Pacific Employers
Management Advisor
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June 2008

Top of the News

Court Rejects "Dichotomy"

A recent decision by California's Fourth District Court of Appeal analyzed the administrative exemption from overtime compensation and found that an employer was entitled to summary judgment because its network operations director qualified for the administrative exemption.

Significantly, in reaching its conclusion in *Combs v. Skyriver Communications, Inc., 159 Cal.App.4th 1242 (2008),* the court held that it was not necessary to apply the administrative/production worker dichotomy and that the employee qualified for the exemption without regard to that test.

"Combs' duties were largely undisputed."

Mark Combs sued his former employer Skyriver Communications seeking recovery of unpaid overtime. Skyriver is a high-speed wireless broadband internet service provider. Combs worked for Skyriver first as manager of capacity planning and then as director of network operations. Combs' duties were largely undisputed. A resume he prepared after leaving Skyriver indicated his responsiblity for project management, budgeting, vendor management, purchasing, forecasting, employee management, management of overseas deployment of wireless data network, management of the integration and standardization of three networks into the Skyriver architecture, and overseeing of day to day network operations.

At trial, Combs testified that he spent 60-70% of his time on his "core" responsibility of maintaining the well-being of Skyriver's network. This responsibility included high-level problem solving and "troubleshooting," as well as planning to integrate acquired networks into Skyriver's network. Combs also prepared reports for Skyriver's board of directors and conducted lease negotiations and equipment sourcing and purchasing. The trial court granted Skyriver's motion for judgment on the ground that Combs was exempt from overtime under the administrative exemption.

On appeal, Combs claimed that the court should have applied the *"administrative/production worker dichotomy"* that would have led to a determination that he was a nonexempt production worker.

Addressing the facts of Combs' employment, the court determined that Combs performed *"specialized functions"* that were not limited to the *"routine and unimportant."* The analysis therefore called for *"finer distinctions than the administrative/production worker dichotomy provides."* Consequently, the trial court did not err in deciding not to apply the dichotomy test.

The court also rejected Combs's arguments that, regardless of the application of the dichotomy test, Skyriver failed to prove that 1) Combs's work was directly related to Skyriver's management policies or general business operations, 2) Combs customarily and regularly exercised discretion and independent judgment, and 3) Combs's job duties made up more than half of his work day.

The court relied on various FLSA regulatory definitions and interpretive guidelines which IWC Wage Order No. 4-2001 explicitly incorporates. Among those guidelines is 29 C.F.R. 541.201, which includes the terms "budgeting," "purchasing, procurement," and "computer network, internet and database administration" in the meaning of work "directly related to the management or general business operations."

Based on the plain meaning of those terms, the court found that Combs' undisputed duties fell clearly within the category of work directly related to Skyriver's management policies or general business operations. [PE]

Child Labor Law Flyer Enclosed!

President's Report
~Dave Miller~

Employment Laws Permit Gays

The California Supreme Court decision legalizing same-sex marriage may require employers to consider some workplace policies, even though last week's ruling will have little direct effect on employee benefits.

California's domestic partnership law, as well as statutory bans on discrimination based on marital status and sexual orientation, already requires businesses to provide virtually the same state-regulated benefits to gay couples on their payrolls as they do to employees who are in opposite-sex unions.

California's first statewide domestic partnership law, passed in 1999, took a step toward granting same-sex partners many of the same rights, protections and benefits as married couples. The law was greatly expanded in 2003.

"...justices outlined nine differences..."

However, businesses that have traditionally allowed just-married employees to take time off for their honeymoon would have to extend that benefit to same-sex couples. If an out-of-state company has a benefit plan and it defines the people getting it as 'employee and spouse,' then a person in a marriage by a same-sex couple in California would get the benefit. That person is legally the spouse here, so it would apply.

