PETTITKOHN
PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *August 2014*

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11622 El Camino Real, Suite 300
San Diego, CA 92130
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Los Angeles, CA 90045
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I.

LEGISLATIVE UPDATE

California

Several bills that could impact California employers and employees are pending before the California legislature. The legislature has until August 31, 2014 to pass these bills. Thereafter, Governor Jerry Brown has until September 30, 2014 to sign or veto bills passed by the legislature. Some of the pending bills include:

AB 1522 (Gonzalez): This bill would enact the Healthy Workplaces, Healthy Families Act of 2014 and provide that an employee who, on or after July 1, 2015, works in California for thirty or more days in a calendar year is entitled to paid sick days, to be accrued at a rate of no less than one hour for every thirty hours worked. An employee would be entitled to use accrued sick days beginning on the ninetieth day of employment. AB 1522 would authorize an employer to limit an employee's use of paid sick days to twenty-four hours (three days) in each calendar year. The bill, if signed into law, would subject employers to potential statutory penalties and litigation under the Private Attorneys General Act for alleged violations. As of the time of this update, this bill is in the Senate Appropriations Committee.

AB 2416 (Stone): AB 2416 would allow employees to file liens on an employer's real or personal property, or property where work was performed, based upon alleged wage claims. As of the time of this update, this bill is in the Senate Appropriations Committee.

SB 935 (Leno): SB 935 would increase the minimum wage to $13 per hour by 2017 and increase it thereafter based on the Consumer Price Index. This bill is under reconsideration in the Assembly Labor and Employment Committee, after initially failing to pass.

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II.

JUDICIAL UPDATE

California

California Supreme Court Narrows Commissioned Salesperson Exemption

In *Peabody v. Time Warner Cable*, Susan Peabody ("the Employee") was a commissioned salesperson who sold advertising for Time Warner Cable ("the Employer"). The Employee was classified as exempt from overtime under California's commissioned salesperson exemption. Among other things, the exemption requires that an employee's earnings exceed one-and-one-half times the minimum wage. The Employer paid the Employee her regular wages on a biweekly basis, but only paid her commission wages once per month. The Employer reasoned that even when the Employee's biweekly paychecks resulted in a payment less than one-and-one-half times the minimum wage; her monthly commission payment could be allocated to the earlier pay periods.

The Employee sued, arguing that she was not properly paid overtime wages. The trial court granted summary judgment for the Employer holding that the Employee was an exempt commissioned salesperson. The Employee appealed to the Ninth Circuit Court of Appeals, which certified a question to the California Supreme Court concerning whether an employer could properly allocate commission wages over the pay periods in which they were "earned" for purposes of satisfying the commissioned salesperson exemption. The California Supreme Court held that when looking at the exemption, commission wages can only be attributed to the pay period in which they were actually paid.

The Court opined that California overtime exemptions are narrowly construed and must be interpreted in favor of the employee. The Court acknowledged that California law permits commission wages to be paid less frequently than regular wages and that monthly, or even less frequent, payment of commission wages is permissible (given that commission wages often are not earned until various conditions are satisfied and are not calculable with the same frequency as the regular payroll schedule). Even though commissions are owed only when they have been earned (even if it is on a quarterly, monthly, or other basis), paid commissions cannot be attributed to other pay periods to satisfy the exemption's minimum earnings requirement. An employer cannot attribute wages paid in one pay period to a prior pay period to cure a shortfall.

Peabody makes it more difficult for employers to satisfy the commissioned salesperson exemption under California law. California employers must now allocate commission wages over the pay periods in which they were earned to ensure that the employee's pay is at least one-and-one-half times the minimum wage for each pay period.

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California Supreme Court Clarifies Focus of Class Certification Analysis in Independent Contractor Cases

In *Ayala v. Antelope Valley Newspapers*, the California Supreme Court held that the trial court erred in denying class certification to a group of newspaper carriers who worked as independent contractors and subsequently sued for wage and hour violations on the basis that they should have been classified as employees.

In denying class certification, the trial court held that the issue of whether the carriers were employees or independent contractors could not be decided in one stroke as to the entire class because the evidence showed substantial variation in the degree of control that the newspaper exercised over its carriers' work, and the issue of degree of control is a primary factor in assessing whether a worker is an independent contractor or an employee.

The California Supreme Court held that the trial court erroneously focused on the variation in the level of control actually exercised by Antelope Valley Newspapers, rather than whether the newspaper uniformly retained the right to control the carriers' work. The Court emphasized that the key issue is whether the hirer has the right to control the work, not whether the hirer actually exercises that right. The Court explained that evidence of whether the hirer retains the right of control typically is found in the contract between the hirer and the worker. In this case, Antelope Valley Newspapers used largely the same form of independent contractor agreement for all of its carriers. The Court stated that the trial court "afforded only cursory attention" to the parties' agreement, when it should have focused on the agreement as the starting point for its analysis.

On remand, the trial court will need to assess whether Antelope Valley Newspapers, notwithstanding the form contract, actually had different rights with respect to each carrier that would necessitate mini-trials. The Court briefly addressed the fact that the test for determining whether a worker is an independent contractor or an employee depends not only on the right of control, but also on numerous secondary factors (for example, method of payment, who supplies the tools and equipment, and place of work). The Court minimized the significance of the secondary factors and of evidence of individualized variation bearing on those factors.

The Court's decision provides a roadmap for the class certification analysis in independent contractor misclassification cases.

Court of Appeal Approves Deduction from Exempt Employees' Paid Time Off/Vacation for Partial Day Absences of Any Length

In *Rhea v. General Atomics*, Lori Rhea ("the Employee") sued General Atomics ("the Employer") in a proposed class action on behalf of the Employer's exempt employees in California. The Employer had a policy allowing deductions from paid time off ("PTO") in any amount of time that exempt employees were absent from their jobs for partial days. The Employee challenged this policy, arguing that PTO is a type of wage which cannot be forfeited, and that the use of PTO for partial-day absences violated the salary basis test for exempt employees. The trial court disagreed, granting the Employer's motion for summary judgment.

The Court of Appeal affirmed summary judgment for the Employer. First, the Appellate Court found that requiring exempt employees to use PTO for partial-day absences is not a forfeiture – employees are simply using PTO under the Employer's terms and conditions. Second, the Court held that this type of PTO deduction does not violate the salary basis test.

It should be noted that the Employer made no deductions from exempt employees' salaries. It is well established that an employer may not deduct monetary pay when an exempt employee is absent from work. Based on *Rhea*, it is permissible to subtract from an exempt employee's PTO balance for absences of any length.

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SAVE - THE - DATE

Pettit Kohn Ingrassia & Lutz's

8th Annual

Employment Law Symposium

Thursday, November 13, 2014

Hilton San Diego/Del Mar

Details coming soon, visit our website for update-to-date information www.pettitkohn.com

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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, Heather Stone, Ryan Nell, Lauren Bates or Jennifer Suberlak at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.

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