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EMPLOYMENT LAW UPDATE

Relationship-Driven Results December 2012

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I.

LEGISLATIVE/ADMINISTRATIVE

Agency

Department of Industrial Relations Announces 2013 Rates for Overtime Exemptions

California's Department of Industrial Relations has announced rate changes for the computer software employee exemption and the licensed physician or surgeon exemption, which will be effective on January 1, 2013.

For the computer software employee exemption:

The minimum hourly rate of pay exemption increased to $39.90 (the previous hourly rate was $38.89);

The minimum monthly salary increased to $6,927.75 (the previous monthly rate was $6,752.19); and

The minimum annual salary exemption increased to $83,132.93 (the previous annual rate was $81,026.25).

For the licensed physician or surgeon exemption:

The minimum hourly pay for licensed physicians and surgeons increased to $72.70 (the previous hourly rate was $70.86).

These rate increases are linked to the California Consumer Price Index for Urban Wage Earners and Clerical Workers. The 2013 rate changes reflect the 2.6 percent increase in the CPI.

IRS Announces 2013 Mileage Reimbursement Rates

The Internal Revenue Service recently issued the 2013 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes.

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The rates take effect on January 1, 2013. According to the IRS, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

- 56.5 cents per mile for business miles driven;
- 24 cents per mile driven for medical or moving purposes; and
- 14 cents per mile driven in service of charitable organizations.

The rates for business miles driven and for medical and moving purposes during 2013 increase one cent from the 2012 rate.

<u>Amended Pregnancy Disability Regulations Approved</u>

The Office of Administrative Law has approved amendments to California's pregnancy regulations proposed by the Fair Employment and Housing Commission (FEHC). The amendments take effect December 30, 2012.

California employers with five or more employees must make pregnancy disability leave ("PDL") available to employees. The regulations clarify, and, in some instances, expand the PDL protections afforded to employees.

Specific changes to the regulations include:

- A change to the definition of "four months";
- An expanded definition of when a woman is "disabled by pregnancy";
- Clarification of an employer's responsibilities regarding reasonable accommodation or transfer of employees affected by pregnancy, childbirth or related medical conditions;
- An expansion of protections to include that it is unlawful to discriminate against or harass an applicant or employee based on "perceived pregnancy"; and
- Necessary changes to Notices "A" and "B," which provide information for employees about their rights and responsibilities regarding PDL (Notice "A") and the California Family Rights Act (Notice "B").

Additional information about these changes can be found on the FEHC's website: http://www.fehc.ca.gov/act/pregnancyregulations.asp.

II.

JUDICIAL

California

<u>California Court Approves Rounding of Timecard Entries</u>

In an employer-friendly opinion, the California Court of Appeal held in *Silva v. See's Candy* that employers may round employee timecard entries to the

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nearest tenth of an hour. This ruling is particularly important because there is no statute or prior case law that expressly authorizes this common practice, which is permissible under federal law and has been adopted by the California Division of Labor Standards Enforcement ("DLSE").

See's Candy ("See's") used a timekeeping software system to keep track of its employees' working hours. The software system required employees to "punch" into the system at the beginning and end of their shift. Adjustments to the timecards were made only in accordance with two See's policies: (1) the nearest-tenth rounding policy; and (2) the "grace period" policy. A former employee filed a class action lawsuit challenging these two policies.

Under the nearest-tenth rounding policy, in and out punches were rounded up or down to the nearest tenth of an hour. Under the separate grace period policy, employees whose schedules had been programmed into the timekeeping system could voluntarily punch in up to 10 minutes before their scheduled start time and 10 minutes after their scheduled end time. Employees were not permitted to work during that time, but could use it for personal activities.

In concluding that See's policies were permissible, the court relied on the federal Department of Labor rounding standard, confirming that a rounding policy is acceptable, provided the policy is "fair and neutral on its face" and over time does not result in failure to properly compensate the employee. The court also relied on the DLSE manual which it held, while not binding on courts, could be considered for its persuasive value. The *See's* court seemed persuaded by the fact that a rounding practice had been long adopted by employers throughout the country and that holding otherwise would prevent California's employers from adopting and maintaining rounding practices available to employers throughout the rest of the country.

