2011 Labor Law Update

Legislative and Regulatory Changes and Important Court Decisions during 2010 made significant changes for employers. Here is a summary of some of the most important ones you need to know to prepare for this year.

New State Laws

This year, as in years past, the Legislature presented Governor Schwarzenegger with a number of workplace-related bills. Below are the bills the Governor chose to sign:

Organ/Bone Marrow Donor Leave – SB 1304

California's private employers with at least 15 employees must now provide limited paid leave to certain employees who act as medical "donors." Under the Michelle Maykin Memorial Donation Protection Act, employees who have exhausted all available sick leave may take a paid leave of absence, not exceeding 30 days, for the purpose of organ donation, and not exceeding five days for bone marrow donation. The statute says this leave does not run concurrently with employee leave rights under the Family and Medical Leave Act ("FMLA") or the California Family Rights Act, although it is unclear whether FMLA leave indeed will apply. Public employees are already entitled to similar paid organ and bone marrow donor leave.

Under the new law, private employers must restore employees returning from organ or bone marrow donation leave to the same or equivalent position held by the employee when the leave began. Additionally, the new law protects employees from retaliation. Finally, the new law creates a vehicle for aggrieved employees to seek enforcement of these provisions. Employers should consider revising their employee handbooks and leave policies to include these new leave rights for organ and bone marrow donation.

Background Checks – SB 909

Effective January 1, 2012, this law requires additional disclosures by an employer to an applicant or employee when conducting background checks through a third party "investigative consumer reporting agency." Designed as another measure to combat identify theft, the law requires that employers disclose the website address for the agency's privacy practices, and weather the applicant's or employee's personal information will be sent out of the Unites States. To comply with this law, employers should update their background check consent forms to reflect these new requirements, prior to the law's January 1, 2012 effective date.

Retired Employee Health Benefits – AB 1814

This law clarifies state age discrimination law regarding the provision of health benefits to retirees. Many of California's public and private sector employers provide some form of continued medical benefits to retirees before they are Medicare-eligible.

This new law amends the state's anti-discrimination statute, the Fair Employment and Housing Act ("FEHA"), to specifically permit employers to alter, reduce or eliminate these so called "bridge plans" to retired persons when they become eligible for Medicare, and clarifies that such acts will not be considered acts of age discrimination. This law now brings California in conformity with existing law under the federal Age Discrimination in Employment Act ("ADEA") on the topic of retiree health benefits.

Meal Period Exemptions – AB 569

Labor Code section 512 generally prohibits employers from requiring an employee to work more than five hours per day without providing a meal period, or ten hours per day without providing a second meal period. For some unionized employers, a new law may alleviate these burdensome and often times difficult-to-enforce requirements.

NOTE: Court Decisions on Meal and Rest Breaks

A California court recently ruled the IWC exceeded its authority by exempting certain unionized employees covered by Wage Order 16 from the meal period requirements set forth in Labor Code section 512

Domestic Violence Victims – AB 2364

This law revises the Unemployment Insurance Code to specify that a claimant is eligible for benefits where he or she left employment to protect his or her family from domestic violence abuse. This law brings California law into compliance with federal eligibility guidelines, and makes California eligible to receive federal funding for unemployment insurance benefits.

Labor Commissioner Appeals – AB 2772

Employees sometimes bring claims against their employers for unpaid wages and other Labor Code violations before the Division of Labor Standards Enforcement ("DLSE"). Under existing law, an employer

has a right to appeal an adverse order or decision by the DLSE to the local superior court, who then hears and decides the matter anew. To do this, however, a new law clarifies that employers must first post a bond in the superior court, in the amount of the judgment rendered by the DLSE. This law overturns the 2006 Court of Appeal decision in Progressive Concrete, Inc. v. Parker, which had held that the posting of a bond was not a mandatory condition precedent for appeal.

