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I.

LEGAL/LEGISLATIVE UPDATE

Federal

Congress Targets Employee Misclassification with Fair Playing Field Act

Twenty-seven co-sponsors in the House of Representatives have introduced the Fair Playing Field Act of 2012 (HR 4123), a bill that appears to be identical to the Fair Playing Field Act of 2010 (HR 6128), which was never acted upon by Congress. This is the second time in eighteen months that Congress has introduced a bill intended to eliminate the so-called "safe harbor" in federal tax law relied upon by some businesses that for years may have consistently misclassified employees as independent contractors. That law currently affords businesses a safe harbor to treat workers as independent contractors for employment tax purposes if the company has a reasonable basis for such treatment and has consistently treated such employees as independent contractors by reporting their compensation on Form 1099s.

If passed, HR 4123 would amend the Internal Revenue Code to permit the Secretary of the Treasury to issue prospective guidance clarifying the employment status of individuals for purposes of employment taxes and to prevent retroactive assessments with respect to such clarifications. The bill would also: (1) eliminate the reduced penalty provisions of the Tax Code for failure to withhold income taxes and the employee's share of FICA taxes in cases where the business did not have a reasonable basis for treating a worker as an independent contractor; (2) require businesses who use independent contractors "on a regular and ongoing basis" to provide them with a written statement informing them of their federal tax obligations, notifying them of the employment law protections that do not apply to them, and telling them how they can seek a determination of their status from the IRS; and (3) exclude certain skilled workers (engineers, designers, drafters, computer programmers, systems analysts, and the like), who are *not* eligible for the safe-harbor protection under current law, from the prohibition on retroactive tax assessments.

The bill has been referred to the House Committee on Ways and Means.

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Bill Banning Predispute Arbitration Agreements Introduced in the House

On March 8, 2012 Rep. Robert Andrews (D-NJ) reintroduced a bill (HR 4181) that would effectively ban most employment-related predispute arbitration agreements. Specifically, this bill would stipulate that no predispute arbitration agreement would be valid or enforceable if it requires arbitration of an employment dispute. The term "employment dispute" means a dispute between an employer and employee arising out of the relationship of employer and employee.

The bill would exempt collective bargaining agreements from the ban on predispute arbitration agreements, although such agreements would not be permitted to contain a provision "waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefore."

The bill has been referred to the House Committee on the Judiciary.

Senators Introduce Bill Designed to Alter Burden of Proof in ADEA Cases

Senators Tom Harkin (D-IA), Chuck Grassley (R-IA), and Patrick Leahy (D-VT) have introduced the Protecting Older Workers Against Discrimination Act ("POWADA"), a bill that would overturn *Gross v. FBL Financial Inc.* *Gross* was a 2009 Supreme Court decision that toughened an employee's burden of proof in claims of discrimination brought pursuant to the Age Discrimination in Employment Act ("ADEA"). The *Gross* decision provided that: (1) a plaintiff who sues under the ADEA must prove that he/she was fired "because of" age (i.e., that age was the "but for" reason for the termination); and (2) the plaintiff always has the burden of proof in an ADEA case (i.e., the burden never shifts to the defendant to show that it would have made the same decision absent any consideration of the plaintiff's age). This framework differs from Title VII, which requires that a plaintiff show only that a protected characteristic (e.g., race, sex, etc.) was "a motivating factor" in the employment decision. If the plaintiff in a Title VII case makes that showing, the burden then shifts to the defendant to justify its decision.

POWADA (SB 2189) would establish that when an employee shows that discrimination was a "motivating factor" behind a decision, the burden shifts back to the employer to show that it complied with the law. Specifically, the bill states that in order to establish claims under the ADEA, complainants are not required to demonstrate that age was the *sole* cause of the employment practice.

The bill has not yet been referred to a committee.

