Pacific Employers
MANAGEMENT ADVISOR
48 Years of Excellence!
June 2012

WHAT'S NEWS!

ANOTHER SHOE FALLS AT CA SUPREME COURT

The California Supreme Court held that attorneys' fees are not awarded to the winners in cases involving meal and rest period claims. In *Kirby v. Immoos Fire Protection, Inc.,* the Court unanimously held that neither prevailing plaintiffs nor victorious employers can receive an award of attorneys' fees in these types of cases.

An appeals court affirmed an award of fees to the employer after the plaintiffs dismissed their claims for missed rest periods. The Supreme Court agreed to hear the case to determine if attorneys' fees could properly be awarded for meal and rest break claims under either of two Labor Code sections: §218.5 (which awards attorneys fees to the prevailing party in actions brought for nonpayment of wages) or §1194 (which awards attorneys' fees to prevailing employees in actions for unpaid minimum wage or overtime compensation).

Employers who are aware of the recent history of California wage and hour laws may remember that this same court held in *Murphy v. Kenneth Cole* that meal and rest period penalties are actually premium wages. If that is the case, why wouldn't an action to recover these premium wages be an action for nonpayment of wages?

The Court stated that, based on the plain meaning of section 1194, claims for minimum wage or overtime compensation are not the same as missed rest or meal period claims. The Court also distinguished a meal and rest period claim from a section 218.5 claim for nonpayment of wages.

The Court stated that, even though the penalty for a missed rest or meal period is one hour of premium pay, the essence of the wrong is not nonpayment of wages. As a result, awarding attorneys fees for missed meal and rest period claims under a statute intended to cover nonpayment of wages would be confusing the remedy with the violation itself.

After this opinion, combined with the recent decision in *Brinker*, California employers might believe they can play fast and loose with the rest and meal periods, or to believe that there is a benign future for wage and hour litigation in California. Don't believe it, as a legislative reaction to *Brinker* may be coming. In this case, the Court practically invited it by stating that "it is up to the legislature to decide whether section 1194's one-way fee shifting provision should be broadened to include section 226.7 [missed meal and rest period] actions." There may be a legislative reaction to these recent wage and hour decisions.

Until then, this decision, while favorable to employers, will likely result in plaintiffs' actions being sure to include other claims in addition to meal and rest period violations. [PE]

Heat Illness Flyer Enclosed!

President's Report
~Dave Miller~

W & H Seminar Update!

Our regular monthly Wage & Hour and Exempt Status Seminar on Thursday, June 21st, in which we review overtime, wage considerations and exemptions will be expanded to cover a workshop on the *Brinker Decision*.

"WHAT WILL YOUR POLICIES BE ON THE IMPORTANT ISSUES?"

Handling rest and meal periods is a scheduling as well as a wage and hour task that every employer needs to consider. What will your policies be on the important issues?

Many questions now surround the rest and meal periods such as "Can I give my employees a "late" lunch? Or what about an "early" lunch?" or "What if I meet all the requirements to 'provide' a meal period, but the employee continues to work through the meal period?" We will try to provide guidance in these areas. [PE]

Ambush Election Rule Blocked!

The United States District Court for the District of Columbia just ruled that the NLRB lacked a valid 3-member quorum to adopt its "ambush election" rulemaking in December 2011.

The rule amended the procedures for determining whether a majority of employees wish to be represented by a labor organization for purposes of collective bargaining.

The rule allowed votes by employees for union representation to be accelerated. Unions loved the idea, but it has been vehemently opposed by business organizations, nonprofits and some members of Congress.

The court issued its opinion in *U.S. Chamber of Commerce and Coalition for a Democratic Workplace v. National Labor Relations Board*, stating the rule is invalid because the NLRB did not have the necessary quorum to have a vote to approve the rule. [PE]

Useless laws weaken the necessary laws. - Charles de Montesquieu, philosopher and writer (1689-1755)

Recent Developments

NLRB Notice Delayed Indefinitely!

Employers expecting to have to post new notices of employee rights in the workplace can breathe a sigh of relief. On April 17, 2012, the U.S. Court of Appeals for the District of Columbia issued an injunction delaying the effective date of the National Labor Relations Board's Final Rule requiring most employers to post a notice of employee rights in their workplaces.

The Final Rule, previously scheduled to take effect on April 30, 2012, has now been postponed indefinitely due to conflicting opinions issued by several federal district courts.

"... THE NLRB EXCEEDED ITS STATUTORY AUTHORITY ..."

Judge Amy Berman Jackson of the U. S. District Court for the District of Columbia issued a ruling on March 2, 2012, that upheld the NLRB's authority to enact the Final Rule but invalidated the primary enforcement mechanisms. However, on April 13, 2012, Judge David C. Norton of the U.S. District Court for the District of South Carolina struck down the Final Rule in its entirety in Chamber of Commerce v. NLRB, No. 2:11-cv-02516-DCN. Judge Norton held that by enacting the Final Rule, the NLRB exceeded its statutory authority in violation of the Administrative Procedure Act. As a result of the conflicting opinions, the D.C. Circuit enjoined the enforcement of the Final Rule pending appeal.

