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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *May 2012*

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

California

Assembly Bill Targets Use of Social Media By Employers During Hiring Process

The California Assembly is currently considering AB 1844 (Campos), a bill that would prohibit an employer from requiring a prospective employee to disclose a user name or account password to access a personal social media account that is exclusively used by the prospective employee. The bill also confirms that an employer does not have a duty to search or monitor social media before hiring an employee, notwithstanding the provisions of existing law which impose on employers a duty to exercise reasonable care to discover whether a potential employee is unfit or incompetent. This bill is currently pending before the Labor & Employment Committee.

Assembly Bill Proposes Expansion of Fair Employment and Housing Act

AB 1999 (Brownley), which is currently being considered by the Assembly Appropriations Committee, would amend California's Fair Employment and Housing Act to include "familial status" as an additional basis upon which the right to seek, obtain, and hold employment cannot be denied. The bill defines "familial status" as being an individual who is, will be or is perceived to be a family caregiver, and specifies "family" as a child, parent, spouse, domestic partner, parent-in-law, sibling, grandparent, or grandchild.

Assembly Bill Proposes Expansion of California Family Rights Act

If passed, AB 2039 (Swanson) will increase the circumstances under which an employee is entitled to protected leave pursuant to the California Family Rights Act by: (1) eliminating the age and dependency elements from the definition of "child," thereby permitting an employee to take protected leave to care for his or her independent adult child suffering from a serious health condition, (2) expanding the definition of "parent" to include an employee's parent-in-law, and (3) permitting an employee to take leave to care for a seriously ill grandparent, sibling, grandchild, or domestic partner, as defined.

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Under existing law, "child" means a biological, adopted, foster, or stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under 18 years of age or an adult dependent child. The Act currently defines "parent" as the employee's biological, foster, or adoptive parent, stepparent, legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

The bill is currently pending before the Assembly Appropriations Committee.

Assembly Considers Bill Targeting Inspection of Employment Records

Under existing law, an employee has the right to inspect the personnel records that his or her employer maintains relating to the employee's performance or any grievance concerning the employee. An employer who fails to permit an employee to inspect these records is guilty of a misdemeanor punishable by a fine or imprisonment, as specified.

AB 2674 (Swanson) would require an employer to maintain personnel records for a specified period of time and to provide a current or former employee, or his or her representative, an opportunity to inspect and receive a copy of those records within a specified period of time, except during the pendency of a lawsuit filed by the employee or former employer relating to a personnel matter. In addition, in the event an employer violates these provisions, the bill would permit a current or former employee or the Labor Commissioner to recover a penalty of $750 plus attorneys' fees from the employer, and obtain injunctive relief. This bill would also provide that a violation of the statute would constitute an "infraction," rather than a misdemeanor.

The bill is currently pending before the Assembly Appropriations Committee.

Senate Considers Bill Imposing Stricter Penalties for Wage Statement Violations

Existing law requires every employer, semimonthly or at the time of each payment of wages, to furnish each employee an accurate itemized statement in writing showing specified information, including, among other things, the name of the employee and the last 4 digits of his or her social security number or an employee identification number, the gross wages earned, all deductions, net wages earned, the inclusive dates of the period for which the employee is paid, the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, the name and address of the legal entity that secured the services of the employer. The law further provides that an employee suffering injury as a result of a knowing and intentional failure by an employer to comply with this requirement is entitled to recover the greater of all *actual* damages or a specified sum, not exceeding an aggregate penalty of $4,000, and is entitled to an award of costs and reasonable attorneys' fees.

SB 1255 (Wright) would provide that an employee is *deemed to suffer injury* for purposes of the above-referenced penalty if the employer fails to provide a wage statement or fails to provide a wage statement showing the name of the

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employee and the last 4 digits of his or her social security number or employee identification number. The bill would also provide that an employee is deemed to suffer injury for that penalty if the employer fails to provide accurate and complete information, as specified, and the employee cannot promptly and easily determine from the wage statement alone: (1) the amount of the gross and net wages paid to the employee during the pay period and how those gross and net wages were determined by reference only to specified information on the itemized wage statement; (2) the deductions the employer made from the gross wages to determine the net wages paid to the employee during the pay period; and (3) the name and address of the employer or legal entity that secured the services of the employer.

This bill is currently pending before the Senate Judiciary Committee.

AGENCY

Federal

NLRB Puts Notice Posting Rule on Hold

The Federal Circuit Court of Appeals for the District of Columbia has temporarily enjoined the National Labor Relations Board's rule requiring the posting of employee rights under the National Labor Relations Act. Under the rule, most private sector employers would be required to post (in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted) a notice advising employees of their rights under the National Labor Relations Act. Employers would also be required to publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there.

The rule, which had been scheduled to take effect on April 30, 2012, will not take effect until the legal issues are resolved. There is no new deadline for the posting requirement at this time.

California

California Labor Commissioner Revises Wage Theft Prevention Act Notice Template and Frequently Asked Questions

The California Labor Commissioner has once again attempted to clarify employers' legal obligations by revising its official Frequently Asked Questions Guidance ("FAQs") and Notice template in connection with California's Wage Theft Prevention Act of 2011, which requires an employer to provide a notice to an employee at the time of hire that includes wage-related information.

The amount of information required in the revised form has been reduced significantly:

- The introductory paragraph and all but one of the concluding paragraphs regarding the scope and timing of the obligation to give the Notice that appeared in the original template have been deleted.

