

EMPLOYMENT LAW UPDATE

Relationship-Driven Results

October 2014

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LEGISLATIVE

New California Laws

Governor Jerry Brown signed into law a number of bills that will impact California employers. These new laws include:

AB 802 (Wieckowski): The bill amended Code of Civil Procedure section 1281.96 and requires arbitration providers to publish on their websites quarterly detailed information about arbitrations they have administered. The law takes effect on January 1, 2015 and requires the following information to be published: (1) the name of the non-consumer party involved (i.e., the name of the employer); (2) the nature of the dispute; (3) whether the non-consumer party is an employer and whether it is the initiating or responding party; (4) the annual wage range earned by the involved employee; (5) the amount of the claim, which party prevailed, and the amount of any award, including attorney's fees; (6) whether the employee was represented by an attorney and, if so, the name of the attorney and his or her firm; (7) the name of the arbitrator and the arbitrator's fees; and (8) the total number of times the employer previously has been a party in arbitration or mediation before the dispute resolution provider.

AB 1897 (Hernandez): This new law, which will take effect on January 1, 2015, mandates that a client employer will share civil legal liability for all workers supplied by a labor contractor for the payment of wages and the failure to obtain worker's compensation coverage. A "client employer" means a business entity that obtains or is provided workers to perform labor within its usual course of business from a labor contractor. The new law, however, does not include business entities with a workforce of less than twenty-five workers or businesses with five or fewer workers supplied by a labor contractor at any given time. AB 1897, which adds Labor Code section 2810.3, makes the client employer jointly liable with the labor contractor for civil liability in connection with the payment of wages as well as the failure to provide worker's compensation coverage. Importantly, Labor Code section 2810.3 permits a client employer to include indemnification provisions in its service contracts and to enforce those provisions as a remedy against the labor contractor for liability created by acts of the labor contractor.

AB 2053 (Gonzalez): This bill amends Government Code section 12950.1 and expands the mandatory sexual harassment training that has been required in California since 2005. The content of the training must include training on the prevention of "abusive conduct." The statute defines abusive conduct as "conduct

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of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." The statute further states: "abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." However, "a single act shall not constitute abusive conduct, unless especially severe and egregious." The new law becomes effective on January 1, 2015.

JUDICIAL

Federal

Ninth Circuit Affirms Class Certification Despite the Need for Individualized Damages Assessment

In *Jimenez v. Allstate Insurance Company*, the Ninth Circuit Court of Appeals affirmed the certification of a class of 800 claims adjusters in California who alleged violations of state wage and hour laws. The Court held that the putative class should be certified even though the litigation would require an individualized calculation of damages because the employer's liability originated from a single unlawful policy or practice.

Jack Jimenez ("Jimenez") worked as a claims adjuster for Allstate Insurance Company ("Allstate"). He and other claims adjusters typically worked more than 40 hours per week. In 2005, Allstate changed its classification of California-based claims adjusters from exempt "salaried" to hourly employees. After the reclassification, however, their compensation was still referred to as their annual "salary," and they were not required to keep time records. The adjusters were expected to work only eight hours per day and forty hours per week; any additional hours required approval from a manager, who was allotted a limited overtime budget (which was allegedly insufficient to meet the overtime needs of the company). Because these employees had substantially the same workload as they did while classified as "exempt," they worked more than forty hours per week on a regular basis.

Jimenez alleged that Allstate's overtime policies encouraged the claims adjusters to regularly work off the clock in order to maintain their productivity.

The district court certified a class with respect to the claims of unpaid overtime, untimely payment, and unfair competition. Allstate appealed the decision, arguing that the district court misapplied the law's "commonality" requirement. Allstate also contended that the court violated its due process rights by limiting its ability to raise affirmative defenses at trial, and by using a statistical sampling of class members to determine liability.

On appeal, the Ninth Circuit held that statistical sampling and representative testimony are acceptable ways to determine liability as long as they are not utilized to calculate damages. The appellate court emphasized that a single, common issue

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of liability was sufficient to support class certification. It reasoned that as “long as the plaintiffs were harmed by the same conduct, disparities in how or how much they were harmed did not defeat class certification.” The Ninth Circuit emphasized that Allstate would still have the opportunity to raise individual defenses during the damages phase of the proceedings because the district court had bifurcated the liability and damages phases of trial.

The *Jimenez* decision confirms that class certification will likely be granted where the putative class is subjected to a common unlawful policy or practice, even when an assessment of damages would require individualized analysis. Employers should therefore review their wage and hour policies and practices to ensure that they are legally compliant to avoid potential class action liability.

