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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *April 2017*

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LEGISLATIVE

California

Legislature Considers Bill to Raise Salary Threshold for White-Collar Exemptions

The California Legislature is currently considering Assembly Bill ("AB") 1565 (Thurmond). AB 1565 would add section 514.5 to the California Labor Code. The bill proposes to raise the minimum monthly salary to qualify for white-collar exempt status in California to $3,956. The minimum annual salary for exempt executive, administrative, or professional workers would be $47,472, or twice the state minimum wage, whichever is greater. As California's minimum wage continues to rise, a salary of twice the state minimum wage eventually will be a number greater than $47,472. Until that time, $47,472 would be the minimum salary for exempt status in California. This bill has been referred to the Committee on Labor & Employment.

JUDICIAL

California

Court of Appeal Court Requires Rest Pay Compensation for Non-Exempt Commissioned Employees

The past several years have seen a significant uptick in both legislative enactments and judicial decisions aimed at protecting the rights of commissioned California employees. This trend continues with a California Court of Appeal's ruling in *Vaquero v. Stoneledge,* in which the Court held that non-exempt commissioned employees are entitled to separate compensation for rest periods.

Plaintiff Ricardo Vaquero was one of a number of sales associates (collectively, "Plaintiffs") employed by Stoneledge Furniture, LLC ("Stoneledge"), a retail furniture company. Over the course of the relevant time period, Plaintiffs operated under two different compensation agreements. The first entitled employees to a "draw" of $12.01 per hour, in which a minimum hourly payment was set at that threshold but was credited against future commissions earned by each employee. The second, which replaced the first in March 2014, paid sales associates a base hourly rate of $10 per hour, plus a series incentives based on the percentage of sales made by each employee.

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Plaintiffs filed suit against Stoneledge, alleging that the applicable payment structures violated California law, which entitles non-exempt employees to one *paid* ten minute rest period for every four hours worked (or major fraction thereof). The trial court granted Stoneledge's motion for summary judgment, which argued that Stoneledge's policy was valid as a matter of law. Plaintiffs appealed.

On appeal, the Court of Appeal looked primarily at two issues: 1) whether employees paid on a commission basis are entitled to separate compensation for rest periods; and 2) if so, whether employers who keep track of all hours worked (including rest periods) violate this provision by paying a guaranteed hourly rate as an advance on commissions earned at a later time. The court held that the answer to both issues was "yes."

Regarding payment of commissioned employees for rest breaks, the court relied primarily on the 2013 decision in *Bluford v. Safeway Stores*, which requires employers to provide *separate compensation* to employees engaged in an "activity based compensation system." While *Bluford* applied to a piece-rate compensation structure, the *Vaquero* Court held that the same analysis should apply here. As Plaintiffs' compensation was based on commission, they should be entitled to separate compensation for all rest breaks.

After establishing that rest periods for non-exempt commission employees are separately compensable, the Court of Appeal moved to the secondary issue to hold that Stoneledge's policy of providing employees with a draw on commissions was an impermissible workaround to considering rest periods "paid." The Court likened the draw structure to an interest-free loan in determining that it did not satisfy the requirement that employees be compensated for rest periods.

While *Vaquero* only applies to non-exempt employees (as exempt employees need not be provided with rest periods), its holding still marks a significant victory for California employees. Courts have recently shown a tremendous willingness to resolve rest break compensation issues in favor of employees, even when employers create systems intended to satisfy the spirit of the law. California employers, particularly those utilizing unique pay structures for non-exempt employees, should take this as an opportunity to review applicable break policies and ensure that those policies do not create unnecessary legal exposure.

