disciplinary suspensions of more than one week for reasons other than major safety violations can result in a failure to meet the salary basis test required for overtime exemption under the Fair Labor Standards Act. The court held that only even-week suspensions made for reasons other than safety violations comply with the salary basis test. Despite the fact that the employer occasionally disciplined its employees with unpaid suspensions for less than full weeks, the court found that the employer was not precluded from asserting an overtime exemption claim because the employer did not objectively intend to treat its employees as hourly instead of salaried.

**Morillion v. Royal Packing Co.**, 22 Cal. 4th 575 (2000).

Employees must be paid for the time they spend traveling to and from a work site on buses provided by the employer. Such time is compensable as “hours worked.”

**Taylor v. Lockheed Martin Corporation**, 78 Cal. App 4th 472 (2000).

A civilian employee of a government contractor working on a military enclave cannot sue for violation of FEHA or for common law wrongful termination in violation of public policy. The law applicable to federal enclaves generally is federal law or state law, which was in effect at the time the federal government assumed legislative power over the enclave and which is not inconsistent with federal law. State law which is created after the federal government exercises legislative power over the enclave will apply only if the state regulation has been expressly permitted by Congress. The court finds that Labor Code §6310, the California whistleblower statute for reporting violations of Cal/OSHA, applies on this particular enclave (Vandenberg Air Force Base).

**Klem v. County of Santa Clara**, 208 F.3d 1085 (9th Cir. 2000).

County of Santa Clara unlawfully imposed disciplinary suspensions of less than one full workweek on exempt employees, thereby destroying their exempt status. The county defended on the “window of correction” regulation issued by the Secretary of Labor, which permits an employer, in some circumstances, to correct improper payroll practices and save the exempt status. The Ninth Circuit rejected the window of correction argument, finding that the improper disciplinary suspensions were part of a pattern of violations. Approximately 5,300 exempt employees lost exempt status as a result of fifty-three improper disciplinary suspensions.

V.  
**WRONGFUL TERMINATION/CONSTRUCTIVE TERMINATION**

**Guz v. Bechtel National, Inc.**, 24 Cal. 4th 317 (2000).

See discussion of this case under the section, infra, on Employment Discrimination. The Guz opinion contains many important holdings, most of them pro-employer, on implied contract theories.

The mere passage of time and the employer's service, even where benefits, raises and bonuses are awarded, does not alone establish an implied in fact contract that the employee is not at will. The employer's personnel policies are very important and will be given significant weight by the court. (For example, Bechtel had an express policy stating that none of its employees had contracts for continuous employment.) However, the court found that any triable issue of fact could be no "broader than the specific provisions of [Bechtel's] personnel policies." Nonetheless, the court found that Bechtel's policies did not preclude it from eliminating an entire work unit, without breaching any implied contract it may have had with Guz or others. The Supreme Court reversed a portion of the case, finding that there might be a triable issue of fact whether Bechtel breached an implied contract by not scrupulously following its reduction in force guidelines.

Guz contains a footnote which suggests that an express written agreement, signed by the employee, and containing "at will" language, will be a very powerful defense to any implied contract claim.

**Jersey v. John Muir Medical Center**, 97 Cal. App. 4th 814 (2002).

No wrongful termination/public policy claim where hospital terminated an employee for initiating a lawsuit against a former patient of the hospital. "None of the broad constitutional and statutory provisions plaintiff relies upon reflect a legislative determination that it is against public policy for an employer to insist that its employees not sue its customers, clients or patients."

**Grant-Burton v. Covenant Care, Inc.**, 99 Cal. App. 4th 1361 (2002).

The termination of an employee for discussing compensation with other employees is a violation of California public policy. The plaintiff, an at-will employee, was terminated six days after a marketing directors meeting in which the plaintiff discussed with other directors the company's bonus structure. The appellate court held that: 1) the plaintiff's termination violated California Labor Code section 232, which provides that "no employer shall ... discharge ... an employee who discloses the amount of his or her wages; and 2) the claim inured to the benefit of the public, not merely the plaintiff's own interest as the termination contravened the fundamental, substantial and established provisions of California Labor Code section 232, and the National Labor Relations Act and California Labor Code section 923, both of which expressly provide for the right of concerted activities by employees for the purpose of mutual aid or protection. Note: The

issue of preemption of the claim by the National Labor Relations Act was not raised by the employer.

**Starzynski v. Capital Public Radio, Inc.**, 88 Cal. App. 4th 33 (2001).

A written agreement providing for at-will employment is conclusive and cannot be contradicted by alleged, contemporaneous oral promises of “continuing” employment. Further, a claim for constructive termination fails because his employer could terminate him for any reason, even an arbitrary reason.

