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PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *January 2012*

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

IRS Announces 2012 Standard Mileage Rates

The Internal Revenue Service has issued the 2012 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes.

Beginning on January 1, 2012, the standard mileage rates for the use of a car (as well as vans, pickups or panel trucks) will be:

- 55.5 cents per mile driven for business purposes
- 23 cents per mile driven for medical or moving purposes
- 14 cents per mile driven in service of charitable organizations

The rate for business miles driven is unchanged from the mid-year adjustment that became effective on July 1, 2011. The rate is based on an annual study of the fixed and variable costs of operating an automobile.

Don't Forget: New Employment Laws Took Effect

The following laws took effect in 2012:

- **SB 272 (Labor Code § 1510):** Clarifies 2010's paid bone marrow/organ donation leave law by confirming (1) the time off provided by the original statute is measured in "business days" as opposed to calendar days; (2) an employer may require an employee to use up to five days of earned sick leave, vacation or paid time off for bone marrow leave, and up to two weeks of earned sick leave, vacation or paid time off for organ donation leave; and (3) the twelve month period for measuring the entitlement is "rolling" based on the date of the leave request.

- **SB 299 (Government Code § 12945):** Requires employers with five or more employees to continue to maintain and pay for health coverage under a group health plan for an eligible female employee who takes Pregnancy Disability Leave, up to a maximum of four months in a twelve-month

period. The benefits must be maintained at the same level and under the same conditions as if the employee had continued working during the leave period.

- **SB 459 (Labor Code §§ 226.8, 2753):** Creates severe penalties for the "willful" misclassification of employees as independent contractors.

- **SB 559 (Government Code § 12940):** Amends the Fair Employment and Housing Act ("FEHA") to state that employers are prohibited from discriminating against employees on the basis of their genetic information.

- **AB 22 (Civil Code § 1785.20.5; Labor Code § 1024.5):** Limits California employers' ability to use credit reports for employment purposes.

- **AB 240 (Labor Code §§ 98, 1194.2):** Permits an employee to recover liquidated damages of twice the amount of wages improperly withheld plus interest, in proceedings before the Labor Commissioner involving claims for minimum wage underpayment.

- **AB 469 (Labor Code § 2810.5):** Requires employers to provide each employee, at the time of hire, with a notice that specifies (1) the pay rate and basis (whether hourly, salary, commission or otherwise), as well as any overtime rate; (2) allowances, if any, claimed as part of the minimum wage, including meals or lodging; (3) the regular pay day; (4) the name of the employer, including any "doing business as" names used; (5) the physical address and telephone number of the employer's main office or principal place of business, and a mailing address, if different; (6) the name, address and telephone number of the employer's workers' compensation carrier; and (7) any other information the Labor Commissioner deems material and necessary. The employer must notify each employee in writing of any changes to the information set forth in the notice within seven days of the changes, unless such changes are elsewhere reflected on a timely wage statement or other writing required by law to be provided. The notice requirements do not apply to state government employees, salaried exempt employees under California state law, or employees covered by a valid collective bargaining agreement.

  (To assist employers in providing the above information, the Labor Commissioner has prepared a template form, which can be accessed at http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf. It should be noted that this template includes items not specified in the actual statute: 1) the employee's hire date and position; 2) the business form of employer – corporation, partnership and the like; 3) the identity of any other entities used to hire employees or administer wages or benefits, excluding recruiting services or payroll services; 4) whether the employment agreement is oral or written; 5) the workers' compensation policy number or certificate number for permissible self-insurance; 6) the name and signature of the employee and the date the notice was received and signed; and 7) the name and signature of the employer representative providing the notice and the date notice is provided. The Labor Commissioner has stated that employers may develop their own notices so long as they contain all of the information

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required by the law, including *all* of the information requested on DLSE's template. As such, the additional items should be considered "other information the Labor Commissioner deems material and necessary." A sample template containing all of the required information can also be found at the back of this newsletter.)

- **AB 887 (Government Code § 12940):** Amends the FEHA to further define "gender" to include both gender identity and "gender expression," and to make clear that discrimination on either basis is prohibited.