Workers' Compensation for Contractors – SB 1254

This law amends the Business and Professions code by authorizing the state registrar of contractors to issue stop orders to employer contractors who do not have workers' compensation coverage for his or her employees, and makes violation of these orders a crime. This law also provides procedures that must be followed for the payment of employees during a work stoppage subject to a stop order, and sets forth a process for the employer contractor to timely challenge any such stop order.

Expedited Civil Jury Trials – AB 2284

Presents civil litigants (not just employers and employees) with an alternative to full-blown jury trials. To combat the ever-rising costs of litigation, parties can now voluntarily elect to proceed with a shortened civil jury trial by eight or fewer jurors. The process envisions a jury trial being completed in one day, with each side being given only three hours to present their cases (including making opening statements and closing arguments). Under this new scheme, both post-trial motions and rights to appeal are significantly limited. Also, the parties are permitted to agree in advance of trial to set the parameters for maximum and minimum recoveries, about which limits the jury is not told. Unless renewed earlier, this new law is operative only until January 1, 2016.

An alternative for parties desiring to "have their day in court" without the attendant time commitment and high costs normally associated with civil jury trials.

New Federal Laws

Affordable Care Act

The federal government enacted a major reform to health care in March 2010. Some of the provisions of the Patient Protection and Affordable Care Act (the PPACA) are already in effect, as summarized below.

Mandatory Coverage for Adult Children. Under the new law, group plans must allow young adults to stay on their parent's plan until they turn 26 years old. (In the case of existing group health plans, this right does not apply if the young adult is offered insurance at work.) Some insurers began implementing this practice early.

Preventative Care. All new plans must cover certain preventive services such as mammograms and colonoscopies without charging a deductible, co-pay or coinsurance.

Limit on Policy Rescission. In the past, insurance companies could search for an error, or other technical mistake, on a customer's application and use this error to deny payment for services when he or she got sick. The new law allows rescission only in the case of intentional misrepresentation/fraud.

Elimination of Lifetime Limits. Under the new law, for plan years beginning on or after September 23, 2010, insurance companies will be prohibited from imposing lifetime dollar limits on "essential" benefits, like hospital stays.

Regulation of Annual Limits. Under the new law, insurance companies' use of annual dollar limits on the amount of insurance coverage a patient may receive for "essential" benefits will be restricted for new plans in the individual market and all group plans. Annual limits will phase out over four years. In 2014, the use of annual dollar limits on essential benefits like hospital stays will be banned for new plans in the individual market and all group plans.

Prohibit Denial of Coverage for Children with Pre-Existing Conditions. The new law includes new rules to prevent insurance companies from denying coverage to children under the age of 19 due to a pre-existing condition.

OTC Meds Not Reimbursable From FSA, HSAs. Starting in 2011, over-the-counter medicines other than insulin will no longer be reimbursable through FSAs or HSAs without a prescription.

Medicare Donut Hole. In 2010 Medicare recipients received a one-time, tax free $250 rebate from Medicare for prescriptions, meant to help cover the "donut hole" gap in prescription medication coverage. In 2011, if a recipient hits the prescription drug donut hole, she will get a 50% discount on brand-name drugs. The donut hole is supposed to reduce until there is complete coverage of the donut hole in 2020.

Small Business Tax Credit. Small employers with fewer than 25 full-time equivalent employees and average annual wages of less than $50,000 are eligible for a tax credit of up to 35% of the cost of the insurance. The tax credit is available for insurance costs beginning January 1, 2010.

The maximum credit will be available to employers with 10 or fewer full-time equivalent employees and average annual wages of less than $25,000.

Pump in Private Rules ,The PPACA includes provisions granting broad protections to working mothers who breastfeed and wish to express milk while at work. Most significantly, the PPACA requires employers to provide reasonable unpaid break time to nursing mothers to express their breast milk in a private space for up to one year after the child's birth.

IRS Delays Reporting Group Health Cost.

The provisions of the PPACA that require employers to report the aggregate cost of employer-sponsored health-care coverage on 2011 Forms W-2 will be optional and not mandatory. According to the IRS, this interim relief is being provided to allow employers to make necessary changes to their payroll systems. The PPACA requires the "aggregate cost" is to be determined under rules similar to the rules for determining the "applicable premium" under COBRA. The aggregate cost will include the portions of the cost paid by both the employer and the employee.