**Lenk v. Total-Western Inc.**, 89 Cal. App. 4th 959 (2001).

No implied contract for employment created by a statement in an offer letter that employee would receive a performance review “to be completed after 12 months employment.” The same offer letter contained at will language. The employee was not allowed to sue for breach of implied contract but was permitted to sue for alleged fraud based on allegedly false representations after the company’s financial condition.

**Soltani v. Western & Southern Life Ins. Co.**, 258 F.3d 1038 (9th Cir. 2001).

Written employment agreement that decreases statutes of limitations for employment claims to six months is not unconscionable and may be enforced. However, requirement in written agreement that 10 days written notice be given to the employer before commencing suit would not be enforced.

**VI.  
PRIVACY**

**Muick v. Glenayre Electronics**, 280 F.3d 741 (7th Cir. 2002).

Former employee sued former employer alleging that the employer violated employee's Fourth and Fifth Amendments rights and Illinois law by seizing a laptop computer it had issued to the employee, at the behest of federal agents pursuant to a warrant. Court held no violation because employer was not acting under the color of law and employee had no right of privacy in employer-owned laptop computer issued by employer for use in the workplace. Although an employee may have a reasonable expectation of privacy if the employer equips the employee's office with a safe or file cabinet or other receptacle in which to keep his private papers, no such reasonable expectation existed where, as here, an employer announces that it may inspect the laptops furnished to its employees.

**TBG Insurance Services Corp. v. Superior Court**, 96 Cal. App. 4th 443 (2002).

No expectation of privacy in computer that company provided to employee. Employee had signed a written agreement acknowledging the company's right to inspect the computer. The statement the employee signed also acknowledged the company could monitor the computer. The employee allegedly accessed pornographic Web sites while at work. Additionally, the company had issued the employee two computers: one for home use and one for office use. During the lawsuit, the employee refused to produce the home computer, citing his right of privacy. The court rejected the privacy claim and found that the employee had consented to monitoring both computers and had no reasonable expectation in the home computer when used for personal matters. It ordered the home computer produced in discovery.

**Cramer v. Consolidated Freightways Inc.**, 255 F.3d 683 (9th Cir. 2001).

A state law privacy claim is not preempted by the Labor Management Relations Act when such privacy claims are not covered by a collective bargaining agreement. The court held that a state law claim is not preempted by the Labor Management Relations Act unless it necessarily requires the court to interpret an existing provision of a collective bargaining agreement in order to resolve the dispute. Where employees' rights are based on the California Constitution or statutory rights of privacy, the rights are not conferred by or substantially dependent upon the collective bargaining agreement, and thus are not preempted.

**VII.  
IMMIGRATION STATUS**

**Hoffman Plastic Compounds, Inc. v. NLRB**, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002).

The United States Supreme Court held that federal immigration policy precluded the NLRB from awarding back pay to an undocumented alien who had never been legally authorized to work in the United States. The employer hired a worker on the basis of documents appearing to verify his authorization to work in the US. The worker and others were laid off after they supported a union-organizing campaign at petitioner's plant. The NLRB found that the lay-offs violated the NLRA and ordered back pay and other relief. At a subsequent compliance hearing, the employee testified to not having authorization to work in the United States. The court held that to allow an award of back pay would run counter to immigration policy, citing various provisions of the Immigration Reform Control Act of 1986.

**Singh v. Jutla & C.D. & R's Oil, Inc.**, 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

An illegal-alien employee sued his employer, alleging that the employer reported the employee to the Immigration and Naturalization Service (INS) in retaliation for the employee's filing of a wage claim in violation of the FLSA. The court held that the illegal-alien employee's filing of a wage claim constituted conduct protected from retaliation under the FLSA. The court further held that the illegal-alien employee's allegations that the employer reported the employee to the INS, with retaliatory intent--after employee filed a wage claim--was sufficient to state a claim for retaliation in violation of the FLSA.

**VIII.  
WORKERS' COMPENSATION**

**Navarro v. A&A Farming and Western Growers Insurance Co.**, 2002 WL 236699, 67 Cal. Comp. Cases 145 (2002).

Plaintiff had been off work for over three months due to industrial injuries. Pursuant to plan provisions, the employer terminated its contributions to an ERISA group health benefits plan after a certain time period elapsed. Plaintiff sued for unlawful discrimination against an industrially-injured worker, in violation of Labor Code section 132a. The court held that where an injured employee's section 132a claim is premised upon the employer's termination of (or refusal to provide) group health plan benefits to the employee pursuant to the terms of an ERISA plan, the employee's section 132a claim "relates to" the ERISA plan and, therefore, is preempted by ERISA.