In their ruling, the justices outlined nine differences between domestic partners and married couples under current state law. For employers, the main difference is that the definition of a married person -- and therefore one who is eligible for spousal benefits -- is a bit broader. [PE]

Conformity is the jailer of freedom and the enemy of growth. — John F. Kennedy

Supervisors' Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on July 23rd, registration at 7:30am — seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast

Recent Developments

Supreme Court Refuses To Review Tucoemas Ruling

The U.S. Supreme Court has refused to hear an appeal from Tucoemas Federal Credit Union of Visalia, apparently clearing the way for a former manager to be paid more than $1.5 million awarded in punitive damages in an employment discrimination case.

Kim McGee of Exeter had sued in 2003 for workplace discrimination after the credit union demoted her and eventually forced her out of her job when she had to undergo treatment for breast cancer.

The credit union had argued that state laws about employment discrimination didn't apply to it because it is federally regulated – an argument rejected by the original jury in 2003, by the Fifth District Court of Appeal, the California Supreme Court and, with its refusal to hear the case, by the U.S. Supreme Court.

The original jury award for punitive damages was $1.2 million but has grown because of accumulating interest. The credit union earlier paid the compensatory portion of the original $3.2 million total verdict.

Ms. McGee, a 17-year employee and its former vice president of lending, had been diagnosed with breast cancer and underwent surgery and an aggressive treatment of chemotherapy and radiation.

Her lawsuit contended that the credit union refused to provide her with medical accommodation and threatened to fire her if she needed more than four months to recuperate.

Ms. McGee said she tried to meet the demands of her boss but was demoted to a part-time position requiring greater physical activity while she was still undergoing cancer treatment, her pay was slashed in half and her medical insurance coverage was canceled. [PE]

Appeals Court Rejects "On-Call" Pay for Resident Employees

On-call resident employees, such as resident managers under Wage Order 5, need only be paid for time spent performing their assigned job duties. Employers are not required to pay them for the time they are on call, so long as they are free to engage in personal activities, regardless of any geographic restrictions imposed by the employer on such activities. *Isner v. Falkenberg/Gilliam Associates.*

Employers Should:

- Determine which Wage Order applies to their business.
- Review and understand the applicable Wage Order, then make sure it is posted in a conspicuous location where employees can see it.
- Pay employees for hours actually worked and keep accurate time records for nonexempt employees. [PE]

No Requirement for Third-Party Medical Verification under CFRA

An employer can still claim that an employee did not suffer from a serious health condition, even if it did not use the California Family Rights Act's (CFRA) dispute resolution mechanism of having a health care provider -- jointly chosen by both parties -- verify the employee's entitlement to leave.

In addition, an employee's ability to work part-time -- performing similar job functions for another employer while on CFRA leave from their original employer -- is evidence that they may have been able to perform the job with the original employer, but it is not conclusive. The California Supreme Court sent this case back to the trial court to be heard after both the trial court and court of appeal threw out the case. *Lonicki v. Sutter Health Central.*

Employers Should:

- Communicate with employees consistently during a leave of absence so as to have the most up-to-date information regarding their condition and potential return to work dates.
- Never terminate an employee on a protected leave of absence without first consulting counsel.
- Consider their rights and obligations, as well as those of employees regarding protected leaves of absence. [PE]

Child Labor Law Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

On-Duty Meal Periods

Q: ***"Sometimes, when there is only one employee on duty, there may be no way for that employee to enjoy a full lunch hour without being interupted. Can they agree to work straight through?"***

A: Generally, you must provide a meal break of at least one half-hour for every work period of more than five hours. However, if six hours of work will complete the day's work, the employee may voluntarily choose not to take the meal break. Meal breaks may be unpaid only if:

* They are at least 30 minutes long;

* The employee is relieved of all duty; and

* The employee is free to leave the premises.

Meal breaks may be longer than a half-hour, at your discretion. However, scheduling anything longer than a one-hour meal break may raise issues of a split shift.

For each workday you fail to provide an employee a meal break as required, you owe the employee one additional hour of pay at the employee's regular rate.

As with rest breaks, there has been some question about whether this penalty is due when you have a policy of providing meal breaks, but an employee chooses not to take them. How far must you go in forcing employees to take meal breaks? The Labor Commissioner has clarified what is meant by an employer who fails to provide a meal break, stating that "the employer has an affirmative obligation to ensure that workers are actually relieved of all duty, not performing any work, and free to leave the worksite."