- **AB 1236 (Labor Code § 2811 et seq.):** Allows employers to continue to choose to use E-Verify, but prohibits California state agencies and local governments from passing mandates that require employers to use E-Verify.

The Following Law Takes Effect in 2013:

- **AB 1396 (Labor Code § 2751, repealing § 2752):** Requires employers who have commission pay arrangements to put those agreements into a signed written contract that sets forth the method by which the commissions will be computed and paid.

NLRB Postpones Effective Date of Rights Posting Rule to April 30, 2012

The National Labor Relations Board ("NLRB") has agreed to postpone the effective date of its employee rights notice-posting rule at the request of a federal court in Washington, D.C. hearing a legal challenge regarding the rule. The Board's ruling states that it has determined that postponing the effective date of the rule would facilitate the resolution of the legal challenges that have been filed with respect to the rule. The new implementation date is April 30, 2012.

Most private sector employers will be required to post the 11-by-17-inch notice on the new implementation date of April 30. The notice is available at no cost from the NLRB through its website, www.nlrb.gov, which has additional information on posting requirements and NLRB jurisdiction.

California Assembly Considers Raising Minimum Wage

The California Assembly is considering a bill that would raise the State's minimum wage from $8.00 per hour to $8.50, beginning January 1, 2013. In its current form, AB 196 would provide for an adjustment to the hourly minimum wage on January 1, 2014, and annually thereafter, to maintain employee purchasing power. The automatically adjusted minimum wage would be calculated using the California Consumer Price Index. The bill would also prohibit the Industrial Welfare Commission ("IWC") from adjusting the minimum wage downward and from adjusting the minimum wage upward if the average percentage of inflation for the previous year was negative. The bill would additionally require the IWC to publicize the automatically adjusted minimum wage. Finally, the IWC would be given leeway to increase the minimum wage in an amount greater than the formula would provide.

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The bill is currently being reviewed by the Labor and Employment Committee. The same proposal was introduced during 2011 as AB 10 and is currently in the Assembly Appropriations Committee suspense file.

California Assembly Considers Bill Prohibiting Discrimination Against Unemployed Job Applicants

On January 5, 2012, California lawmakers introduced AB 1450, a bill that would make it unlawful, unless based on a bona fide occupational qualification or any other provision of law, for an employer to knowingly or intentionally refuse to consider for employment or refuse to offer employment to an individual because of the individual's status as unemployed, publish an advertisement for any job that includes provisions pertaining to an individual's status as unemployed, or direct or request that an employment agency take an individual's status as unemployed into account in screening or referring applicants for employment.

The bill would also make it unlawful, unless based on a bona fide occupational qualification or any other provision of law, for an employment agency to knowingly or intentionally refuse to consider or refer an individual for employment because of the individual's status as unemployed, limit, segregate, or classify individuals in any manner that may limit their access to information about jobs or referral for consideration of jobs because of their status as unemployed, or publish an advertisement, as described above with respect to employers.

While the bill would not create a private right of action against employers or employment agencies, such entities would be subject to civil penalties for violating its provisions.

II.

JUDICIAL UPDATE

Supreme Court Delays Ruling on *Brinker*

The California Supreme Court has issued an order delaying its ruling on *Brinker Restaurant Corp. v. Superior Court,* pending its analysis of supplemental briefing on whether the Court's ruling on the "rolling five" meal period issue should be applied retroactively. The "rolling five" issue addresses the timing of meal breaks during the workday. Both sides had until January 3, 2012 to provide supplemental briefs on this issue, and then had ten days to respond to the other side's submission. The new deadline for the Court's decision is April 12, 2012.

Supreme Court Clarifies "Administrative" Exemption

In *Harris v. Superior Court (Liberty Mutual Insurance Co.),* the California Supreme Court unanimously reversed the decision of a lower appellate court, which held that certain insurance claims adjusters are not exempt employees as a matter of law.