**Land v. Workers' Compensation Appeals Board**, 102 Cal. App. 4<sup>th</sup> 491 (2002).

A university student was injured during a field portion of a class in animal husbandry and sought workers' compensation benefits. The court denied the student's claim, rejecting her theory that she was a university employee, even though the student signed a contract that all expenses would be advanced and that any profit would be split among the participating students after the university had been reimbursed. The crucial question was whether it may reasonably be said that the student is "rendering service" for his or her university in participating in its educational programs. In fact, the court said, the "university is rendering service by providing a panoply of educational resources for the student's use". Other factors that the court looked at were: 1) the student was not working alongside paid workers, 2) the student was not working in an established business or institution, 3) the student did not receive wages, and 4) the student would have received nothing if the project was not profitable.

**IX.**  
**INTELLECTUAL PROPERTY/NON-COMPETITION PROVISIONS**

See **Advanced Bionics Corp. v. Medtronic, Inc.**, 87 Cal. App. 4th 1235 (2001), review granted, 108 Cal. Rptr. 2d 595; and **Walia v. Aetna**, 93 Cal. App. 4th 1213 (2001), review granted, 117 Cal. Rptr. 2d 541.

These cases are discussed in Section II above. They are both before the California Supreme Court and will result in important rulings whether California courts can prohibit out-of-state courts from enforcing covenants not to compete against California employees. Additionally, these cases may address the extent to which, if any, a California court will enforce a restrictive covenant against an employee working for a competitor of his former employer, where there are no issues involving the theft of trade secrets.

**Whyte v. Schlage Lock Company**, 101 Cal. App. 4th 1443 (2002).

The inevitable disclosure doctrine, under which a plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him or her to rely on the plaintiff's trade secrets, is not the law in California and will not bar an employee from working for a competitor.

**D'Sa v. Playhut Inc.**, 85 Cal. App. 4th 927 (2000).

Employment agreement contained a provision that employee would not render services for "any person or entity in connection with any competing product" for one year after termination. This provision was held to be unlawful under California Business and Professions Code 16600. An employer commits a wrongful termination in violation of public policy if it terminates an employee for refusing to sign such an illegal non-compete agreement. The unlawful non-compete agreement is not "saved" by a provision in the contract allowing the court to "sever" unlawful provisions.

**X.  
DISCOVERY**

**Oleszko v. State Compensation Insurance Fund**, 243 F.3d 1154 (9th Cir. 2001).

Plaintiff in a sexual harassment claim sought to discover records pertaining to other alleged sex or race discrimination claims, by demanding production of records from the company's Employee Assistance Program ("EAP"). The EAP records sought involved persons other than the plaintiff herself. The Ninth Circuit rejected the discovery request, finding that the federal psychotherapist-patient privilege protected the information, even though counselors at the EAP were not themselves licensed psychiatrists or psychologists in all cases.

**XI.  
DAMAGE ISSUES**

**Cooper Industries, Inc. v. Leatherman Tool Group, Inc.**, 535 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)

The United States Supreme Court, in a non-employment case, held that appellate courts must conduct a de novo review of punitive damages to determine whether punitive damages are grossly excessive. This will be a more favorable standard for employers than under prior law. A de novo standard means that the appeals court reviews the amount of punitive damages without any deference to the trial court's decision. The de novo standard replaces the less favorable "abuse of discretion" standard, under which the trial court's review of a jury award was given substantial deference.

The Supreme Court's ruling in Cooper Industries is based on federal law. It is not yet clear whether the same scrutiny will be given to punitive damages under California law.

**Levine v. Weis**, 90 Cal. App. 4<sup>th</sup> 201 (2001).

Provision in California's False Claims Act, prohibiting an employer from discriminating against an employee because of lawful acts done by the employee in furthering a false claims action, does not impose liability on anyone other than the employer. Accordingly, supervisors and other employees cannot be liable for discrimination against a whistle-blowing employee.

**Joint Executive Board of the Culinary/Bartender Trust Fund, etc. v. The Las Vegas Sands Inc.**, 244 F.3d 1152 (9th Cir. 2001).

Back pay awards under the Worker Adjustment and Retraining Notification Act must include tips and holiday pay, not simply base salary. Purpose of WARN Act is to make employees "whole" for the period for which WARN Act notice is not given. The court also rules that this case should have been certified as a class action.