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- The description of the employer, now referred to as the "Hiring Employer," has been simplified.
- The prior need to list "any other business or entity [used] to hire employees or administer wages or benefits" has been simplified and reduced in scope by limiting the information to that needed to identify a "staffing agency."
- The obligation to identify whether an employee is employed pursuant to a written or oral agreement has been replaced by simpler inquiries as to whether and to what extent all wage rates are contained in a written agreement.
- The "Acknowledgement of Receipt" section has been made optional and has been simplified. The confusing references to the dates on which the Notice was "provided to employee & signed by employer representative" and was "received by employee & signed by employee" have been replaced with an undifferentiated reference to "date."

The changes in the Notice are reflected in the modification of the responses to FAQs 10, 19-21, and 23, and the addition of five new FAQs and responses, 26 through 30. The revised Notice template and FAQs can be found at http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

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 has 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 (collectively, "Plaintiffs") are or were non-exempt employees at one or 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

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meal and rest breaks.[1] During the course of litigation, two distinct theories 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.

[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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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 total minutes for shifts of more than six hours up to ten hours, thirty total 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 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 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

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[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."

[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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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."

Finally, the Court held that absent a 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 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.

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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). However, employers should review their meal and rest break policies to ensure that they are fully compliant with the law, as the *Brinker* court confirmed that class treatment *is* appropriate where an employer's policy is *on its face* illegal.

Brinker Take-Aways

Rest Periods

- **Employees are entitled to 10 minutes rest for shifts from three and one-half to six hours in length, two 10 minute breaks for shifts of between six and 10 hours, three 10 minute breaks for shifts between 10 and 14 hours, and so on.**
- **The only constraint on the 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.**

Meal Periods

- **An employer's duty is to provide for a proper meal period to be available.**
- **The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities, 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 that no work is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work voluntarily undertaken by a relieved employee during a meal break will not constitute a violation of the statute.**
- **The employer must provide a first meal period after no more than 5 hours of work and a second meal period after no more than 10 hours of work.**

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Ninth Circuit Addresses Regular Attendance as "Essential Function of the Job"

In *Samper v. Providence St. Vincent Medical Center*, the Ninth Circuit Court of Appeals held that regular attendance is an essential function of the job for a nurse working in the neo-natal intensive care unit of a hospital.

The plaintiff, Monika Samper ("Samper"), worked as a part-time nurse in Defendant Providence St. Vincent Medical Center's ("Providence") neo-natal intensive care unit ("NICU"). Samper suffered from fibromyalgia, a condition that affected her sleep and caused her chronic pain, which in turn allegedly interfered with her ability to attend work.

Throughout her employment, Providence provided Samper with reasonable accommodations designed to assist her in dispatching her duties for her disability. Among other things, it allowed her to call in when she was having a bad day and move her shift to a different day during the same week, and scheduled her to work only on non-consecutive days. Nonetheless, Samper's attendance failed to improve. While Samper requested to "opt out" of Providence's attendance policy, which permits five unplanned absences of a limited duration during a rolling 12 month period (excluding family medical leaves), the such request was denied. During 2008, Samper was discharged for having seven absences in a twelve month period (as well as ongoing attendance problems). Samper then sued, alleging that Providence failed to provide a reasonable accommodation for her disability.

In ruling in favor of Providence, the Ninth Circuit held that Providence successfully demonstrated that, pursuant to its standards of performance, "attendance" and "punctuality" were essential functions of the NICU nursing position. Moreover, regularity in a NICU nurse's attendance was critical to providing quality patient care. The court noted that Samper never quantified the number of additional unplanned absences she was seeking as an accommodation. Instead, she requested an accommodation that would allow her to simply miss work whenever she felt she needed to and for so long as she felt necessary. The court explained that under the Americans with Disabilities Act, an accommodation that exempts an employee from an essential job function is not reasonable. As such, Providence was under no obligation to give Samper a free pass for every unplanned absence caused by her illness.

California Court Holds Employer Cannot Be Forced to Arbitrate Class Claims Based on Arbitration Agreement with Individual Employee

In *Kinecta Alternative Financial Solutions, Inc. v. Superior Court*, the Court of Appeal held that an employer could not be forced to arbitrate class claims based on an arbitration agreement it entered into with an individual employee.

The employer, Kinecta Alternative Financial Solutions, Inc. ("Kinecta" or "the Company"), operated a credit union and employed tellers and branch managers. The plaintiff employee, Kim Malone ("Plaintiff"), filed a complaint on behalf of herself as well as "all others similarly situated." Among other things, Plaintiff alleged that Kinecta failed to pay wages due at termination and failed to provide meal and rest breaks to six separate classes of employees: a branch

manager class, a former branch manager class, a wage statement class, a late pay class, a meal period class, and a rest period class.

The arbitration provision that Plaintiff had previously signed stated, in pertinent part: "I [Plaintiff employee] further agree and acknowledge that Kinecta and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context." The clause was silent on the issue of classwide arbitration. Kinecta argued that the arbitration clause required arbitration *only* of the specific dispute between Plaintiff and the Company (i.e., the arbitration clause did *not* operate to force Kinecta to arbitrate with an entire "class," and thus, the "class action" portion of Plaintiff's complaint should be dismissed). The court ultimately agreed with Kinecta, stating, "class action arbitration changes the nature of the arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." The court ultimately ruled that the arbitration clause pertained *only* to Plaintiff's disputes with the Company, and that the class claims must therefore be dismissed.

This case demonstrates how employers can utilize arbitration agreements with individual employees to negate class claims at the outset of litigation. Notably, however, the *Kinecta* decision does not prevent the filing of class action lawsuits in court (though employees subject to valid arbitration agreements would not be able to serve as class representatives).

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