NLRB Chairman Mark Gaston Pearce expressed the Board's opposition to the order but confirmed that all regional offices have been directed to comply with the injunction. The D.C. Circuit ordered an expedited briefing schedule and directed the court clerk to schedule oral argument in September. [PE]

Unconscionability Standards

A California court has held that the United States Supreme Court's recent decision in *AT&T Mobility v. Concepcion* does not overrule California unconscionability standards for assessing employment arbitration agreements, including the standards generally prescribed by the California Supreme Court in *Armendariz v. Foundation Health*. *Armendariz* is the leading case setting forth basic standards for assessing whether an employment arbitration agreement is unconscionable in California.

The case makes clear that in order to be enforceable, an agreement must include a mutual agreement to arbitrate, must provide for adequate discovery, must not impose costs on the employee that the employee would not normally bear in court, must provide for selection of a neutral arbitrator, and similar other fairness requirements.

"..REQUIRING THE WORKERS TO PAY THE EMPLOYER'S COSTS..."

The court relied on *Armendariz* to find the agreement at issue unconscionable and unenforceable, primarily because it was presented on a take it or leave it basis, required the employees (actually contractors) to arbitrate all claims but reserved a judicial forum for certain employer claims, shortened the statute of limitations for filing claims, and contained a unilateral fee-shifting provision requiring the workers to pay the employer's costs in certain circumstances. The case is *Samaniego v. Empire Today*. [PE]

Child Farm Work Rule Withdrawn

The U.S. Department of Labor has withdrawn a proposal to restrict farm jobs for children under the age of 16. The proposed rule faced criticism from farm organizations and ethnic farmers who have traditionally put the whole family to work on a small farm. The rule was proposed to protect children from accidents on the farm.

"... CHILDREN ARE SIGNIFICANTLY MORE LIKELY TO BE KILLED ..."

Studies show children are significantly more likely to be killed while performing agricultural work than while working in all other industries combined.

But removing children from farm duties on family farms was considered detrimental to family farm operations. A release from the U.S. Department of Labor said the Obama administration is committed to promoting family farmers and respecting the rural way of life that is passed on from generation to generation.

Instead of pushing for a rule change, the Department of Labor and agriculture safety experts will now work with rural stakeholders such as the American Farm Bureau Federation, the National Farmers Union, the Future Farmers of America and 4-H Clubs to develop an educational program to reduce accidents to young workers and promote safer agricultural working practices. [PE]

Farm Labor Contractor Verification

It's that time of the year again when many growers and packers will hire farm labor contractors to work on the farm. Remember that as a grower, packer, or other entity that hires a farm labor contractor, you are required to verify that the FLC you hire is licensed with U.S. DOL and the State of California. Part of this verification includes requesting verification through DLSE (California's FLC licensing agency).

DLSE has launched an internet-based verification system that is easy to use. Previously, you had to fax or email your verification request to the agency office for verification. You can go to (http://www.dir.ca.gov/databases/dlselr/farmlic.html) for the DLSE Verification webpage, enter the appropriate information in one or more of the data fields, and locate the FLC you intend to hire from the results list. If the FLC's license is current, you can click on the expiration date to take you to the verification page. Once there, type your business name in the space provided and print the document by clicking the word "Print" and keep that page for your records. Licenses must be verified once a year for each contractor hired. This process should only takes a few quick minutes. [PE]

Dinner for 2 at the *Vintage Press!*

That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press.*

Call 733-4256 or 1-800-331-2592.

Human Resources Question with Candice Weaver

The Month's Best Question

Are I-9 Updates Permitted?

Q: ***"I wanted to know if an I-9 Form was initially filled out incorrectly, can it or should it be corrected?"***

A: The Department of Homeland Security, formerly the INS, appears to be reluctant to tell you to revise and correct your incorrectly prepared I-9 forms. From an article issued as "INS Guidelines for Conducting a Private I-9 Audit" they offer the following advice:

"The appropriate action for employers to take concerning I-9 Forms that are lost, destroyed, or not maintained as required by the retention requirements of the INA is to come into compliance with the law as quickly as possible. However, past violations of this nature cannot be retroactively corrected.

"Missing information should be conspicuously inserted, initialed, and dated contemporaneously with its insertion. The employee should provide any missing information in Section 1 of the Form I-9; the employer should complete Sections 2 and 3 of the form. In cases where it is necessary to go back to the employee for additional information, be sure that the employer makes a special effort to avoid anti-discrimination violations. The employer should not require more documentation than is necessary to meet IRCA's requirements. The employer should allow the employee to present any document or combination of documents sufficient to satisfy the requirements of IRCA.