Employees may take on-duty meal breaks in certain circumstances. An on-duty meal break:

* Is permitted only when the nature of the work prevents an employee from being relieved of all duty

* Must be agreed to in writing by the employee and employer

* Must be paid

* May be revoked at any time in writing by the employee (except under Wage Order 14).

A California court of appeal clarified that an "on duty meal break" is a type of meal break that employees take, which must be paid. Contrast this with considering the "on duty meal break" as a waiver of one's meal break. This is particularly important if employees work between 10 and 12 hour shifts, as employees cannot waive the second meal break, which is required by law, if they waived the first meal break. If employees take an "on duty meal break," they can still waive their second meal break and employers will not be liable for the additional hour of pay for a missed meal break. [PE]

No-Cost Employment Seminars

The Small Business Development Center and Pacific Employers host this Free Seminar Series at the Tulare-Kings Builders Exchange on the corner of Lover's Lane and Tulare Avenue in Visalia, CA. RSVP to Pacific Employers at 733-4256 or the SBDC, at 625-3051 or fax your confirmation to 625-3053.

The mid-morning seminars include refreshments and handouts.

2008 Topic Schedule

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.

Thursday, June 19th, 2008, 10am - 11:30am

♦ **Hiring & Maintaining "At-Will" -** From the thought to hire to putting to work, we discuss maintaining procedures that protect you from the "For-Cause" Trap!

Thursday, July 17th, 2008, 10am - 11:30am

♦ **Record Keeping -** Forms, Posters, Signs, Handouts, Fliers - Just what paperwork, posters, flyers and handouts does an Employer need?

Thursday, September 18th, 2008, 10am - 11:30am

♦ **Guest Speaker Seminar -** Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.

Thursday, October 16th, 2008, 10am - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.

Thursday, November 20th, 2008, 10am - 1:30am

There is No Seminar in December

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Veterans' Guidelines

The Equal Employment Opportunity Commission (EEOC) has posted on its web site two sets of guidelines for employers who hire veterans with service-connected disabilities. These guidelines point out the differences between employer responsibilities under the Americans with Disabilities Act (ADA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

These two separate federal laws provide important protections for veterans with disabilities. USERRA is enforced by the U.S. Department of Labor (DOL) and the ADA is enforced by the EEOC.

If you have veterans with disabilities in your workforce you will want a copy of these two new documents. One document tackles ten key questions about the issues involved. Those include everything from, "How does USERRA differ from the ADA?" to "May an employer give preference in hiring to a veteran with a service-connected disability over other applicants?"

The other document tackles the same issues from the veteran's viewpoint. It explains how to deal with the disability issue when seeking employment and what protections are offered by these laws.

www.eeoc.gov/facts/veterans-disabilities.html

www.eeoc.gov/facts/veterans-disabilities-employers.html

[PE]

UNLIMITED CONSULTATION?

A benefit of Pacific Employers' Membership is unlimited, direct, phone consultation on labor, safety or personnel questions on the Pacific Employers' Helpline at

(559) 733-4256 or Toll Free (800) 331-2592

Workers' Comp Rates May Remain Stable!

For the first time in six years, an interim pure premium rate advisory will not be issued by the California insurance commissioner because of market strength, according to the Department of Insurance.

"I am pleased that stability in the workers' compensation insurance marketplace has eliminated the immediate need for a pure premium rate advisory," says Insurance Commissioner Steve Poizner.

The pure premium rate advisory is a recommendation used by the workers' compensation insurance industry as a benchmark for filing its rates.

Past system reforms appear to continue their beneficial impacts, Mr. Poizner says. Currently, insurers are expecting to pay out only 48 cents in claims for every dollar collected in premiums.

Mr. Poizner also convened a blue-ribbon fraud task force, which is studying and determining the most effective ways to fight workers' comp fraud; its report is expected within weeks. [PE]