**Thompson v. Tracor Flight Systems Inc.**, 86 Cal. App. 4<sup>th</sup> 1156 (2000).

Plaintiff successfully brought a case for retaliation and constructive termination. The after-acquired evidence rule did not require the trial court to reduce the jury verdict because plaintiff, a personnel director, removed from the company and took home with her copies of personnel files and other sensitive information to which she had access. The company contended that it would have terminated her for misconduct if it had known she was copying and removing personnel-related files. The appeals court refused to order a reduction in the jury verdict based on the after-required evidence, because it found that there was no certainty plaintiff would have been terminated, as opposed to simply disciplined, for removing the sensitive documents.

**Finegan v. County of Los Angeles**, 91 Cal. App. 4th 1 (2001).

Plaintiff sued for disability discrimination. During a worker's compensation proceeding, the employer developed evidence indicating that the employee was not qualified for the position in question. The appeals court held that "after-acquired evidence" may be admitted to show that a plaintiff in a disability discrimination case is not or was not qualified for the position in dispute. This evidence is admissible even if it was unknown to the employer at the time of the decisions in question.

**Caudle v. Bristow Optical Company, Inc.**, 224 F.3d 1014 (9th Cir. 2000).

Plaintiff won her pregnancy discrimination case but was denied back pay for most of the back pay period, because she had left the workforce to take care of her newborn child. The employer was not required to pay back pay for a period that the plaintiff voluntarily removed herself from the workforce.

**XII.  
ARBITRATION**

**ENFORCEABILITY OF MANDATORY ARBITRATION AGREEMENTS  
AFTER THE CIRCUIT CITY AND ARMENDARIZ CASES**

**Summary:** Since the California Supreme Court's Armendariz decision on July 27, 2000, California courts have generally continued to enforce employer-imposed arbitration agreements, if the agreement contains procedural and substantive protections to ensure fairness, and if the agreement is not one-sided. Employers who use or are considering using arbitration agreements won a victory from the United States Supreme Court on March 21, 2001, when the Supreme Court decided Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). See Armendariz v. Foundation Health Psychcare Services, 24 Cal. 4th 83 (2000).

**The Circuit City Decision:** In Circuit City, the United States Supreme Court held, in a 5-4 opinion, that federal law, not state law, governs issues of arbitrability in employment contracts where the employer is engaged in interstate commerce. The Supreme Court held that the Federal Arbitration Act governs such employment agreements and preempts any state law inconsistent with the pro-arbitration federal statute. The effect of the Circuit City decision is to limit a state's ability to defeat most mandatory arbitration agreements. All but the smallest employers are "engaged in interstate commerce," and therefore the Federal Arbitration Act will apply to arbitration agreements between those employers and their employees.

Circuit City Stores is also important because it will limit the ability of states, such as California, to enact new legislation to undermine most mandatory employment arbitration agreements.

Many issues, however, remain unresolved even after Circuit City. For example, what issues are preempted? Once a contract to arbitrate exists, and the employer is engaged in interstate commerce, are states absolutely barred from restricting the content of arbitration agreements, as the California Supreme Court in Armendariz attempted to do? Or, is the Armendariz decision still valid, because the California Supreme Court has decided that certain provisions in arbitration agreements are so inherently unfair or one-sided that there is no agreement to arbitrate at all?

**EEOC v. Luce Forward Hamilton & Scripps -- Duffield Overruled**

On September 3, 2002, a panel of the Ninth Circuit held that the Supreme Court's decision in Circuit City Stores, supra, overruled the Ninth Circuit's 1998 decision in Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998). EEOC v. Luce Forward Hamilton & Scripps, 303 F.3d 994 (9th Cir. 2002).

The Ninth Circuit's Duffield decision had held that mandatory arbitration agreements could not be used to compel arbitration of a claim under Title VII of the Civil Rights Act of 1964 or under the California Fair Employment and Housing Act. However, eight other circuits, as well as the supreme courts of California and Nevada, had rejected Duffield. The California Supreme Court had expressly done so in Armendariz, supra.

A 2-1 panel of the Ninth Circuit, with Judges Trott and Fitzgerald in the majority (and Judge Pregerson in the minority) concluded that the Supreme Court's opinion in Circuit City Stores silently overruled Duffield. The Ninth Circuit majority referred to language in Circuit City which stated that "arbitration agreements can be enforced under the Federal Arbitration Act without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law . . . ."

A request has been made for a rehearing en banc by the Ninth Circuit.