California

There are a number of bills pending before both houses of the state legislature that, if signed into law by Governor Jerry Brown, would impact both employers and employees in California. These bills include:

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AB 1450 (Allen): AB 1450 would prevent employers, employment agencies, and individuals who operate Internet sites from, among other things, refusing to hire a person because of that person's employment status, and publishing a job opening that includes provisions pertaining to an individual's current employment status. Violations would subject employers, employment agencies, and individuals who operate Internet sites to civil penalties that increase (from $1,000 to $10,000) as the number of violations increases. The bill has passed the Assembly Committee on Labor & Employment and has been referred to the Judiciary Committee.

AB 1740 (Perez): AB 1740 would include one's status as a victim of domestic violence, sexual assault, or stalking as an additional basis upon which the right to seek, obtain, and hold employment cannot be denied under the Fair Employment and Housing Act ("FEHA"). By expanding the bases upon which discrimination is prohibited under the FEHA, this bill would also expand the bases upon which discrimination is prohibited under other antidiscrimination provisions that prohibit discrimination on the same bases as provided for in the FEHA. Other antidiscrimination provisions include provisions that make willful discrimination in a recruitment or apprenticeship program on those bases a misdemeanor. The bill has passed the Assembly Committee on Labor & Employment and has been referred to the Judiciary Committee.

AB 2039 (Swanson): AB 2039 seeks to expand the California Family Rights Act ("CFRA") by: (1) eliminating the age and dependency requirements to care for a "child," therefore allowing a qualifying employee to care for an independent adult child experiencing a serious health condition; (2) expanding the definition of "parent" to include an employee's parent-in-law; and (3) permitting an employee to care for a grandparent, sibling, grandchild, or domestic partner with a serious health condition. The bill has passed the Assembly Committee on Labor & Employment and has been referred to the Appropriations Committee.

SB 1374 (Harman): This bill would provide employers with protection from litigation if the employer can prove its actions or omissions were based upon a good faith reliance on the written advice or opinion of a state agency. SB 1374 has been referred to the Senate Judiciary Committee.

AGENCY

Federal

EEOC Issues Final Regulation Under ADEA

The U.S. Equal Employment Opportunity Commission ("EEOC") has issued its final rule on disparate impact and reasonable factors other than age ("RFOA") under the Age Discrimination in Employment Act ("ADEA"). The final rule makes the EEOC's ADEA regulations consistent with Supreme Court case law and clarifies that the reasonableness test is not a rational-basis test.

The agency noted that in *Meacham v. Knolls Atomic Power Laboratory* (2008) 554 U.S. 84, the Supreme Court ruled that an employer defending an ADEA claim of disparate impact has the RFOA burden of proof—the burden of persuasion

as well as production. The EEOC revised its ADEA regulations to reflect the Supreme Court's holding that the RFOA provision is an affirmative defense in disparate impact cases for which the employer bears the burdens of both production and persuasion.

The EEOC's final rule also amends its "Differentiations Based on Reasonable Factors Other than Age" regulation, 29 C.F.R. § 1625.7, by identifying new considerations for establishing the RFOA defense in age discrimination cases. Among other things, the final rule declares that the degree of subjectivity in decision-making should be considered in evaluating employer liability where it is alleged that an employment practice has a disparate impact against older workers. Other considerations include the extent to which a factor having a disparate impact "is related to the employer's stated business purpose," and the extent to which the employer defined the factor accurately and applied it fairly and properly (and provided supervisors guidance) to avoid disparate impact.

The Final Rule is effective April 30, 2012.

II.

JUDICIAL

California

California Supreme Court (Finally) Rules on *Brinker:* Employers Have No Duty to *Ensure* Meal and Rest Breaks are Taken

In a much-anticipated ruling that affects thousands of California businesses and millions of employees, the California Supreme Court just issued its decision in *Brinker Restaurant Corporation et al. v. Superior Court (Hohnbaum),* wherein it held, among other things, that while employers must *provide* their employees with legally-mandated meal and rest periods, they have *no* duty to *ensure* that such breaks are actually taken (i.e., that employees perform no work during those breaks).

Defendants Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. (collectively, "Brinker"), own and operate popular restaurants throughout California, including Chili's Grill & Bar and Maggiano's Little Italy. The plaintiffs ("Plaintiffs") are or were nonexempt employees at one of more of Brinker's restaurants.

