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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *August 2013*

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JUDICIAL

California

Court of Appeal Addresses Compensable Time Issues

In *Mendiola v. CPS Security Solutions, Inc.*, a California Court of Appeal addressed the complexities of compensable time under California law in determining an employer's duty to compensate its on-call employees. The court held that on-call time is considered compensable when an employer exercises sufficient control over its employees. However, the court also protected the right of employers to contractually agree to deduct "sleep time" when certain requirements are satisfied.

CPS Security Solutions, Inc., CPS Construction Protection Security Plus, Inc., and Construction Protective Services, Inc. (collectively, "CPS") offer security guard staffing for building construction job sites throughout the state. CPS provides its security services eighteen hours per day Monday through Friday, and twenty-four hours per day on Saturday and Sunday.

In order to satisfy its security coverage schedule, CPS requires its guards to remain on job sites for the entirety of each sixteen or twenty-four hour shift. During the sixteen hour weekday shifts, guards are on duty from 5:00 am to 7:00 am, and again from 3:00 pm to 9:00 pm. Between 7:00 am and 3:00 pm, they are free to come and go as they please. During the twenty-four hour weekend shifts, guards are on duty from 5:00 am to 9:00 pm.

For both the eighteen and twenty-four hour shifts, guards are required to remain on-call between 9:00 pm and 5:00 am. While on-call, guards are required to handle any issues which arise on the job site, but are also provided with fully furnished trailers wherein they are permitted to sleep, bathe, and relax when not working. Guards are not permitted to have pets or child guests in the trailers, and adult guests are only permitted with prior approval. While on call, guards may not leave the premises without permission; and when such permission is granted, they may travel no farther than thirty minutes away. During such times, guards are required to wear a pager which can be used to call for an immediate return to the job site. Guards are only compensated for time spent handling on-site issues; the remainder of their on-call time is unpaid.

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A group of guards ("Plaintiffs") filed a class action suit, seeking damages for failure to pay wages during the on-call periods, and for declaratory relief regarding the legality of the on-call employment provision. The trial court ruled in favor of Plaintiffs on a summary adjudication motion, finding that on-call time amounted to "hours worked" under California law. CPS appealed the decision.

Under California law, employers are required to compensate employees for time during which employees are subject to the control of the employer. A number of factors are considered, whereby a determination is made regarding the level of control exerted by the employer. In this case, the appellate court held that during the on-call periods of the sixteen hour shift, the control exerted by CPS over Plaintiffs "substantially restricted" Plaintiffs' actions and therefore warranted compensation.

With regard to the twenty-four hour shifts, however, the appellate court found that CPS may deduct eight hours of "sleep time" from Plaintiffs' compensation, given the satisfaction of certain requirements. The court instructed that a sleep time provision may be enforceable when it has been formalized in writing and provides that the employee: (1) works a twenty-four hour period; (2) is provided adequate sleeping facilities; and (3) receives an opportunity to sleep for at least five uninterrupted hours. Here, CPS and Plaintiffs entered into an agreement which satisfied these requirements. CPS was therefore permitted to deduct eight hours of sleep time per twenty-four hour shift.

Court of Appeal Applies Control Test in Finding Independent Contractor's Status

A California Court of Appeal held in *Beaumont-Jacques v. Farmers Group, Inc.* that a former district manager of a group of affiliated insurers was an "independent contractor" based on the appointment agreement she signed with the group, the type of discretion she exercised in her daily job duties, her ability to hire and supervise her staff, and her identification as "self-employed" on her personal tax returns.

Appellant Erin Beaumont-Jacques ("Appellant") worked for several years for a group of affiliated insurers ("Defendants"). In September 2005, she became one of their district managers by executing a District Manager Appointment Agreement ("the Appointment Agreement"). The Appointment Agreement specifically provided that there was no employer/employee relationship.
In her new role, Appellant recruited and recommended persons to become insurance agents solely for the Defendants and regularly autonomous discretion in her regular tasks. She also recruited, trained and motivated individual agents who sold insurance products for the Defendants, had autonomy with respect to the hiring and firing her own office staff, and set her own day-to-day hours, including vacations and arrival and departure times. In October 2009, Appellant voluntarily terminated the relationship.