### **Little v. Auto Stiegler -- Does Armendariz Apply to Contract and Tort Claims?**

See discussion of Little v. Auto Stiegler, Inc., 92 Cal. App. 4th 329 (2001), review granted, 114 Cal. Rptr. 2d 612, in Section II, above. The California Supreme Court will decide whether the requirements for mandatory arbitration clauses established in Armendariz apply to employment claims for breach of contract and common law torts.

### **Properly Drafted Agreements Are Still Being Enforced**

Ironically, many California state courts continue to enforce mandatory arbitration clauses, unless the clause fails under the Armendariz standard. However, one recent California Court of Appeal decision, from Orange County, refused to enforce an arbitration agreement where the agreement required arbitration before a retired California Superior Court Judge. The appeals court reasoned that arbitration before a retired judge would be unreasonably expensive for the employee. This objection, however, can be cured by providing in the arbitration agreement that the employer will pay the arbitrator's fees. See McCoy v. Superior Court, 104 Cal. Rptr. 2d 504 (2001), ordered not published.

### **Practical Effect and Recommendations**

State courts generally continue to enforce arbitration agreements if they are properly drafted. Therefore we do not advise employers to abandon arbitration programs in place. However, any employer with an existing arbitration program, or contemplating imposing one, should make sure that the arbitration agreement does at least the following:

- The agreement should refer to arbitration rules of a recognized arbitration provider, such as the American Arbitration Association Employment Dispute Resolution Rules.
- If the arbitration agreement does not contain reference to a set of arbitration rules, it should provide for pre-hearing discovery in the discretion of the arbitrator, a written arbitration award, and procedural protection such as the right to counsel at the hearing, the right to confront and cross-exam witnesses and the right to produce documentary evidence and to submit written or oral argument at the conclusion of the hearing.
- The agreement should provide for a neutral arbitrator, including pre-appointment disclosure of any possible conflicts of interest the arbitrator may have. This topic also is covered in the American Arbitration Association Rules.

- The arbitration clause must not impose on the employee any costs associated specifically with the arbitration, such as arbitrator's fees or fee of the arbitration provider. It is probably permissible to require the employee/plaintiff to pay fees up to an amount that would be required to file a civil action in California Superior Court. Cases from elsewhere in the country have reached conflicting results whether the arbitration agreement can impose more significant fees if the employee loses the arbitration.
- Under no circumstances should the arbitration agreement attempt to limit any remedy or damage element that the employee could recover if the case were in court.
- Under no circumstances should the agreement impose any "statute of limitations" other than the applicable statute of limitations if the case were in court.
- Do not attempt to carve out exceptions to the arbitration agreement. All employment disputes should be submitted to arbitration and the employer must be bound to arbitrate as well as the employee.
- At least one court has approved the carving out of intellectual property claims from an arbitration agreement, as long as both the employer and the employee were free to bring trade secret claims or similar intellectual property claims in court.
- It is advisable to specifically list the various common types of employment claims as being arbitrable under the clause.
- We recommend that the clause state that the issue of arbitrability shall be governed by the Federal Arbitration Act, if the employer is engaged in interstate commerce.

### **Post-Armendariz Cases**

After the California Supreme Court's ruling in Armendariz v. Foundation Health PsychCare Services, Inc., 24 Cal. 4th 83 (2000), the following significant cases have been published:

1. Even where the arbitrator makes a probable error in law in interpretation of a contract's attorney fee provision, courts will generally not overturn the arbitration award. The parties bargained for the arbitration award and gave up the right to court review. Moshonov v. Walsh, 22 Cal. 4th 771 (2000) (not an employment case).
2. Arbitration clause precluding compensatory damages, limiting recovery to back pay for six months less benefits or pay from another job, limiting the arbitrable claims to issues based on termination, conditions of employment or pay, and requiring arbitration in a remote city, all held unconscionable and unenforceable. Pinedo v. Premium Tobacco, Inc., 85 Cal. App. 4th 774 (2000).

3. Although not an employment case, one recent case addresses the doctrine of waiver as applied to arbitration agreements. The defendant was held to have waived the right to arbitrate by filing an answer (which did not allege an arbitration agreement as an affirmative defense) and then participating in discovery for three months, prior to attempting to compel arbitration. Guess?, Inc. v. Superior Court, 79 Cal. App. 4th 553 (2000)

4. Employee is bound to an arbitration agreement where there is substantial evidence that he received a memorandum and brochure containing the arbitration agreement and continued to work for four years thereafter, even though there is no signed acknowledgment. Craig v. Brown & Root, Inc., 84 Cal. App. 4th 416 (2000).