Procedural History

Nine years ago, Plaintiffs filed a putative class action lawsuit against Brinker, alleging that Brinker failed to provide its employees legally-mandated meal and rest breaks.[1] During the course of litigation, two distinct theories

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[1] Under California law, employers are obligated to afford their nonexempt employees meal and rest periods during the workday. [See Lab. Code §§226.7, 512; Industrial Wage Order No. 5-2001 ("Wage Order No. 5").] Labor Code section 226.7(a) prohibits an employer from requiring an employee "to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." Employers who violate these requirements must pay premium wages.

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underlying the meal break claim emerged: (1) Brinker provided employees fewer meal periods than required by Labor Code section 512 ("section 512") and Wage Order No. 5; and (2) Brinker sometimes required "early lunching" (a single meal period soon after the beginning of a work shift followed by six, seven, eight or more hours without an additional meal period). Plaintiffs also contended that Brinker required employees to work off-the-clock during meal periods and engaged in time shaving (unlawfully altering employee time records to misreport the amount of time worked and break time taken).

Plaintiffs moved for class certification, defining the class as "all present and former employees of Brinker who worked at a Brinker owned restaurant in California, holding a nonexempt position, from and after August 16, 2001." The class definition included several subclasses, including (1) a "rest period subclass," comprising "all class members who worked one or more work periods in excess of three and one-half hours without receiving a paid ten minute break during which the class member was relieved of all duties"; (2) a "meal period subclass," covering "all class members who worked one or more work periods in excess of five consecutive hours, without receiving a 30 minute meal period during which the class member was relieved of all duties"; and (3) an "off-the-clock subclass" for "all class members who worked off-the-clock or without pay."

Brinker opposed class certification, arguing that a rest break subclass should not be certified because an employer's obligation is simply to permit such breaks to be taken, as Brinker did, and whether employees in fact choose to take such breaks is an individualized inquiry not amenable to class treatment. Brinker contended a meal period subclass should not be certified because an employer is obliged only to make meal breaks available and need not ensure that employees take such breaks. Brinker asserted it had complied with its legal obligation to make meal breaks available, many employees took those breaks, and inquiry into why particular employees did not take meal breaks raised individual questions precluding class treatment. Brinker also contended that Plaintiffs' "early lunching" claims were unfounded. Finally, Brinker argued that the "off-the-clock subclass" should not be certified because no Brinker policy permitted alteration of time records, Brinker did not suffer or permit off-the-clock work, and any such off-the-clock work would require individualized employee-by-employee proof.

Following a full hearing, the trial court granted class certification. The California Court of Appeal reversed class certification as to the three disputed subclasses. The California Supreme Court then granted review.

Court Provides Clarification Regarding Timing and Rate of Rest Periods

The Supreme Court confirmed that, pursuant to Wage Order No. 5,[2] employees are entitled to ten minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to ten hours, thirty minutes for shifts of more than ten hours up to 14 hours, and so on. Although Plaintiffs asserted that employers have a legal duty to provide their employees a

[2] Wage Order No. 5 provides, in relevant part: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3.5) hours."

rest period *before* any meal period, the Court construed the plain language of the wage order and found no such requirement. The Court confirmed that the only constraint on timing is that rest breaks must fall in the middle of work periods "insofar as practicable." Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible.

With respect to the class certification issue, the Court reversed the appellate court's ruling, finding that Brinker's uniform rest period policy—under which employees receive one 10-minute rest break per four hours worked but do not *necessarily* receive a second rest break for shifts longer than six, but shorter than eight, hours—as measured against wage order requirements, is "by its nature" a common question eminently suited for class treatment. That is, because Plaintiffs pleaded and presented substantial evidence of a uniform rest break policy authorizing breaks only for each full four hours worked, the trial court's certification of a rest break subclass should not have been disturbed.