In May 2010, Appellant filed a suit against Defendants, among others asserting claims for breach of contract, sex discrimination, and unfair business practices. Defendants filed a motion for summary judgment which the trial court

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granted, finding that they did not exercise sufficient control over Appellant so that an employee-employer relationship could be inferred because Appellant retained sufficient discretion in the performance of her duties and in the manner in which she performed them she was held to be an independent contractor as a matter of law.

In examining the trial court's ruling, the Court of Appeal found the type (as opposed to the level) of discretion regularly employed by Appellant in the completion of her duties and job performance goals indicated independent contractor status. While Appellant argued that the fact that the Defendants set goals for her employment, and the existence of various other indicia unrelated to the control over her job duties, were indicative of an employment agreement, the Court of Appeal upheld the trial court's ruling in its entirety.

This case highlights the very thin line California law draws between independent contractors and employees. The key question for California courts is generally whether the individual has the right to control the manner and means of accomplishing the result desired. The existence of the right to control, rather than the amount of control, is important. Employers should review their classification policies to ensure that individuals are appropriately classified in light of the relevant factors.

Court of Appeal Rules Employee Retaliation Claim not Barred by Statute of Limitations

In *Acuna v. San Diego Gas & Electric Co*., California's judiciary reaffirmed its willingness to allow employees wide latitude when asserting claims under the Fair Employment and Housing Act ("FEHA"). Specifically, a California Court of Appeal held that an employee's right to file a civil lawsuit for retaliation may still exist even when the deadline to file a claim for the alleged wrongful acts leading to the retaliation has long expired.

The plaintiff, Esperanza Acuna ("Acuna"), had been employed by San Diego Gas & Electric Co. ("SDG&E") since 1979. Acuna claimed that she faced a pattern of unlawful conduct on the part of SDG&E beginning in 2002. In March 2006, Acuna filed her first administrative charge with the California Department of Fair Employment and Housing ("DFEH"), alleging racial discrimination and harassment. Acuna subsequently filed a second DFEH charge in February 2007, alleging disability discrimination.[1] Acuna did not file a civil suit within the mandatory one-year statute of limitations after the DFEH issued right-to-sue notices for each administrative charge. On July 11, 2008, days after Acuna attempted to return to active duty, SDG&E discharged her, purportedly due to fraudulent timekeeping practices.

Acuna filed her third administrative charge with the DFEH on October 23, 2008, reiterating the previous harassment and discrimination allegations, and adding a claim for retaliation. She received a right-to-sue notice on November 7, 2008. On November 5, 2009, Acuna filed a lawsuit against SDG&E alleging

[1] Acuna's proffered disability was stress relating to alleged harassment by her supervisor. As such, the only available accommodation was believed to be the reassignment of either Acuna or her supervisor to prevent further interaction.

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retaliation, discrimination, harassment, and various common law claims. SDG&E requested that the trial court dismiss the lawsuit, contending that Acuna had violated the one-year filing deadline set forth in the DFEH's first two right-to-sue notices. The trial court agreed with SDG&E. Acuna appealed the trial court's ruling, contending that the wrongful conduct had been ongoing, and that the statute of limitations had not yet run on her claim for retaliatory discharge.

The Court of Appeal reversed in part, holding that the lower court had erred by applying the same statute of limitations to the retaliation claim as it had to the other allegations. The court drew a clear distinction between the alleged retaliatory discharge in 2008 (a discrete act) and the alleged discrimination and harassment occurring (and more importantly, concluding) years prior. Thus, while the court upheld the dismissal of the discrimination and harassment claims, it ruled that the retaliation claim was not time-barred. The court found no support for SDG&E's position that the retaliation claim was barred by the statute of limitations because such a finding would necessarily mean that Acuna would have had to anticipate her (allegedly) retaliatory discharge well in advance of its occurrence.

On the other hand, the court dismissed Acuna's contention that her disability discrimination claim had been tolled, finding that a reasonable person would have recognized her request for accommodations to be futile no later than February 2007.[2] As such, the continuing violation doctrine she sought to use to sidestep the one-year filing deadline was unavailable. Similarly, the alleged racial harassment had ceased by the end of 2006, far too early to be encompassed by the 2008 DFEH complaint. Accordingly, that claim was also barred.

