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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *June 2013*

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I.

LEGISLATIVE/ADMINISTRATIVE

Federal

U.S. House of Representatives Passes "Comp Time" Bill

The U.S. House of Representatives has passed HR 1406, also known as the "Working Families Flexibility Act." As drafted, the bill would allow private sector employers to give non-exempt employees the choice of receiving paid time off (compensatory, or "comp" time) instead of overtime. Employees would accrue one and one-half hours of paid time off for each hour of overtime worked.

The bill provides that compensatory time off arrangements must be consistent with any collective bargaining agreement, if applicable. Or, if not governed by collective bargaining, time off arrangements must be set forth in a written agreement prior to the performance of work. All agreements must be voluntary and are only available to employees who have worked at least 1,000 hours of continuous employment with the employer. Employees who choose compensatory time off may not accrue more than 160 hours annually and are subject to an annual cash-out for any unused time.

Notably, HR 1406 includes numerous employee protections for workers who choose to participate in a comp time program. Among other things, the bill:

- prohibits employers from intimidating or coercing employees into a comp time arrangement;
- allows employees to use the comp time at their discretion, unless the time off unduly disrupts the business operations of the employer; and
- allows employees to opt out of the comp time arrangement at any time and receive cash payments for banked hours.

The bill now moves on to the U.S. Senate. It is unlikely that the bill will pass in the Senate. In any event, it would have no effect on California's overtime requirements.

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U.S. House of Representatives Introduces Bill Aimed at Eliminating Pregnancy Discrimination in the Workplace

The U.S. House of Representatives has introduced HR 1975, also known as the "Pregnant Workers Fairness Act." The goal of the new legislation is to eliminate pregnancy discrimination in the workplace and promote women's health by ensuring reasonable workplace accommodations for employees whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.

Among other things, the bill would prohibit employers from:

- failing to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business;

- denying employment opportunities to a job applicant or employee, if such denial is based on the need of the employer to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant;

- requiring a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee desires not to accept; or

- requiring an employee to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided for the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

The new law would apply to all employers who are also subject to the mandates of Title VII.

The bill was recently amended to apply only to public agencies and is currently under consideration by the Senate Labor and Industrial Relations Committee.

II.

JUDICIAL

California

California Appellate Court Helps Define "Severe or Pervasive" Standard in Harassment Case

In *McCoy v. Pacific Maritime Association*, a California appellate court upheld an order dismissing the plaintiff's sexual harassment and emotional distress claims.

Catherine McCoy ("McCoy") worked as a marine clerk. In 1998, McCoy and other employees filed a federal discrimination lawsuit against Pacific Maritime

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Association ("PMA"). As part of the settlement that was reached in that suit, McCoy was entitled to certain career enhancement training through Yusen, a member company of PMA. McCoy alleged however, she was denied training materials and instructions in retaliation for her filing of the previous lawsuit, and that other trainees were provided better treatment and hands-on instruction. McCoy also alleged that her supervisor yelled at her in front of other employees and made racial comments about her and other female employees. In 2006, McCoy filed a civil action against PMA for sexual harassment, retaliation, negligent hiring, and intentional infliction of emotional distress. PMA moved for summary adjudication, which the trial court granted as to all claims except retaliation. The appellate court agreed with trial courts' finding that the allegedly harassing comments were made on "at most, nine, and possibly as few as five occasions." Additionally, the appellate court upheld a finding that the comments were vague, not directed at McCoy, and (while offensive) were not so severe or pervasive as to alter the conditions of McCoy's employment. In other words, the conduct did not "create a work environment 'permeated' with sexual harassment." The appellate court further affirmed that McCoy's allegation that she was ostracized did not go "beyond all bounds of decency," and could therefore not support the claim for intentional infliction of emotional distress.

The retaliation claim proceeded to trial, and after three days of deliberation, the jury returned a verdict for McCoy, awarding her $660,000 in economic damages and $540,000 in emotional distress damages. PMA immediately filed a motion for judgment notwithstanding the verdict on the ground that PMA was not McCoy's employer. PMA successfully argued that the alleged comments were not made by a supervisor, but rather by a vessel planner who was only partially responsible for McCoy's training. The appellate court found that although PMA had negotiated the labor contracts for several companies, including Yusen, there was undisputed evidence that Yusen "controlled the means and manner of [McCoy's] performance." Yusen owned the site and equipment McCoy worked on, was responsible for her training, had the right to promote or discharge her, and had employed the individuals allegedly responsible for the retaliatory conduct. Based on these factors, the court concluded that PMA was not McCoy's employer, and affirmed the judgment notwithstanding the verdict in favor of PMA.