Court of Appeal Holds Employer's Pay Plan Violated the FLSA Because It Unlawfully Decreased the Hourly Rate of Statutory Overtime Hours

In *Brunozzi v. Cable Company*, the Ninth Circuit Court of Appeals ("Ninth Circuit") reversed the district court's summary judgment for the defendant under the Fair Labor Standards Act ("FLSA"). The panel held that defendant's "piece-work-based" pay plan, which included a bonus designed to decrease in proportion to an increase in the number of overtime hours worked, violated the FLSA's overtime provisions because it lowered the hourly rate during statutory overtime hours.

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Matteo Brunozzi and Casey McCormick worked as technicians for Cable Communications, Inc. ("CCI") installing cable television and internet services for Comcast customers. According to the CCI pay plan, it was guaranteed the technicians would earn at least the statutory minimum wage. In addition to this, they were paid a fixed rate for each piece of work, or task, that was completed, and adjustments for incomplete work were deducted from the total for the week ("piece rate total"). If a technician worked over 40 hours, CCI divided the piece rate total by the number of hours worked, to calculate the average hourly rate of pay for that week. The hourly rate was then divided by two, and the resulting quotient multiplied by the number of overtime hours the technician worked that week, to arrive at the technician's base overtime pay ("piece rate OT premium"). The production bonus was calculated by dividing the piece rate total by 60, multiplying that quotient by 70, and subtracting his piece rate total and any piece rate OT premium.

Brunozzi filed his complaint alleging CCI violated both the FLSA and Oregon state overtime regulations. Brunozzi argued that CCI reduced the production bonus paid during a regular forty hour work week by the amount of overtime premium it calculated was due to the technician on his piece rate total. However, because the "bonus" formed part of the technician's income in a normal, non-overtime week, diminishing or eliminating that "bonus" resulted in the technician being paid at a reduced hourly rate during weeks when he worked overtime.

According to the Department of Labor ("DOL"), an agreement or practice that lowers the hourly rate when statutory overtime is worked is expressly prohibited under the FLSA. The regulations state that "the parties cannot lawfully agree that the rate applicable to a particular piece of work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked." 29 C.F.R. § 778.316. The DOL cautioned that the hourly rate paid for identical work during the hours cannot be lower than the rate paid for the non-overtime hours nor can the hourly rate vary from week to week inversely with the length of the workweek. Agreements or practices that do this are "ineffective."

The court found that CCI's "diminishing bonus" device pay plan caused it to miscalculate the technicians' regular hourly rate during weeks when they worked overtime and allowed CCI to pay the technicians less during those weeks. Therefore CCI's pay plan had violated the FLSA's overtime provisions and the court reversed the district court's summary judgment in CCI's favor.

This case is especially pertinent to any employer with non-exempt employees who frequently work overtime hours, earn bonuses, or who utilize commission agreements. All pay plans must ensure compensable time is not "decreased" in compliance with the FLSA.

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Court of Appeal Upholds IWC Order Enabling Healthcare Employees to Waive Second Meal Period During Shifts Over 12 Hours

In the recent decision *Gerard, et al. v. Orange Coast Memorial Medical Center* ("*Gerard II*"), a California Court of Appeal ruled that an order from the Industrial Welfare Commission ("IWC") was not invalidated by subsequent legislation that restricted the IWC's ability to set waivers on statutory meal periods.

By law, non-exempt California employees are entitled to two meal periods for shifts longer than ten hours. Under Labor Code Section 512(a) ("Section 512(a)"), an employee may waive his or her second meal period for a shifts lasting up to twelve hours. However, under a specific IWC order, healthcare employees can waive one of their two meal periods for any shift lasting over eight hours—including shifts over twelve hours ("the Healthcare Order").