The plaintiffs, a group of claims adjusters, sued Liberty Mutual Insurance Company claiming that they were misclassified as "exempt" employees for the

purposes of overtime pay. The Court of Appeal agreed, holding that claims adjusters are part of an insurance company's "production" and therefore cannot be performing "administrative" functions. The Court of Appeal's decision also indicated that only work that is performed "at the level of making company policy" would count towards the administrative exemption.

In rejecting the appellate court's narrow interpretation of the administrative exemption, the Supreme Court relied on the federal Department of Labor guidelines for guidance in interpreting the Wage Order exemption. The Court clarified that in order to qualify for the administrative exemption, employees must (1) be paid a salary of at least twice the current minimum wage, (2) perform administrative work, (3) have primary duties that involve administrative work, and (4) discharge those primary duties by regularly exercising independent judgment and discretion. The Court also rejected the administrative/production worker dichotomy as a dispositive test.

The Court, however, limited its ruling to setting forth the proper standard for determining whether an employee is performing "administrative" work. It declined to rule on whether or not the plaintiffs/claims adjusters were, in fact, exempt. This issue will be subject to future litigation.

California Court Clarifies Employers' Obligation to Provide "Reporting Time" and "Split Shift" Pay

A California Court of Appeal held in *Aleman v. Airtouch Cellular* that an employer is not required to provide "reporting time pay" to an employee who attended meetings at work because the meetings were scheduled ahead of time and the plaintiff worked at least half of the scheduled time. The Court also held that the employer was not required to provide additional compensation to an employee who worked "split shifts" because on each occasion that such shift was worked, the employee earned more than the minimum amount required by the Industrial Welfare Commission's Wage Order No. 4-2001 ("Wage Order 4-2001").

The plaintiffs worked mostly as "retail sales representatives" at AirTouch Cellular ("AirTouch" or "the company") stores and kiosks, selling cell phones, accessories, and cell phone service plans. They filed a putative class action against AirTouch, alleging that the company did not properly pay its nonexempt employees for attending mandatory store meetings. The thrust of the plaintiffs' claims was that AirTouch violated two separate provisions of Wage Order 4-2001: (1) it failed to provide reporting time pay for days when employees were required to report to work just to attend work-related meetings; and (2) it failed to provide split shift compensation for days on which they attended a meeting in the morning and worked another shift later the same day.

With respect to "reporting time pay," Wage Order 4-2001 provides that "[e]ach workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at the employee's regular rate of pay."

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In holding that the trial court properly granted summary judgment in favor of the employer, the Court of Appeal simplified the issue by framing it as follows: if an employee's only scheduled work for the day is a mandatory meeting of one and a half hours, and the employee works a total of one hour because the meeting ends a half hour early, is the employer required to pay reporting time pay pursuant to Wage Order 4-2001 in addition to the one hour of wages? The Court answered this question in the negative "because the employee was furnished work for more than half the scheduled time. The employee would be entitled to receive one hour of wages for the actual time worked, but would not be entitled to receive additional compensation as reporting time pay."

The Court further clarified that under Wage Order 4-2001, when an employee is scheduled to work, the minimum two-hour pay requirement applies only if the employee is furnished work for less than half the scheduled time. In this case, each period of work at issue, including meetings, was scheduled (at least four days in advance), and the plaintiff always worked at least half the duration of each period.

The Court then turned its attention to the split shift issue and the portion of Wage Order 4-2001 that provides that "[w]hen an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment." While there was no dispute that there were five occasions on which the plaintiff worked a short shift in the morning followed by a longer shift later the same day, AirTouch argued, and the Court agreed, that additional compensation was not owed because every time the plaintiff worked a split shift, he was paid a total amount greater than the minimum wage for all hours worked plus one additional hour. In essence, the Court relied on the "plain language" of the split shift regulation, which merely "reflects an intent to ensure that an employee who works a split shift [is] compensated highly enough so that he or she receives more than the minimum wage for the time actually worked plus one hour."

This ruling provides employers leeway to schedule short meetings on days employees would not otherwise work without having to provide a "reporting time" premium as long a such meetings last for at least half of the scheduled duration.