Safety Law Changes

Cal-OSHA Violations – AB 2774

Under California law, the state Division of Occupational Safety and Health ("DOSH") may issue citations to employers for violations of law affecting the health or safety of employees. Civil penalties may be issued, in amounts commensurate to the severity of the infraction. The civil penalty may be up to $25,000 for a "serious violation."

This new law establishes a rebuttable presumption as to when an employer commits a "serious violation" of state workplace safety provisions. Under the new language, a serious violation will be presumed to exist if the DOSH demonstrates that there is a "realistic possibility" that death or serious physical harm could result from the actual hazard created by the employer's violations. Under the previous version of the law, a "serious violation" existed only if the

DOSH demonstrated a "substantial probability" of death or serious physical harm. The new law also, for the first time, defines the term "serious physical harm," and likewise establishes certain procedures to be followed by the DOSH in investigating alleged workplace health or safety violations before issuing a citation. An employer may rebut the presumption of a serious violation by "demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have know of the presence of the violation."

COURT DECISIONS OF NOTE

CA SUPREME COURT DECISIONS

The California Supreme Court decided significant employment law cases since our last Labor Law Review. We summarize below the recently decided cases.

Lu v. Hawaiian Gardens Casino, Inc.

Labor Code section 351 specifies: "Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for." This law has led to lawsuits involving "tip pooling," in which, for example, waiters file lawsuits over being required to split tips with dishwashers and bussers.

The Lu case involved dealers in a card room. The Supreme Court considered whether Labor Code Section 351 created a private cause of action under which an employee could file a lawsuit. The answer was "no"; employees cannot file lawsuits directly under Section 351. The court noted plaintiffs may file lawsuits for money they lost under a "conversion" theory, or for "unfair competition" under Business and Professions Code Section 17200.

What's the difference? Conversion and Section 17200 claims do not allow for recovery of penalties or attorney's fees. Provided they properly exhaust administrative remedies, employees likely can pursue these remedies under the Labor Code's Private Attorney General Act, Labor Code Sections 2698 et seq. Lu did not directly address the question of whether an employer can require its employees to share tips amongst themselves.

Reid v. Google

In Reid v. Google, the Supreme Court addressed an age discrimination claim under California's Fair Employment and Housing Act. Reid was hired as an engineering manager in 2002. Staff joked about him being "an old fuddy duddy," and said that his CD-jewel-case name plate should be replaced with an LP album jacket.

The decision-makers who separated Reid cited difficult-to-measure criteria such as his "obsolete" ideas, his "slow," "fuzzy" and "lethargic" performance, his lack of a "sense of urgency," and his not being a good "cultural fit." E-mails discussing the termination referred to adopting a position that there was "no place" for Reid in the company, and questioning whether a judge might think Google acted "harshly" if the company discharged him without severance pay.

Relying on a line of federal cases, Google argued that Reid's only evidence of discrimination consisted of "stray remarks," unrelated to the decision to terminate him or the decision-makers. Overturning the trial court's summary judgment, the Supreme Court held that trial was required. The court rejected the application of a blanket "stray remarks" rule, holding that discriminatory comments must be considered along with the entire record to determine the existence of a triable factual issue.

The Supreme Court also ruled that the trial court has an obligation to rule on objections to evidence presented during summary judgment proceedings. However, if a trial court does not rule on the objections, they are preserved for appellate review.

Martinez v. Combs, 48 Cal. 4th 35

Plaintiffs were pickers who did not receive all their wages for strawberries picked during the 2000 season. The plaintiffs worked for a grower named Munoz. He sold the strawberries to the defendants (packing and distributing companies), which had longstanding business and personal relationships with Munoz.

Munoz became unable to pay the plaintiffs for work in his fields. When the employees stopped picking for Munoz, he convinced them to come back to work by promising to pay as soon as he got money from the defendants. Munoz then went bankrupt, so the workers sued the distributors for wages.