This case reinforces the notion that a few vague comments (even if objectively offensive) will likely not meet the "severe or pervasive" standard required to support a claim for harassment. Nonetheless, employers should ensure that they have policies and practices in place that discourage such comments, and impose discipline in cases where employees engage in offensive conduct. This case also serves as a reminder that courts assess the existence of an employer-employee relationship using a "totality of the circumstances" approach, and that job titles are not controlling.

California Appellate Court Offers Post-*Brinker* Clarity on Wage and Hour Class Certification

In its recent decision in *Faulkinbury v. Boyd & Associates, Inc.*, a California Court of Appeal reconsidered its earlier ruling in the same case in light of the California Supreme Court's 2012 holding in *Brinker Restaurant Corp. v. Superior Court*. In doing so, the *Faulkinbury* Court clarified the grounds upon which California wage and hour classes may be certified. The court held that decisions regarding whether to certify a class depend upon the plaintiff's legal theory of liability and that the existence of a policy applicable to all alleged putative class members is a sufficient basis upon which a class may be certified.

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Boyd & Associates, Inc. ("Boyd") provides security services to businesses throughout Southern California. Josie Faulkinbury and William Levene (collectively, "Plaintiffs") were employed by Boyd as security guards. Plaintiffs claimed that Boyd made them sign an agreement to take exclusively on-duty meal breaks. Plaintiffs also claimed they were instructed never to leave their security posts and, as a result, never took off-duty rest breaks. Finally, Plaintiffs claimed that Boyd failed to include certain reimbursements and bonuses in the calculation of their hourly rate of overtime pay.

Plaintiffs brought a class action on behalf of themselves and 4,000 current and former Boyd employees. They asserted claims for denial of off-duty meal breaks, denial of off-duty rest breaks, and improper calculation of overtime wages. In an attempt to satisfy class certification requirements, Plaintiffs proposed three subclasses: (1) the meal break class; (2) the rest break class; and (3) the overtime class.

The primary issue addressed by the appellate court was whether or not common questions of law or fact predominated such that class certification would be appropriate. The court initially denied class certification of the meal break and rest break classes based on the perceived predominance of individual questions surrounding the issue of damages. The *Brinker*[1] ruling prompted the court to reconsider.

Because the Plaintiffs in this case alleged that Boyd: (1) had a company-wide policy that prevented employees from taking off-duty meal and rest breaks; and (2) used an improper, company-wide policy to calculate overtime pay, the court held that certification of all three subclasses was warranted despite some remaining uncertainty with respect to individual damages calculations.

In light of *Faulkinbury*, California employers should be even more wary of the implications of their wage and hour policies, and should review existing policies—particularly meal break, rest break, and overtime policies—to ensure that they are fully compliant with the law.

California Appellate Court Holds Rest Periods Must Be Separately Compensated Under Piece-Rate System

In *Bluford v. Safeway Stores, Inc.*, a California Court of Appeal held that an employer must provide its employees separate compensation for rest periods under a piece-rate compensation system.

Kenneth Bluford ("Plaintiff") sought to certify a class in his action against his employer, Safeway Stores, Inc. ("Safeway"). Plaintiff alleged that Safeway failed to provide him and other similarly situated employees with rest periods, meal periods, and properly itemized wage statements. The appellate court reversed the trial court's order denying certification of the rest period sub-class, holding that certification was appropriate because common issues predominated over individual issues, and Plaintiff alleged a common injury resulting from Safeway's rest period policy.

Plaintiff was employed for approximately ten years as a truck driver for Safeway. Pursuant to a collective bargaining agreement, Safeway was required to provide two paid, fifteen-minute rest periods for every eight or ten-hour shift worked.

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1 The *Brinker* court held if an employer has an illegal policy which it applies to all putative class members, class certification is generally appropriate.

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Employees received an additional fifteen-minute paid rest period if they worked in excess of two hours of overtime. Additionally, drivers were required to take an unpaid thirty-minute meal period no later than five hours after their shift began.