5. Employee bound to arbitrate despite refusal to sign acknowledgment to updated employee handbook. Employee continued to work after receiving the handbook, which contained an arbitration agreement. Prior handbook, which did not contain such an agreement, was superceded. Martinez v. Scott Specialty Gases, Inc., 83 Cal. App. 4th 1236 (2000).

6. Arbitration agreement which is silent regarding costs and fees is nonetheless enforceable; the party claiming that arbitration would be prohibitively expensive must bear the burden of showing the same. Greentree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

7. Employee could bring a FEHA claim against her employer even though she had previously lost an arbitration under her union agreement based on the same facts. The union agreement did not clearly indicate that FEHA claims would be subject to arbitration under the agreement. Camargo v. California Portland Cement Co., 86 Cal. App. 4th 995 (2001).

8. Arbitration agreement and collective bargaining agreement does not require arbitration of FEHA claim, where collective bargaining agreement did not explicitly mention FEHA claim as being arbitrable. At a minimum, the collective bargaining agreement would have to contain “an explicit incorporation of statutory anti-discrimination requirements” in order for the claims to be arbitrable. Vasquez v. Superior Court, 80 Cal. App. 4th 430 (2000).

9. Former truck driver for Road Way Package Systems could not be compelled to arbitrate his claims under the National Labor Relations Act and California Fair Employment and Housing Act, because employees moving goods in interstate commerce are not covered under the Federal Arbitration Act. The employer never relied on the California Arbitration Act and the trial court and the Ninth Circuit refused to enforce the arbitration agreement under California law since the issue had not been raised in the trial court. Harden v. Road Way Package Systems, 249 F.3d 1137 (9th Cir. 2001)

The Armendariz case teaches us many lessons, many of which were apparent even before the decision:

- Arbitration agreements, if imposed as a condition of employment, are lawful so long as they are fair and not overly harsh.

- We continue to believe that arbitration in most cases is a preferable means to resolve employment disputes, from both the employer and employee's point of view, than court litigation.
- If you currently use a mandatory arbitration agreement, review the agreement to insure it complies with the Armendariz standards.
- In drafting an arbitration agreement, the employer should avoid attempting to overreach. The point of the agreement should be simply to change the forum from a court or jury trial to an arbitrator.
- The agreement should contain provisions to ensure fairness and neutrality. Reference to the rules of a recognized arbitration tribunal, such as the American Arbitration Association, is one of the easiest ways to accomplish this goal.
- The agreement should not impose on the employee any costs unique to the arbitration.
- The agreement should not attempt in any way to limit the scope of remedies that the employee (or employer) may recover in arbitration as opposed to in court.
- The agreement should not attempt to shorten any statute of limitations that would otherwise apply.
- The clause should bind both parties to arbitrate claims within its scope.
- When imposing arbitration agreements on existing employees, care must be taken to avoid creating morale problems or a situation where the agreement could be attacked for lack of consideration.
- Many larger companies have developed very sophisticated programs. Some of these programs do not require binding arbitration but simply a non-binding fact-finding hearing. The experience with these programs is that they resolve the great majority of claims, even if the final fact-finding hearing is not binding. The Armendariz decision does not address such non-binding programs; but we see nothing in the Armendariz decision that would invalidate such programs as long as the employee is not burdened with their cost.

Arbitration is not without its detractors. The chief arguments against arbitration are that (1) it can result in one-sided decisions which cannot be reviewed by an appeals court; and (2) it may in some cases encourage marginal claims. An employer considering adopting a program should discuss the pros and cons of the decision with its labor counsel.

**XIII.  
CLASS ACTIONS AND REPRESENTATIVE CLAIMS**

**McCullah v. Southern California Gas Company**, 82 Cal. App. 4th 495 (2000).

Class certification denied in an employment discrimination case where employee claimed that he was wrongfully terminated after he failed to complete a training course. The question of whether employer provided reasonable accommodation to the employee's disability could not be answered by a class action because there were diverse factual issues to be resolved and the question of whether the employer must provide reasonable accommodation involved a case-by-case inquiry.

**Kraus v. Trinity Management Services, Inc.**, 23 Cal. 4th 116, (2000).

**Cortez v. Purolator Air Filtration Products Co.**, 23 Cal. 4th 163 (2000).

**These two cases hold:**

1. Wage hour claims may be prosecuted in a representative action under the California Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200.
2. Such UCL representative actions need not be certified as class actions.
3. Unpaid overtime may be recovered in such a UCL action on behalf of all employees who were not paid overtime due and who can be identified.
4. The "fluid recovery" remedial procedure available in class actions cannot be used in a representative UCL case.
5. The statute of limitations for such UCL actions is 4 years.
6. Kraus was a non-employment claim for apartment rental fees imposed at the beginning of the tenancy to defray pre-leasing expenses by the landlord.