Court Provides Clarification Regarding Timing and Scope of Meal Period Requirement

On the issue of meal periods, the Court rejected the Plaintiffs' contention that an employer is obligated to "ensure that work stops for the required thirty minutes." Instead, the Court concluded that under Wage Order No. 5 and section 512,[3] an employer must relieve the employee of all duty for the designated period, but need not *ensure* that the employee does not work. In other words, the employer is obligated only to "make available" meal periods, with no responsibility for whether they are taken. The meal period requirement is satisfied if the employee "(1) has at least 30 minutes uninterrupted, (2) is free to leave the premises, and (3) is relieved of all duty for the entire period."

Notably, the Court stated that "the obligation to ensure employees do no work may in some instances be inconsistent with the fundamental employer obligations associated with a meal break: to relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time." That is, voluntary work may occur while the employee is not subject to the employer's control, and its cessation may require the reassertion of employer control.

The Court also held that "proof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay; employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability. On the other hand, an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks."

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[3] Under section 512, "an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." Similarly, under Wage Order No. 5, "no employer shall employ any person for a work period of more than five hours without a meal period of not less than 30 minutes" absent a mutual waiver in certain limited circumstances.

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Finally, the Court held that absent waiver, section 512 requires a first meal period no later than the end of the employee's fifth hour of work, and a second meal period no later than the end of an employee's tenth hour of work. The Court explicitly rejected the Plaintiffs' contention that the law should be read as requiring a second meal period no later than five hours after the end of a first meal period if a shift is to continue (i.e., an employer must provide a meal period at least once every five hours).

In terms of class certification, the Court determined that the proposed class definition was too broad in that it included not only every Brinker employee who might have a claim under Plaintiffs' "failure to provide meal periods" theory, but also every employee who might have had a claim under the theory that a meal period must be provided every five hours. Consequently, in light of the Court's ruling regarding the scope of an employer's duty to "provide" meal periods, as well as its ruling regarding the timing issue, the class definition included individuals with no possible claim. Accordingly, the Court remanded the question of meal subclass certification to the trial court for reconsideration in light of its clarification of the applicable substantive law.

Court Affirms Denial of Class Certification Regarding Off-the-Clock Claims

The Court characterized Plaintiffs' "off-the-clock" claims as an "offshoot" of their meal period claims. That is, Plaintiffs contend Brinker required employees to perform work while clocked out during their meal periods; they were never relieved of all duty nor afforded an uninterrupted 30 minutes, and were not compensated. The Court held, however, that unlike the rest period claim and subclass, for this claim there was neither a common policy nor common method of proof. The only formal Brinker off-the-clock policy submitted by the parties disavows such work, consistent with state law. Similarly, Plaintiffs' failed to present substantial evidence of a company policy to pressure or require employees to work off the clock. The fact that employees are clocked out "creates a presumption they are doing no work."

Because nothing before the trial court demonstrated how Plaintiffs' off-the-clock claim could be shown through common proof, and because the trial court was instead only presented with anecdotal evidence of a handful of individual instances in which employees worked off the clock, with or without knowledge or awareness by Brinker supervisors, the Court of Appeal properly vacated certification of this subclass.

In Summary

This long-awaited decision resolves numerous uncertainties in the field of wage and hour law, and clarifies employers' obligations with respect to the provision of meal and rest breaks. Much to employers' delight, the Court's decision will likely make it significantly more difficult for employees to obtain class certification on meal and rest break claims, as individual questions and circumstances regarding the provision of breaks to each employee must now be taken into account (i.e., an employee can no longer assert simply that he did not take a break, but rather must demonstrate that the employer denied him *the opportunity* to do so).

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Brinker **Take-Aways**

Rest Periods

- **Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, thirty minutes for shifts of more than 10 hours up to 14 hours, and so on.**

- **The only constraint on the timing is that such breaks must fall in the middle of work periods "insofar as practicable." Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible.**

Meal Periods

- **An employer's duty is to provide a meal period to its employees.**

- **The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice regarding an employer's obligation will vary from industry to industry.**

- **The employer is *not* obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay.**

- **The employer must provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work.**

Court Rules in Favor of Employee in Dispute Over Applicability of Arbitration Agreement

In *Grey v. American Management Services*, the California court of appeal held that an employee was not required to arbitrate his claims against his employer where his explicit agreement to do so was superseded by a later employment contract that did not require arbitration.