The Supreme Court decided that because the distributors had no responsibility for hiring, firing, training, or disciplining any of the plaintiffs, the defendants were not "employers" who could be sued for back wages. In short, buying strawberries from the grower did not make the distributor the employer of the workers who picked them.

Pearson Dental Supplies (Turcios), 48 Cal. 4th 665

The usual rule is that arbitrators' decisions cannot be vacated simply because they are wrong. Arbitration is supposed to streamline the litigation process and result in final decisions that are not appealable as of right. But in this case, the arbitrator incorrectly calculated the date the statute of limitations applied in a case brought under the Fair Employment and Housing Act (FEHA). He summarily dismissed the case and refused to hold an evidentiary hearing.

The Supreme Court gave the employee a do-over because the arbitrator's decision was so obviously incorrect and denied the employee of a hearing of any kind.

Chavez v. City of Los Angeles, 47 Cal. 4th 970

California courts have "Limited Jurisdiction" for cases in which less than $25,000 is at issue, and "Unlimited Jurisdiction" for larger cases. Chavez sued for discrimination and retaliation under the FEHA and filed his case an Unlimited Jurisdiction case. A jury awarded him $11,500. His lawyer then submitted a bill for $870,935.50 in attorney's fees.

The Superior Court denied the attorney's fees, citing a section of the Code of Civil Procedure that limits fee awards in cases worth less than $25,000 incorrectly filed in Unlimited Jurisdiction. The Supreme Court affirmed the Superior Court, holding that the Code of Civil Procedure can limit attorney's fees despite the FEHA's strong public policy in favor of attorney's fees to prevailing plaintiffs.

McCarther v. Pacific Telesis 48 Cal. 4th 104

California's "kin care" law, Labor Code Section 233, requires employers to let employees use sick leave in "an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement" to care for dependents, if the employer grants sick leave. But, at least as of now, no state law requires employers to give sick leave.

Pacific Telesis allowed employees to take virtually "unlimited" time off for illness, but no sick leave accrued into "leave banks." Because no leave "accrues" during six months, employees were not legally entitled to use any leave for "kin care" under the Labor Code.

Roby v. McKesson, 47 Cal. 4th 686

Roby was a troubled employee of a large pharmaceutical company. Her medication caused her to scratch herself until she had scabs covering her arms and body odor. Her supervisor was openly uncomfortable with Roby, did not say "hello" to her in the mornings, and assigned her to answer phones during office parties.

Roby was eventually terminated under McKesson's absence policy. She sued for discrimination and harassment under the FEHA. The Court of Appeal held that personnel actions, like being assigned to answer phones, could state a discrimination case, but not a harassment case. The Supreme Court reversed, holding that a harassment case is based on the employer "sending a message" to the plaintiff,

and even a series of minor personnel actions can send a harassing message when coupled with abusive conduct.

The Court also considered the punitive damages awarded against McKesson. Roby's supervisor was responsible for just four employees out of 20,000. So she was not a "managing agent" who could impute to McKesson the reprehensible conduct required for a punitive damages award. The harm attributable to McKesson itself was not "highly reprehensible" because it resulted only from the impersonal application of an attendance policy. Under those circumstances, the Supreme Court reasoned, punitive damages could be no larger than the actual damages suffered.

Costco Wholesale Corp (Randall) 47 Cal. 4th 725

Costco retained a lawyer to audit its payroll. Employees sued claiming that Costco probably knew they were misclassified as exempt, and asked to see the lawyer's audit during discovery. Costco objected on the basis of attorney-client privilege.

The trial court ordered production of the letter, with privileged advice redacted. The Supreme Court reversed. While facts are never privileged (a litigant cannot conceal a fact by sharing it with an attorney), communications always are (what a litigant discussed with its attorney can never be revealed, even if they discussed things that were not secret).