Cortez was a garden-variety overtime claim brought as a UCL representative action.

The California Supreme Court permitted the overtime claim to proceed as a UCL class action, without the need to be certified as a class action. However, the court ruled that a "fluid recovery" remedy could not be imposed. The employer would have to pay unpaid overtime to identifiable employees who could establish entitlement to overtime. The named plaintiff could act in a representative capacity.

In Cortez, a Labor Code claim was brought by the named plaintiff but not certified for class treatment. Therefore, Labor Code section 203 penalties could not be recovered except by the named plaintiff.

**Significance:**

1. These cases limit the “fluid recovery” approach to properly certified class actions. A representative UCL action, however, can result in extensive “disgorgement” of due but unpaid back pay.
2. To obtain full Labor Code remedies (e.g., penalties under Labor Code section 203), the action must be certified as a class action.
3. The longer, 4-year statute of limitation for UCL claims will apply to any disgorgement remedy, even though the statute for Labor Code claims is only three years.
4. The employer may assert equitable defenses, but it is questionable if such defenses will be effective in most cases.

#### XIV. CONCERTED ACTIVITY

**NOTE:** This paper does not attempt to summarize the many important recent developments in union/management relations law. However, the following case is very significant:

**Epilepsy Foundation of Northeast Ohio v. Borg and Hasan**, 331 NLRB 92 (2000), affirmed 268 F.3d 1095 (D.C. Cir. 2001).

#### **Holding**

The D.C. Circuit has affirmed a ground-breaking ruling by the National Labor Relations Board, holding that “Weingarten” rights are available to employees in non-union companies. Weingarten rights, named after a 1975 Supreme Court decision, permit an employee who is interviewed in a disciplinary setting to request a union representative or fellow employee attend an investigatory interview.

In reaching its decision, a 3-2 majority of the National Labor Relations Board overruled Sears Roebuck & Company, 274 NLRB 230 (1985), in which it had held that Weingarten rights are available only in a unionized company. The Board had modified its Sears decision in E.L. DuPont & Co., 289 NLRB 627 (1988), but continued to rule that Weingarten rights were not applicable in non-union companies.

In affirming the Board’s new rule, the D.C. Circuit found it must affirm the NLRB’s findings if supported by evidence in the record considered as a whole, and unless the NLRB ruling unambiguously conflicts with the intent of Congress or is not otherwise a permissible construction of the statute. The D.C. Circuit found that the Board’s new rule was a permissible construction of the National Labor Relations Act and therefore upheld the Board’s interpretation.

However, the D.C. Circuit refused to give retroactive affect to the Board’s new rule, as the Board itself would have done. Epilepsy Foundation, 268 F.3d at 1102-1103.

#### **What Rights Are Guaranteed Under Epilepsy Foundation?**

The Weingarten right is simply the right of an employee, when facing an investigative interview that may result in discipline, to request a union steward or co-worker be present during the interview.

In other cases, the Board has held that, once an employee requests a representative be present, the employer has the right either to (i) wait for the representative to arrive; (ii) to dispense with the interview all together; or (iii) to inform the employee that he/she can elect between proceeding without a representative or foregoing the interview (and any benefit the employee might derive from the interview).

As part of its Epilepsy Foundation decision, the Board indicated it would not overrule precedents holding an employer may decide to forego the investigatory interview.

What Does This Mean For Employees Who Are Not Unionized?

When disciplining an employee or conducting an investigative interview, if the employee asks to have another employee present, the employer should either arrange for the other employee, forego the interview all together, or give the employee the choice between an interview without a representative, or no interview at all.

Existing law does not require the employer to advise the employee of his or her Weingarten rights. Although the Board's Weingarten jurisprudence is now open to question, there is no indication that the Board intends to require notice similar to a Miranda warning in the criminal law.

It is unclear how the Board will rule in a case where a non-represented employee requests a non-employee (such as an attorney) be present at the investigative interview.

**Significance**

We recommend that, when faced with a Weingarten request from an employee at a non-union company, the employer usually attempt to arrange for the representative requested by the employee or, if to do so would require a lengthy period of time, a reasonably acceptable alternative representative.

**XV.**  
**ADMINISTRATIVE DEVELOPMENTS**

1. Issuance of New Enforcement Policies and Interpretations Manual by California Division of Labor Standards Enforcement.