Plaintiff Jazmina Gerard was one of multiple healthcare workers (collectively, "Plaintiffs") who had been employees of Orange Coast Memorial Medical Center ("the Hospital"). They claimed to have worked twelve-hour shifts on a regular basis, and often worked over twelve hours. Plaintiffs often utilized a Hospital policy whereby employees were able to waive their second meal period when working over ten hours, even if they worked over twelve hours. Plaintiffs later brought suit on the grounds that they had been denied their guaranteed second meal period for shifts over twelve hours, in violation of Section 512(a). The Hospital attempted to dismiss the claim, arguing that the Plaintiffs had waived their second meal period pursuant to the Healthcare Order. The trial court agreed with the Hospital's waiver theory, and granted summary judgment against the Plaintiffs. The Plaintiffs appealed on the premise that because the Healthcare Order conflicted with Section 512(a), the superior status of the Labor Code over IWC orders invalidated the Healthcare Order for shifts over twelve hours. The Court of Appeal initially ruled that the Plaintiffs were correct and reversed the trial court's ruling ("*Gerard I*").

Following *Gerard I*, the California Supreme Court reviewed the decision and directed the Court of Appeal to reconsider its holding. On second look, in *Gerard II*, the Court of Appeal concluded that its reasoning in *Gerard I* had been mistaken. In short, because the IWC adopted the Healthcare Order before its authority to do so was restricted, the Healthcare Order was valid. Based on this misinterpretation, *Gerard I* incorrectly decided that Section 512(a) invalidated a broader set of IWC orders than it actually did.

For employers, *Gerard II* generally confirms that employees working over ten hours should be provided with a second meal period, and that any waivers of that meal period must be documented and approached with caution. Exceptions to the second meal rule are narrowly defined and are fraught with the potential for class action claims, both within and outside of the healthcare sector. Accordingly, implementation of meal and rest break policies that are legally compliant and clearly explained to employees is imperative in today's business environment.

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Court of Appeal Holds Employee's Defamation Claim is Barred Because Employer's Statements Are Privileged

In *Lemke v. Sutter Roseville Medical Center*, a California Court of Appeal upheld that a trial court's grant of summary judgment in favor of the employer on a defamation claim. Plaintiff Dianna Lemke ("Lemke") worked as a registered nurse for Sutter Roseville Medical Center ("Defendant"). Lemke allegedly failed to provide proper care to an elderly patient with a pelvic fracture. Defendant claimed Lemke's dereliction of care cumulated in the near death of the patient. Defendant provided Lemke with an opportunity to resign, but Lemke refused. Defendant terminated Lemke's employment for improper administration of narcotics to a patient, and failure to properly monitor and document the patient's condition.

Lemke filed a civil complaint alleging disability discrimination, failure to accommodate a disability, failure to engage in the interactive process, retaliation, harassment, failure to prevent retaliation, retaliation for whistle blowing, and defamation. The trial court granted Defendant's motion for summary judgment and dismissed Lemke's claims. Lemke appealed the decision, claiming in part that she presented sufficient evidence to demonstrate triable issues of material fact in connection with her claim for defamation. Lemke contended that she produced evidence showing that Defendant's previous statements to the Board of Registered Nursing (the "Board") regarding the patient incident were false and based on an inadequate investigation.

The Court of Appeal held that Defendant's statements were made in connection with its internal investigation and in an official proceeding before the Board, and were absolutely privileged. The Court reasoned that Civil Code section 47 provides an absolute privilege for statements made in an official proceeding, which encompasses communications made during an official investigation of regulatory agencies. In fact, the absolute privilege bars an action for defamation based on a report of misconduct to an appropriate regulatory agency "even if the report is made in bad faith." Consequently, regardless of whether Lemke could prove that Defendant's statements were not made in good faith or based on inadequate investigation, an absolute privilege applied to Defendant's statements and summary judgment was proper.

While this decision is a win for employers, it narrowly applies to defamatory statements made in connection with official proceedings. This decision can give employers confidence to participate in official proceedings with the knowledge that their statements will be absolutely privileged.

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, Ryan Nell, Lauren Bates, Jennifer Suberlak, Shannon Finley, Cameron Flynn, or Cameron Davila at (858) 755-8500; or Jennifer Weidinger or Tristan Mullis at (310) 649-5772.