The defendant, American Management Services ("AMS"), is a residential and commercial property management company. In June 2006, Brandon Grey ("Grey") applied for a position as an investment manager. The application pack that Grey was provided contained an Issue Resolution Agreement ("IRA"), which provided that Grey would "settle any and all previously unasserted claims, disputes

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or controversies arising out of or in relation to the application or candidacy for employment, employment, and/or cessation of employment exclusively by final and binding arbitration before a neutral Arbitrator." Attached to the IRA were issue resolution rules, which described the arbitration procedure. Grey signed the IRA.

Shortly thereafter, Grey accepted employment with AMS and was required to sign an employment contract. The contract provided that "a dispute arising out of the alleged breach of any other provision of this Agreement shall be submitted to final and binding arbitration." A subsequent provision stated: "This Agreement is the entire agreement between the parties in connection with Employee's employment with AMS, and supersedes all prior contemporaneous discussions and understandings." In the next paragraph, the contract provided: "Employee acknowledges that this Agreement is supplemented by such general employment policies and procedures as AMS may implement from time to time. Employee agrees that it is his sole responsibility to remain informed about all applicable general employment policies and guidelines of AMS that may be contained in the Employee Handbook or posted on AMS's intranet site." The IRA and the attached issue resolution rules were posted on AMS's intranet.

During 2009, Grey sued AMS for, among other things, employment discrimination, harassment, and retaliation on the basis of sexual orientation. AMS petitioned the court to compel Grey to arbitrate his claims under the terms of the IRA. Grey opposed the petition, contending that: (1) the employment contract superseded the IRA, and (2) the IRA was unconscionable. The trial court granted the petition and ordered Grey to arbitrate his claims. However, the appellate court reversed the ruling, finding that the employment contract contained an integration clause (i.e., "This Agreement is the entire agreement between the parties…and supersedes all prior and contemporaneous discussions and understandings"), and as such, the contract superseded the IRA. The appellate court rejected AMS's contention that the IRA was an "employment procedure," and accordingly, was incorporated by reference into the employment contract.

The court ultimately held that because a party is not obligated to arbitrate unless he or she has expressly agreed to do so by entering into a valid and enforceable written contract with the party who seeks arbitration, Grey was not required to arbitrate his claims. The employment contract superseded the IRA, and the scope of the arbitration provision in the employment contract applied only to claims arising from a breach of that contract and did not encompass all claims an employee may have against AMS. Because all of Grey's claims were for statutory violations, none of them arose from the employment contract.

<u>Court Grants Summary Adjudication in Favor of Employer on Retaliation Claim</u>

In *Baker v. Mulholland Security and Patrol, Inc.*¸ the California court of appeal examined the burdens of proof borne by the plaintiff employee and defendant employer on a retaliation claim. The employer, Mulholland Security and Patrol, Inc. ("Mulholland"), employed security guards to work on-site at various clients' properties. Plaintiff Eric Baker ("Baker") received three days of training and was then placed on-site with Mulholland's client, the Heschel School, where he worked for seven days. On the seventh day, Mulholland received a complaint from

the school regarding Baker's job performance. Specifically, the complaint alleged that Baker was talking on his cell phone and had a "bad attitude." Mulholland instructed its account manager for the Heschel School to speak with Baker about his job duties and the use of his cell phone. Several days later, Mulholland received a second complaint about Baker's cell phone use and attitude. Mulholland sent Baker home, drafted a warning notice, and scheduled a meeting with Baker for the following day. Mulholland contended that it made the decision to terminate Baker's employment at that time. The same night, Baker complained to Mulholland about a racial comment allegedly made to him by a Heschel School employee. The following day, Mulholland discharged Baker.