In the Summer of 2002 the California Division of Labor Standards Enforcement (“the Labor Commissioner”) issued an updated version of its Enforcement Policies and Interpretations Manual. While this Manual does not have the force of law, the Labor Commissioner asserts that its interpretations are entitled to “great weight” in court litigation. The manual contains many new interpretations and enforcement policies, and is greatly expanded over earlier versions.

2. Continuing Controversy Regarding “Salary Basis” Requirement for Exempt Employees, and Mandatory Use of Vacation Pay.

A very recent letter from Labor Commissioner Arthur Lujan asserts that an employer destroys the exempt status of an exempt employee if it docks the accrued vacation or personal time off of an exempt employee for absences of less than a full day. The August 2002 letter is part of a continuing controversy regarding reductions in the salary or accrued leave of exempt employees, to account for periods of absence.

The August 2002 letter from Labor Commissioner Lujan states that an employer cannot deduct or dock an exempt employee’s vacation or PTO leave bank for hours taken off by the employee during a day for personal reasons, or to cover hours that were not worked due to a partial week plant shutdown. According to Labor Commissioner Lujan, vacation pay and PTO are “vested” benefits and are the same as wages. If Commissioner Lujan’s August 30, 2002 letter is a correct statement of the law, an exempt employee could take off a half-day every week (or even more frequently) and his/her vacation or PTO banks could not be affected without jeopardizing the exemption.

3. Liability of Individual Corporate Officers For Wage Violations.

The Labor Commissioner on June 18, 2002 issued a letter to a Superior Court judge in Orange County, purporting to state a “clarification” of a Labor Commissioner decision issued in an administrative hearing on December 11, 2001. According to the June 18, 2002 letter, an individual officer or employee of a corporate employer can be personally liable for unpaid wages, plus penalties and interest, even where the corporate employer itself is insolvent and cannot satisfy the liability for wages. According to the Labor Commissioner’s June 18, 2002 letter, “all that is needed to come within the definition of ‘employer’ [and therefore be liable for unpaid wages] is the exercise of control over wages, hours or working conditions.” The Labor Commissioner letter also cites several cases under the federal Fair Labor Standards Act which impose individual liability on corporate officers or employees who exercised control over the employer’s payroll practices.

A copy of the June 18, 2002 letter on individual liability was sent to every Labor Commissioner office in the state.

It is clear that the Labor Commissioner intends to pursue a broad definition of “employer” and to hold individual officers and employees liable for unpaid wages, penalties and interest, where the corporate employer is insolvent. Plaintiff’s attorneys are also aware of this development and are naming individual officers and employees in many wage/hour cases.

4. Labor Commissioner Resistance to Arbitration Agreements.

In a February 19, 2002 Opinion Letter, the Labor Commissioner stated that “under State law, all employees have the right to have their wage claims heard and decided by the Labor Commissioner.” This Letter apparently ignores Perry v. Thomas, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987), in which the Supreme Court of the United States held that Labor Code section 229 is preempted where an arbitration agreement exists and is covered by the Federal Arbitration Act. The Labor Commissioner Letter of February 19, 2002 states that an employer seeking to enforce an arbitration agreement must seek to compel arbitration of the claim in a court proceeding, but “DLSE [the Labor Commissioner] will not halt proceeding on a wage claim in response to an employer’s assertion that the claim is covered by an arbitration ‘agreement’.”

An employer who receives an administrative wage claim from the Labor Commissioner must immediately review its files to determine if the employee seeking the wages signed an arbitration agreement. If so, the employer must go to court immediately to seek to compel arbitration of the claim.

5. U.S. Department of Labor to Seek Back Pay Under FLSA For Undocumented Workers.

Despite the U.S. Supreme Court’s decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 122 S. Ct. 1275, 152 L.Ed.2d 271 (2002), the U.S. Department of Labor has publicly stated it will pursue back pay for undocumented workers for hours actually worked. The DOL distinguished Hoffman Plastic from the situation where an employee, even one illegally in the country, actually worked hours and was not paid for the work. The DOL focused on language in the Hoffman case to the effect that the employee in Hoffman was seeking back pay for hours that were not performed and for which wages could not lawfully have been earned. However, even where the employee actually worked and was not paid, the wages “could not lawfully have been earned” if the employee was undocumented and had no right to work in this country in the first place.

The federal courts will have to determine whether Hoffman Plastic precludes any type of back pay for an undocumented worker, even where that worker actually worked hours which were not properly paid for.

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