Schachter v. Citigroup, Inc. 47 Cal. 4th 610

This case considered a stock option plan that allowed employees to purchase discounted shares that vested later, but only if the employees remained with the company. Schachter voluntarily resigned before the shares vested. Schachter and a class of former employees who put part of their salaries into a stock purchase plan complained that they lost wages under the plan. The Supreme Court disagreed, upholding a bonus plan that requires employees to remain employed for a certain period of time.

Hernandez v. Hillsides, Inc., 47 Cal. 4th 272

Hillsides runs a home for abused and neglected children. A manager set up a hidden camera in an effort to discover who was viewing pornography on Hillsides' computers during the night shift. Two employees sued when they discovered the camera was hidden in their office.

The trial court held the employees did not have an expectation of privacy in a not-very-private office (unlike, say, a restroom or a hotel room), and could not sue.

The Court of Appeal reversed, saying that it was reasonable to expect privacy in an office with a door that closes. The Supreme Court ruled that employees can expect privacy in an office. However, the circumstances were such that the employees' privacy rights were not violated because Hillsides' actions were sufficiently justified.

99 CENTS ONLY STORES

California law is clear when it says employers must provide seating to their workers where and when practical, a state appellate court has ruled in 99 Cents Only Stores in Southern California. Ms. Bright was a cashier and was required to stand while dong her job. The Industrial Welfare Commission wage order says "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats" and that when "employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties."

PENDING STATE CASES:

Brinker Restaurant Corp. v. Superior Court and **Brinkley v. Public Storage Inc.**:

Highly anticipated cases present related issues concerning whether an employer has duty to require meal and rest breaks to non-exempt workers, or whether the Labor Code is satisfied merely by allowing employees to take breaks if they chose to do so.

California Grocers Ass'n v. City of Los Angeles

At issue in this case is whether a local ordinance may require grocery stores to retain employees after a change of ownership.

Appeal Court Affirms Denial Of Class Certification

In a decision recently certified for publication, Hernandez v. Chipotle Mexican Grill, Inc., (October 28, 2010) __ Cal.App.4th __, 2010 WL 4244583, the Second Appellate District of the California Court of Appeal affirmed the trial court's order granting Chipotle's motion to deny class certification and denying the Plaintiff's motion for class certification.

California Court of Appeal Extends Wrongful Termination Cause of Action

A California Court of Appeal has recently held that a subsequent employer can be liable for wrongful termination in violation of public policy for firing a new employee when her prior employer attempted to enforce an unenforceable non-compete agreement.

U.S. SUPREME COURT

CITY OF ONTARIO V. QUON, 130 S. CT. 2619

In City of Ontario v. Quon, the Court addressed a significant issue facing employers in today's electronic age—the legality of monitoring employees' electronic communications while at work.

NEW PROCESS STEEL V. NLRB, 130 S. CT. 2635

This decision called into question nearly 600 decisions issued by the National Labor Relations Board (the "Board") between early January 2008 and March 2010.

FEDERAL AGENCIES RULES

NLRB – 10(j) INJUNCTIONS:

Backdoor to "Cardcheck" New Pressure for Emloyers. The Acting General Counsel for the National Labor Relations Board has issued guidelines to the agency's regional officials, recommending that they prepare to seek promptly federal court injunctions where the evidence obtained during an expedited Board investigation appears to support a discriminatory termination charge. According to the Acting General Counsel this would compel employers charged with discriminatory termination of union advocates and supporters during union organizing to offer the fired employees reinstatement pending litigation of the underlining unfair labor practice charge in Board administrative hearings.

IRS – NO EXPENSING CELL PHONES

Good news on the tax front: Employers no longer are required to follow strict documentation requirements to verify the business use of employer-provided mobile phones, under a federal law signed by President Obama on September 27, 2010. Also, if an employer provides a mobile phone for business use, the fair market value of an employee's personal use of the phone no longer has to be included in the employee's gross income. The changes take effect for tax years beginning after December 31, 2009 (Section 2043 of the Small Business Jobs Act of 2010, H.R. 5297, P.L. 111-240).