Thereafter, Baker filed a claim for retaliation, alleging that the complaints about his job performance were pretextual. The trial court granted Mulholland's motion for summary adjudication, concluding that Mulholland set forth a "legitimate, nonretaliatory reason for its termination decision." The appellate court affirmed the trial court's ruling.

As a preliminary matter, the appellate court noted that a plaintiff's initial burden of proof on a retaliation claim is very light. He can satisfy this burden by producing evidence of nothing more than 1) the employer's knowledge that the employee engaged in protected activity; and 2) the proximity in time of the protective activity to discharge (or some other adverse employment action). Here, Baker alleged he complained to Mulholland about an alleged racial comment and was promptly fired the next day. The court held that Baker's complaint, coupled with the fact that he was discharged so soon thereafter, was sufficient to satisfy his initial burden of proof.

The burden then shifted to Mulholland to prove the termination decision was legitimate and nonretaliatory (i.e., that the employment decision was not based on Baker's protected activity). Mulholland satisfied this burden by demonstrating that the Heschel School had complained twice about Plaintiff's job performance *prior to* the time the racial comment was allegedly made. The court found these performance issues were well documented and unrelated to the alleged racial comment. As such, Mulholland met its burden. While the burden then shifted back to Baker to prove Mulholland's stated reason for its employment decision was pretextual (i.e., false), the court found no such pretext given Baker's well-documented performance issues.

This case highlights the value of accurately and timely documenting employee job performance. It is also a good idea for employers to have clear policies and standards in place for recording (and if necessary, investigating) complaints made by, and about, employees.

Court Overturns Grant of Summary Adjudication on Employee's National Origin/Religion-Based Harassment Claim

In *Rehmani v. Superior Court*, the California court of appeal overturned an order granting summary adjudication in favor of Ericsson, Inc. ("Ericsson") on an employee's national origin/religion-based harassment claim.

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The employee ("Rehmani"), a Muslim born in Pakistan, worked as a System Test Engineer for Ericsson. Rehmani alleged, among other things, that several Indian coworkers were frequently rude, dismissive, and hostile toward him because of his national origin and religion, were unwilling to help him with projects, told him that "Pakistan and Afghanistan need to be bombed and wiped out because of all the terrorist activity there" and said "You're not going to blow me up, right?" when Rehmani asked for assistance with a task. On September 11, 2009, Rehmani took a sick day from work. During his absence, a coworker announced by e-mail that there were some Indian treats in the break room for Rehmani's birthday. When some of the other employees went to the break room, the coworker allegedly told them that Rehmani was "out celebrating 9/11 and planning terrorist attacks."

While Ericsson produced evidence suggesting that none of the alleged acts by Rehmani's coworkers was based on his national origin or religion, the appellate court stated that, "considering these employees' conduct in the overall context of Rehmani's allegations of hostility by Indian employees toward non-Indians, we cannot determine as a matter of law that the evidence supplied by Ericsson establishes that Rehmani will not be able to convince a trier of fact that he experienced a hostile environment." The court went on to state that while "actionable harassment cannot be occasional, isolated, sporadic or trivial,… Rehmani offered evidence of a larger picture than just a few interpersonal squabbles. His declaration, taken together with testimony from coworkers, suggests rudeness, taunting and intimidation from Indian engineers toward their non-Indian colleagues." The court ultimately decided that the trier of fact should be permitted to determine either that Rehmani's claims have merit, or instead, that his interpersonal difficulties at work were unrelated to Indian sentiment toward non-Indian (and/or Muslim) coworkers.

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11622 El Camino Real, Suite 300
San Diego, CA 92130
Tel 858-755-8500 | Fax 858-755-8504

9841 Airport Boulevard, Suite 1030
Los Angeles, CA 90045
Tel 310-649-5772 | Fax 310-649-5777

www.pettitkohn.com

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, Vanessa Maync, Christine Mueller, Hazel Ocampo or Heather Stone at (858) 755-8500 or Eric De Wames, Mark Bloom or Jennifer Weidinger at (310) 649-5772.