Safeway paid drivers pursuant to an activity-based compensation system, which calculated: (1) mileage rates based on the number of miles driven; (2) fixed rates for certain tasks (*e.g.*, rates for number of pallets delivered); and (3) an hourly rate for uncontrollable delays (*e.g.*, breakdowns). Drivers logged their mileage/activities for each trip manually on trip sheets. They also logged their activities into an onboard computer system (the "XATA system"). Neither the trip sheets nor the XATA system, however, provided a place to record meal or rest periods.

With each paycheck, drivers received a "driver trip summary—report of earnings" and an "earnings statement." The driver trip summaries listed each component of a driver's pay, and the quantity of each component for which he or she was being paid. The earnings statements itemized the actual components, and expressed them in equivalent hourly pay.

In deciding that issues common to all drivers predominated with respect to the rest period sub-class, the appellate court held that rest periods must be separately compensated under a piece-rate pay system, and that Safeway's piece-rate compensation formula did not provide this separate compensation. None of the calculations that factored into employees' pay—mileage rates, the number of miles driven, the time the trips were made, the locations where the trips began and ended, and fixed rates for various other tasks—directly compensated for rest periods.

Safeway argued that it paid for drivers' rest periods because the negotiated mileage and fixed rates included paid time for rest periods. The appellate court held, however, that: (1) piece rates may not include payment for rest periods; and (2) certification of the sub-class was appropriate because Plaintiff was challenging Safeway's compensation *system*, and this issue did not "concern the drivers' subjective reasons for taking or not taking a rest period."

The appellate court similarly found that: (1) Plaintiff's meal period claim was appropriate for class treatment because it challenged Safeway's policy of providing only one meal period even when employees worked longer than ten hours; and (2) Plaintiff's wage statement claim was appropriate for class treatment because it was premised on an argument that the statements did not allow employees to determine whether their wages compensated them for all hours worked without performing complicated calculations.

California Appellate Court Deals Another Blow to Employers for Misclassification of Employees

In *Heyen v. Safeway, Inc.*, a California Court of Appeal held that when an employee concurrently performs both exempt and nonexempt tasks, the finder of fact must look at the objective purpose of those actions in order to determine whether the employee should be classified as exempt or nonexempt.

Linda Heyen ("Plaintiff") worked as an assistant manager at Safeway, Inc. ("Safeway") in Oceanside, California. After her employment with Safeway was terminated, Plaintiff was added as a named plaintiff to an existing class action against Safeway. When class certification was denied, Plaintiff's individual action for unpaid

overtime wages proceeded against Safeway. Plaintiff alleged that she had been improperly classified as an exempt employee.

Plaintiff and Safeway offered competing testimony regarding her employment. Plaintiff testified that, despite her assistant manager title, she regularly performed nonexempt tasks. For example, Plaintiff often spent time cashiering, stocking shelves, and bagging groceries. Safeway argued that Plaintiff spent much of her time performing exempt managerial tasks, and that the nonexempt tasks were performed in concurrence with managing her employees. Therefore, Safeway asserted, Plaintiff's concurrent performance of exempt and nonexempt tasks warranted an exempt classification under the "executive exemption."

The trial court instructed an advisory jury to determine whether Plaintiff had been misclassified. The jury instructions noted that when an employee is concurrently engaged in exempt and nonexempt tasks, he or she must be classified as *either* exempt *or* nonexempt based on the primary purpose for which the employee undertook those activities. No classification exists for hybrid exempt/nonexempt job duties. Based upon this instruction, the jury found that even though Plaintiff may have simultaneously managed her employees, the time she spent cashiering and stocking resulted in her being "primarily engaged" in nonexempt activities. Accordingly, the trial court awarded her $26,184.60 in overtime wages.

Safeway appealed, arguing that the trial court had improperly instructed the jury that concurrent performance of exempt and nonexempt tasks warranted a nonexempt classification. The Court of Appeal disagreed with Safeway's argument and affirmed the verdict, holding that Plaintiff was primarily engaged in nonexempt activities and that her performance of nonexempt tasks did not diverge from Safeway's realistic expectations of her duties.

Heyen serves as another reminder to California employers to be wary of the specific requirements for exempt classification. When an employee concurrently performs both exempt and nonexempt tasks, a court will closely examine the primary purpose of an employee's duties in order to determine proper classification. Thus, employers must ensure that employees classified as exempt are indeed primarily engaged in exempt duties.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Hazel Ocampo, Heather Stone or Ryan Nell at (858) 755-8500; or Andrew L. Smith, Jennifer Weidinger or Tristan Mullis at (310) 649-5772.

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