Court of Appeal Declines to Enforce Employee Arbitration Agreement

In *Avery v. Integrated Healthcare Holdings, Inc*., a California Court of Appeal affirmed a trial court ruling denying an employer's motion to compel the plaintiffs - former employees - to individually arbitrate their wage and hour claims.

In March 2005, Integrated Healthcare Holdings, Inc. ("Integrated") acquired four hospitals from their prior owner, Tenet. Some of the plaintiffs worked at one of these hospitals both before and after Integrated acquired them; some of the plaintiffs worked at one of these hospitals only after the acquisition. According to Integrated, the details of Tenet's arbitration policy (called the "Fair Treatment Process") were set forth in Tenet's employee handbook, which Integrated adopted as its own when it acquired the hospitals.

Before or during their employment, all of the plaintiffs (except one) signed at least two of the following documents, whereby they agreed to arbitrate claims related to their employment: (1) the "Employee Acknowledgment Form"; (2) the "Application for Employment"; and (3) the "New Hire" or "Transition Letter."

The Employee Acknowledgment Form stated as follows: "I acknowledge that I have received a copy of the Tenet Employee Handbook and Standards of Conduct…In addition, I acknowledge that I have received a copy of the Tenet Fair

[2] In disability accommodation cases, courts will typically equitably toll the one-year limitations period where the denial of accommodations is ongoing, up to the point where an employee's continued attempts to obtain an accommodation are futile.

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Treatment Process brochure. I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet."

The Application for Employment included the following statement: "I understand that any and all disputes regarding my employment with Tenet…are subject to the Tenet Fair Treatment Process, which includes final and binding arbitration…"

Approximately two months after Integrated acquired the hospitals, it sent employees a Transition Letter explaining that their employment with Tenet would formally end on a specified date, but noting that Integrated was offering them employment on the following terms: "[Integrated] and you agree to utilize the existing Open Door Policy and Fair Treatment Process, as hereby amended to substitute [Integrated] for Tenet, to resolve any and all disputes related to your future employment. In order to confirm your acceptance of employment with [Integrated], we request that you sign this letter…In any event, your commencement of work after [the date specified] shall constitute your acceptance of the terms and conditions set forth above." Some of the plaintiffs signed the letter.

In 2009, the plaintiffs brought a class action lawsuit, alleging various wage and hour claims against Integrated. Four months after the suit was filed, Integrated unilaterally issued a new version of the Tenet Employee Handbook without notifying the plaintiffs or any other employees. The new "Integrated Employee Handbook" renamed the Fair Treatment Process the "Alternative Dispute Resolution Process," and added a provision waiving an employee's right to join his or her claims with other employees' claims or bring a class or representative action against Integrated.

In July 2010, Integrated moved to compel each plaintiff to separately arbitrate his or her claims on an individual basis pursuant to the Fair Treatment Process described in the Tenet Handbook as well as the Alternative Dispute Resolution Process set forth in the Integrated Employee Handbook. The plaintiffs opposed the motions. The appellate court concluded that Integrated was limited to the Fair Treatment Process because: (1) it issued the Integrated Employee Handbook and its Alternative Dispute Resolution Process *after* the plaintiffs' claims accrued, and (2) it failed to notify the plaintiffs or any other employees about the Integrated Employee Handbook.

The court noted that although California law permits employers to implement policies that may become unilateral implied-in-fact contracts when employees accept them by continuing their employment, the law requires an employee to receive notice of a condition the employer places on his or her employment before the employee can impliedly accept that condition by working for the employer.

The court also held that arbitration could not be compelled because Integrated failed to establish the terms of an enforceable arbitration agreement. While Integrated argued that the documents the plaintiffs signed (Employee

Acknowledgment Form, Application for Employment, and Transition Letter) incorporated the Fair Treatment Process and established its binding arbitration provisions as the exclusive means for resolving all employment-related disputes, Integrated failed to prove that the specific Fair Treatment Process it presented to the trial court was the Fair Treatment Process to which the plaintiffs agreed. As the court noted, it is not sufficient for the party seeking to compel arbitration to show that the parties generally agreed to arbitrate their disputes by incorporating some arbitration provision into their contract. Rather, the party must establish the precise arbitration provision to which all parties agreed.

In light of *Avery*, employers should remember to disseminate new policies as soon as they become effective, and to require employees to sign a separate, stand-alone arbitration agreement that sets forth the precise terms and parameters of the arbitration process.

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