See's was able to present evidence that employees knew about the rounding and grace period policies. Because See's policies were clear and understood by its employees, and because it could show that the policies did not result in its employees being underpaid, See's prevailed in the action.

While this is a positive ruling for employers, the decision does not validate the blanket use of rounding policies. The appellate court only addressed a one-tenth rounding policy. Further, it expressed that rounding policies must meet the "facially fair and neutral" standard, and may not over time fail to compensate employees for all of the time that they have worked. Accordingly, employers should review their timekeeping policies to ensure that they are facially neutral and do not favor the employer by, for example, only rounding down.

<u>Class Certification Improper on Claims for Expense Reimbursement for Uniforms and Travel</u>

In *Morgan v. Wet Seal*, a California appellate court affirmed a victory for clothing retailer Wet Seal ("the Employer"), which successfully defeated class certification on wage and hour claims for alleged failure to reimburse uniform expenses and alleged failure to compensate employees for expenses associated with using their personal vehicles to travel between store locations. The plaintiff, We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

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Crystal Morgan, and a proposed class of employees ("the Employees") claimed that the Employer required them to purchase and wear company clothing at work, but failed to reimburse employees for the cost of this alleged uniform. The Employees further alleged that the Employer periodically required them to use their own cars to travel from one store location to another for meetings or other business reasons, but did not reimburse employees for mileage or other related travel expenses.

In seeking to have a class of approximately 12,000 employees certified, the Employees submitted declarations of several employees stating that they purchased company clothing without being reimbursed and used their car to travel to stores without reimbursement. In opposing the motion to certify, the Employer presented its expense reimbursement and work attire policies, which demonstrated that employees are entitled to reimbursement for travel expenses in accordance with law, and are not required to purchase the Employer's clothing (but rather are simply expected to dress in accordance with the style of the store). The Employer also offered employees a generous discount on the cost of store merchandise. Moreover, the Employer presented declarations of numerous employees confirming that they understood they did not have to buy or wear the Employer's clothing, and that they had submitted documentation of travel expenses and been reimbursed in accordance with company policy.

In determining that class certification was not appropriate on these claims, the court explained that the Employer's policies were facially lawful and thus could not supply the requisite common policy to support a determination of liability on a class-wide basis. Instead, a determination of liability would depend on individualized testimony of employees, making class certification unmanageable and unwarranted.

Court Rejects Employer's "Honest Belief" Defense In CFRA Leave Case

In *Richey v. AutoNation, Inc.*, a California Court of Appeal overturned an arbitrator's ruling against an employee's claim for violation of the California Family Rights Act ("CFRA"). The Court of Appeal rejected the arbitrator's reliance on the employer's "honest belief" that the employee had abused his approved leave. The Court of Appeal held that an honest belief was not enough for the employer to prevail, because the CFRA, unlike other discrimination laws, protects employees not only from discriminatory and retaliatory treatment, but also from "interference" with the employee's exercise of rights.

While employed as a sales manager at Power Toyota, Avery Richey ("the Employee") opened a family seafood restaurant. Later, while on an approved CFRA leave for a back injury, the Employee worked in his restaurant. AutoNation, Inc. ("the Employer") discharged the Employee because its policy prohibited employees from accepting employment with another company while on approved CFRA leave. The Employee subsequently sued, alleging that his discharge violated the CFRA. The trial court ordered him to arbitrate the claim, pursuant to his arbitration agreement with the Employer.

The arbitrator rejected the Employee's CFRA claim, even though the Employer's policy barring other employment was confusing and even though the Employee did not think he was violating the policy by managing his own

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restaurant. The arbitrator ruled that the Employer was nonetheless entitled to prevail on the basis of its "honest belief" defense, which provides that an employer may discharge an employee if it had an "honest belief," even if mistaken, that he or she was abusing his medical leave or deceiving the company about his or her outside employment.