California Court Rules "Unconscionable" Arbitration Agreement Is Unenforceable

In *Wisdom v. AccentCare, Inc.*, the California Court of Appeal held that a clause in an employment application—requiring only the *applicant* to agree that, if hired, all disputes would be submitted to binding arbitration—was both procedurally and substantively unconscionable and therefore unenforceable.

The plaintiffs were employed by AccentCare as on-call staffing coordinators. They filed a complaint for damages, injunctive, and declaratory relief, alleging they were not paid for all of the overtime and time they spent handling off-hour calls.

Four of the six plaintiffs signed acknowledgment forms when they applied for employment with AccentCare. The acknowledgment was the last page of an

application form that AccentCare gave the plaintiffs, along with several other forms, when they applied for a job. The last page of the form consisted of five initialed paragraphs and a signature line at the bottom. The heading directed: "Acknowledge Your Understanding of the following Statements and Agreements by Placing Your Initials by Each Paragraph, then Sign and Date Below." The third of the five paragraphs was an arbitration agreement that stated as follows:

> *I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application. I further agree, in the event that I am hired by AccentCare, that all disputes that cannot be resolved by informal internal resolution which might arise out of my employment with AccentCare, whether during or after that employment, will be submitted to binding arbitration. I agree that such arbitration shall be conducted under the rules then in effect of the American Arbitration Association.*

The plaintiffs did not negotiate the terms of the application form, nor were the provisions explained to them. They were not told that their signature on the form was optional, and they were not aware of the consequences of signing a binding arbitration agreement.

AccentCare brought a motion to compel arbitration of the claims asserted by the four plaintiffs who had signed the arbitration agreement, but the trial court denied the motion on the ground that the agreement was procedurally and substantively unconscionable. The Court of Appeal affirmed the trial court's ruling, stating that a court can refuse to enforce an unconscionable provision in a contract. A provision is unenforceable if it is both procedurally and substantively unconscionable. A contract can be procedurally unconscionable if it is oppressive due to the unequal bargaining power of the parties. The substantive element of unconscionability means that the agreement is overly harsh or one-sided.

In this case, the Court deemed the preemployment arbitration agreement to be procedurally unconscionable because (1) its language implied there was no opportunity to negotiate, (2) the rules of arbitration were not spelled out in the agreement or attached thereto, and (3) the plaintiffs did not understand they were waiving their right to a trial, nor was that fact explained to them. The Court also concluded that the agreement was substantively unconscionable because it lacked mutuality. According to the Court, the lack of mutuality was made apparent by contrasting the agreement with a different application form, also used by AccentCare, which provided that "in exchange for my agreement to arbitrate, AccentCare also agrees to submit all claims and disputes it may have with me to final and binding arbitration … ."

Because the agreement was both procedurally and substantively unconscionable, it was not enforceable. This decision serves as an important reminder to employers to ensure that their preemployment arbitration agreements meet all of the prerequisites for procedural and substantive conscionability. Employers should also consider attaching to their arbitration agreements copies of any procedural rules (e.g., American Arbitration Association) referenced therein.

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California Court Holds that Nonexclusive Insurance Agent is Independent Contractor

In *Arnold v. Mutual of Omaha Insurance Co.,* the California Court of Appeal held that a nonexclusive insurance agent was an independent contractor rather than an employee. Plaintiff Kimbly Arnold ("Arnold") worked as a nonexclusive insurance agent for Mutual of Omaha Insurance Company ("Mutual"). After terminating her contractual relationship with Mutual, she filed suit, claiming unpaid employee entitlements under the Labor Code. The trial court determined Arnold's causes of action depended on her being a former "employee" of Mutual, and the undisputed facts established she was not an employee, but rather an independent contractor. Accordingly, the trial court granted summary judgment in Mutual's favor, and Arnold subsequently appealed.