"Omissions and mistakes discovered on a completed I-9 Form cannot be retroactively corrected. However, further violations may be prevented by taking corrective action as soon as the omissions or mistakes are discovered, since employers have an ongoing obligation to comply with the law. Incorrect information should be corrected, and the correction should be initialed and dated. If the employee remains employed by the employer, there is no paperwork error that cannot be corrected — other than the failure to complete the form within three days of the date of hire. If the employee has been terminated, however, it may be impossible to correct errors or omissions in I-9 forms that have been uncovered in an audit.

"As an alternative to the suggestions made in the preceding paragraphs that an employer insert and/or correct information on I-9 forms that a private audit has found do not comply with the requirements of IRCA, the employer may generate new I-9 forms. Such new forms will not comply with IRCA's three-day post-hire completion requirement. If done correctly, however, generating such new forms will negate all other violations and enhance a good faith defense. If this alternative is chosen, the employer must retain the original I-9 form." [PE]

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange and Pacific Employers host this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

These mid-morning seminars include refreshments and handouts.

2012 Topic Schedule

"Brinker Decision" Review added to Wage and Hour Seminar

♦ **Wage & Hour and Exempt Status - Thursday, June 21st, 2012, 10 - 11:30am --** Overtime, wage considerations and exemptions.

♦ **Hiring & Maintaining "At-Will" - Thursday, July 19th, 2012, 10 - 11:30am --** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

There is No Seminar in August

♦ **Forms & Posters - Thursday, September 20th, 2012, 10 - 11:30am -- A**s well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

♦ **Guest Speaker Seminar - Thursday, October 18th, 2012, 10 - 11:30am --** Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.

♦ **Discipline & Termination - Thursday, November 15th, 2012, 10 - 11:30am --** The steps to take before termination. Managing a progressive correction, punishment and termination program.

There is No Seminar in December

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 25th, registration at 7:30am
Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

Quarterly Seminar also on 10-24-12

RSVP Visalia Chamber - 734-5876

PE & Chamber Members $35 - Non-members $45
Certificate – Forms – Guides – Full Breakfast

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Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

CA DLSE Creates Information Portal

The California Division of Labor Standards Enforcement recently opened a separate page on its website to help new and small California businesses.

The web portal is designed to help small business owners, new business owners, and businesses based out-of-state understand many of the requirements in the California Labor Code and related regulations in an easy to understand way. The web address of the portal is: *www.dir.ca.gov/SmallBusiness* [PE]

NLRB Orders Fired Employees Reinstated

NLRB again finds protected concerted activity in Facebook posts, orders fired employees reinstated. In a recent decision by the National Labor Relations Board, a judge found that a retailer engaged in unfair labor practices when it discharged three employees who engaged in protected concerted activity through discussions on Facebook.

The board ordered the company to reinstate the employees to their former jobs and to pay back wages. This case illustrates that all employers—unionized and nonunionized—should carefully consider the implications of the National Labor Relations Act before disciplining employees for comments made in social media. [PE]

EEOC Cautions On Criminal Records

Using arrest and conviction records as a basis for employment decisions may violate Title VII if employers fail to take certain precautionary measures, according to the Equal Employment Opportunity Commission's latest enforcement guidance, which was released on April 25, 2012. The new guidance consolidates and clarifies prior EEOC guidance in light of judicial decisions on the use of arrest and conviction records.

The guidance makes the obvious point that the selective use of arrest and conviction records may constitute disparate treatment discrimination in violation of Title VII. For example, an employer that disqualifies an African American based on a prior drug conviction, but is more lenient toward a white candidate with a similar criminal record, would likely be in violation of Title VII.

Less obviously, the guidance clarifies that a neutral policy or practice that has the effect of disproportionately screening out a protected group may violate Title VII under a disparate impact theory, if the employer cannot show that the policy or practice is job related for the position in question and consistent with business necessity. [PE]

Post-Brinker Opinion

One court has invoked the elements of *Brinker* in *Schulz v. Qualxserve, LLC* which it granted class certification to a group of field technicians who service and repair computers and are paid on a piece-rate basis. Plaintiffs had made a variety of wage and hour claims, including missed meal and rest periods.

The employer argued that there was no evidence that it deprived employees of meal and rest periods as a general policy, and therefore class certification of these claims should be denied because individual questions would predominate over a common issue.

While acknowledging that *Brinker* held that employers are not required to ensure that employees take meal and rest breaks, the Court reiterated the holding that employers are required to ensure that employees are relieved of all duties.

Because the plaintiffs were challenging the employers common general policy of not relieving employees of all duties during rest and meal periods, they met the standard for showing that common issues would predominate for these claims, and the Court certified the class because plaintiffs had challenged a uniform policy. [PE]