California

California Court of Appeal Clarifies Statutory Whistleblower Protections

In *Hager v. City of Los Angeles*, the California Court of Appeal clarified the whistleblower protections afforded by California Labor Code section 1102.5(b) (“1102.5(b)"). The Court held that no “first report” protection exists. Rather, any employee that engages in an activity contemplated by the statute is afforded the same level of protection from employer retaliation.

In early 2000, following the disappearance of Los Angeles county deputy sheriff Jonathan Aujay (“Aujay”), Plaintiff Darren Hager (“Hager”), a fellow deputy sheriff, inquired with criminal informants regarding Aujay’s disappearance. Hager learned that a third officer, Richard Engels (“Engels”), may have been directly involved in Aujay’s disappearance.

Later that year, at the request of a superior, Hager created a report outlining potential deputy misconduct. The report referenced the possibility that Aujay had been murdered and that Engels may have been involved. Months later, again at the request of a superior, Hager generated another report which implicated Engels’ relationship with a known drug dealer and potential involvement in Aujay’s disappearance.

In December 2002, following investigation into a complaint lodged by Engels and four other deputies against Hager, Hager’s employment was terminated. The sheriff’s department alleged that Hager had engaged in an improper investigation whereby he recklessly accused Engels of involvement both in drug-related activities and in the disappearance of Aujay. Its justification for Hager’s termination rested on the premise that Hager had not been the *first* individual to “disclose information” about Engels and therefore should not have been afforded whistleblower protection.

The trial court was unmoved by this argument and awarded Hager a sizable verdict. On appeal, the appellate court held that California law does not create a “first report” requirement in connection with the state’s whistleblower statute. Accordingly, whether Hager was the first to report Engels’ alleged improper actions was immaterial. The only material fact was whether Hager disclosed

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information in a manner consistent with the statutory provision. Because he did, whistleblower protection was warranted.

In light of *Hager*, California employers should be cognizant of the fact that the presence of one whistle-blowing employee does not eliminate the possibility of others, even with respect to an identical issue. Employers should therefore maintain thorough documentation of disciplinary and performance issues to overcome any suggestion of retaliatory discharge in cases where an employee has alerted the company to alleged wrongdoing by others.

Appellate Court Clarifies Guidelines for Contesting Unwarranted Unemployment Benefits

California employees are generally ineligible for unemployment benefits if they are discharged because of their own misconduct. In *Irving v. California Unemployment Insurance Appeals Board*, the California Court of Appeal examined the meaning of “misconduct,” providing greater insight for employers considering whether or not to contest a claim for unemployment benefits.

The Los Angeles Unified School District (“LAUSD”) fired Jim Irving on the ground that he repeatedly violated LAUSD’s break policies and knowingly falsified his time records to conceal the violations. Irving sought and received unemployment benefits; LAUSD contested the award. Following an administrative hearing, the California Unemployment Insurance Appeals Board (“the Board”) ruled that Irving’s repeated break violations and falsified timecards constituted misconduct under the Unemployment Insurance Code. The misconduct finding barred Irving’s recovery of benefits.

Irving filed a petition in civil court to contest the validity of the Board’s ruling, claiming that he had been denied a fair hearing and that the Board’s ruling was unjust. In a brief hearing, Irving admitted that he had taken his breaks at improper times and had falsified records, but claimed he only did so because his supervisors had recommended this practice. The trial judge concluded that Irving’s knowing and repeated violations of LAUSD policy were merely “the result of a good faith misunderstanding as to his job duties and responsibilities,” and ruled that Irving could recover unemployment benefits. The Board appealed the ruling.

The California Court of Appeal reversed, finding that Irving’s willful violations of LAUSD policies and his intentional misrepresentations on his time records constituted misconduct sufficient to disqualify him from receiving unemployment benefits. The key finding for the Court was the fact that regardless of what Irving’s coworkers said or did, Irving knowingly and intentionally took non-compliant breaks and falsified his timecards. The Court rejected the contention that his dishonesty was excusable on the basis of similar conduct by coworkers.

The Court explained that analyzing whether the dishonest conduct resulted from a “good faith misunderstanding” required a reasonable person standard, not the perspective of Irving or LAUSD. The Court found no basis for finding that a reasonable person would believe Irving’s conduct was honest, and squarely rejected the trial court’s findings and reasoning.

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This decision is instructive on the distinction between “misconduct,” as required for a denial of unemployment benefits, and simple errors or negligent conduct necessitating a discharge. An employer’s focus in contesting unemployment benefits should not be on whether or not the discharge was warranted, but instead on whether the termination arose out of objectively dishonest or intentionally wrongful misconduct. In order to successfully contest the unjustified award of unemployment benefits, employers should maintain clear standards for employee conduct and accurate records of discipline.

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