In holding that the trial court properly granted summary judgment, the appellate court confirmed that the trial court properly applied the common law test for employment, which generally focuses on the question of whether or not the person to whom service is rendered "has the right to control the manner and means of accomplishing the result desired." Additional factors include whether the principal has the right to discharge at will, without cause; whether the one performing services is engaged in a distinct occupation or business; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; the skill required in the particular occupation; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; the method of payment, whether by the time or by the job; whether or not the work is a part of the regular business of the principal; and, whether or not the parties believe they are creating the relationship of employer-employee.

In this case, the salient evidentiary points established Arnold used her own judgment in determining whom she would solicit for applications for Mutual's products, the time, place, and manner in which she would solicit, and the amount of time she spent soliciting for Mutual's products. Her appointment with Mutual was nonexclusive, and she in fact solicited for other insurance companies during her appointment with Mutual. Her assistant general manager at Mutual's Concord office did not evaluate her performance and did not monitor or supervise her work. Training offered by Mutual was voluntary for agents, except as required for compliance with state law. Agents who chose to use the Concord office were required to pay a fee for their workspace and telephone service. Arnold's minimal performance requirement to avoid automatic termination of her appointment was to submit one application for Mutual's products within each 180-day period. Thus, under the principal test for employment under common law principles, Mutual had no significant right to control the manner and means by which Arnold accomplished the results of the services she performed as one of Mutual's soliciting agents.

The court found that the additional factors of the common law test also weighed in favor of finding an independent contractor relationship. Although Mutual could terminate the appointment at will, a termination at-will clause for both parties may properly be included in an independent contractor agreement, and

is not by itself a basis for changing that relationship to one of an employee. Notably, Arnold was engaged in a distinct occupation requiring a license from the Department of Insurance, and was responsible for her own instrumentalities or tools with the exception of limited resources offered by Mutual to enhance its agents' successful solicitation of Mutual's products. Arnold was required to pay a fee for the use of Mutual's office space and telephone service. Although Mutual paid its agents in a systematic way every two weeks, Arnold's payment itself—chiefly commissions—was based on her results and not the amount of time she spent working on Mutual's behalf. Finally, both Arnold and Mutual believed, at the time of her appointment, they were creating an independent contractor relationship and not an employee relationship.

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NOTICE TO EMPLOYEE

EMPLOYEE

Employee Name: _____ Hire Date: _____

EMPLOYER

Name of Employer: _____

(Check all that apply): □ Sole Proprietor □ Corporation □ Limited Liability Company □ General Partnership

□ Other type of entity: _____

□ Staffing agency (e.g., temp agency or PEO)

Other Name Employer is doing business as (if applicable): _____

Physical Address of Main Office: _____

Employer's Mailing Address: _____

Employer's Telephone Number: _____

If the worksite employer uses any other business or entity to hire employees or administer wages or benefits, complete the information above for the worksite employer, complete the information below for the other business, and complete the remaining sections. If there is no other business or co-employer, or if the only other business is a recruiting service or a payroll processing service, skip the rest of this section, and complete the remaining sections.

Name of Other Business: _____

This other business is a:

□ Professional Employer Organization (PEO) or Employee Leasing Company or a Temporary Services Agency

□ Other: _____

Physical Address of Main Office: _____

Mailing Address: _____

Telephone Number: _____

WAGE INFORMATION

Rate(s) of Pay: _____ Overtime Rate(s) of Pay: _____

Rate by (check box): □ Hour □ Shift □ Day □ Week □ Salary □ Piece rate □ Commission

□ Other (provide specifics): _____

Employment agreement is (check box): □ Oral □ Written

Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):

_____

Regular Pay Day: _____

WORKERS' COMPENSATION

Current Insurance Carrier's Name: _____

Address: _____

Telephone Number: _____

Policy No.: _____

□ Self-Insured (Labor Code 3700) and Certificate Number for Consent to Self-Insure: _____

ACKNOWLEDGMENT OF RECEIPT

_____	_____
(PRINT NAME of Employer representative)	(PRINT NAME of Employee)
_____	_____
(SIGNATURE of Employer representative)	(SIGNATURE of Employee)
_____	_____
(Date provided to employee & signed by representative)	(Date received by employee & signed by employee)