When the Employee asked the trial court to vacate the arbitrator's ruling, the trial court upheld the arbitrator's decision, determining that the Employer could rely on its good faith, "honest belief" that the Employee had abused his leave, and that the Employer's suspicion of misuse was enough to justify its discharge decision.

On appeal, the Court of Appeal reversed the trial court's affirmation of the arbitration award and ordered the trial court to vacate the award. The Court of Appeal ruled that the arbitrator's acceptance of the Employer's "honest belief" defense was clear legal error that exceeded the arbitrator's authority. The Court of Appeal acknowledged that there are limits to the leave rights protected by the CFRA and the federal Family and Medical Leave Act ("FMLA"), and in that an employer may discharge or deny reinstatement to an employee on leave if the employee would not have been employed at the time reinstatement was requested (e.g., if the employee's reason for leave was untrue, the employer could discharge the employee for misconduct). But the arbitrator erred, the Court of Appeal opined, by accepting the Employer's "honest belief" defense, which wrongly relieved the company of its burden to prove that it refused to reinstate the Employee for abusing his medical leave by working another job while on that leave.

Finally, the Court of Appeal determined that the arbitrator failed to make findings of fact to support the denial of the Employee's CFRA claim. Although the Employer could have legally discharged the Employee for misusing approved leave, the Employer could not "simply rely on an imprecisely worded and inconsistently applied company policy to terminate an employee on CFRA leave without adequately investigating and developing sufficient facts to establish the employee had actually engaged in misconduct warranting dismissal."

In light of *Richey*, California employers should exercise caution in refusing to reinstate or in discharging an employee who is on CFRA leave, even when it appears that the employee has abused the leave or deceived the employer into approving the leave. Employers should thoroughly investigate each situation to ensure that a discharge would not violate the employee's CFRA rights. Moreover, leave policies should be clearly defined and adequately explained so that employees know exactly what is expected of them during an approved leave.

<u>Court Holds Employer Can Be Held Liable For Negligent Acts of Individual Misclassified as Independent Contractor</u>

Ruben Monarrez ("Plaintiff") sued the Automobile Club of Southern California ("Auto Club") after he was hit by a motorist while receiving roadside assistance from tow-truck driver Juan Felix ("Felix"). Felix was employed by Hirad, Inc. ("Hirad"), which maintained an independent contractor agreement with Auto Club. Plaintiff alleged that his injuries were caused by Felix's negligence in allowing him to remain in a dangerous location on the freeway shoulder, contrary to safety protocol. The issue on appeal was whether Plaintiff could hold Auto Club liable for Felix's alleged negligence.

The Court of Appeal held that Auto Club could be held liable for Felix's negligence. The court reasoned that the labeling of Hirad as an "independent contractor" was not dispositive with respect to the actual relationship of the parties.

The court noted that a person hiring an independent contractor has no right to control the manner and means by which the worker accomplishes the work. In this case, however, Auto Club had substantial control over the manner and means by which Hirad's tow truck drivers, like Felix, performed their daily duties. Specifically, Auto Club determined every detail of the technicians' appearance and behavior, and explained the exact actions a technician must undertake during a service call. Auto Club had the power to summarily terminate its relationship with Hirad if the appearance of its technicians/tow trucks did not meet its expectations, or if Hirad failed to fire a technician when Auto Club demanded it. Additionally, all of Hirad's technicians were certified by Auto Club, and could not receive dispatches if they failed to undergo Auto Club training every two years. All customers serviced were Auto Club customers, not Hirad's customers, and Hirad's technicians were monitored through face-to-face inspections, phone calls, and weekly status reports. Finally, technicians wore uniforms bearing only the Auto Club logo.

The court held that based on the high level of control it exercised over Hirad's employees, Auto Club had the right to control and supervise the tow truckers' actions such that there was an agency relationship, rather than one of an independent contractor. Accordingly, Auto Club could be held liable for Felix's tortious conduct.

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 or Heather Stone at (858) 755-8500; Mark Bloom, Jennifer Weidinger or Edgar Martirosyan at (310) 649-5772.

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