

California Labor & Employment Law Review

Official Publication of the State Bar of California Labor and Employment Law Section

Volume 22
No. 5

September
2008

Elizabeth Kristen is a Staff Attorney at the Legal Aid Society-Employment Law Center. She received her J.D. from Boalt Hall School of Law in 2001 and clerked for the Honorable James R. Browning of the Ninth Circuit Court of Appeals from 2001-2002.



Application of the FMLA/CFRA Medical Certification Process for an Employee's Serious Health Condition After *Lonicki v. Sutter Health Central*

By Elizabeth Kristen¹

INTRODUCTION

On April 7, 2008, the California Supreme Court ruled in *Lonicki v. Sutter Health Central*,² the first California Supreme Court opinion interpreting California's 1991 Family Rights Act (CFRA).³ The holding addresses both (1) CFRA's second and third opinion process for medical certification and (2) the scope of an employee's right to hold another job while taking CFRA leave.⁴ This article analyzes the first holding, emphasizing the fact that, despite the court's ruling, the medical certification process is mandatory under more employee-protective provisions of the federal Family Medical Leave Act (FMLA).⁵ In a companion article, Judith Droz Keyes addresses the implications of the case from the management perspective.

That management may hold inaccurate views about the legitimacy of an employee's need for medical leave emphasizes the importance of medical professionals making the final determination about an employee's request for medical leave.

OVERVIEW OF THE FACTS

Antonina Lonicki worked for Sutter Health Central for ten years, from 1989 to August 26, 1999. Her "work performance was good and her attendance was excellent."⁶ In 1997, when Sutter became a level II trauma center, Lonicki became increasingly overwhelmed by her workload. She believed her department was neglecting essential procedures, to the possible detriment of Sutter's patients.⁷ She testified to feeling nervous about work, and sought assistance from a doc-

tor to deal with depression.⁸ When Lonicki's supervisors changed her schedule and cancelled her planned vacation, on July 26, 1999, she went home in tears.⁹ Her supervisor required her to produce a doctor's note for her absence.¹⁰

Lonicki saw a family nurse practitioner the following day, who provided her with a note indicating that she would need a leave of absence for "medical reasons" until August 27, 1999, and referred her to a therapist. Lonicki submitted the note, along with Sutter's "Leave of Absence Form," to her supervisor. Sutter then demanded that Lonicki be seen by its occupational health physician, who concluded that Lonicki was able to return to work without restriction.¹¹

Sutter insisted that Lonicki return to work on August 9, 1999 but her union

continued on page 26

— Inside the Review —

- 1 Application of the FMLA/CFRA Medical Certification Process for an Employee's Serious Health Condition After *Lonicki v. Sutter Health Central* | 3 *Lonicki v. Sutter Health Central*: A Perspective From the Management Trenches | 4 MCLE Self-Study: Legal Challenges Raised by Employer-Mandated Wellness Programs | 5 Public Sector Case Notes | 6 Employment Law Case Notes | 7 NLRA Case Notes | 8 Wage & Hour Update | 9 Cases Pending Before the California Supreme Court | 34 Message From the Chair

LABOR AND EMPLOYMENT LAW SECTION MEMBERSHIP ENROLLMENT

Name _____

State Bar Number _____

Firm/Company _____

Address _____

City, State, Zip _____

Telephone _____ Fax _____

E-mail _____

ENROLLMENT STATUS

- ☐ Attorney [ATY]\$75
☐ Out-of-State Attorney [OSA]\$75
☐ Judge/Neutral [JDG]\$75
☐ Non-Attorney [ONA]\$75
☐ Law Student (not Bar Member) [LS]FREE

PRACTICE AREA

- ☐ Employer
☐ Neutral
☐ Union
☐ Plaintiff

COMMITTEE INTEREST

- ☐ Education [ED]
☐ Public Sector [PS]
☐ Internet [INT]
☐ Legislation [LE]
☐ Law School Writing Competition [LC]
☐ Membership [ME]
☐ Program [PG]
☐ Publications [PU]

Please make check payable to the State Bar of California, and send this form with your check or credit card information to Section Enrollments, State Bar of California, 180 Howard Street, San Francisco, CA 94105-1639. Fax (415) 538-2368 (credit card enrollments only).

CREDIT CARD INFORMATION

I authorize the State Bar of California to charge my Labor & Employment Section membership to my VISA/MasterCard account. (No other credit card will be accepted.)

Account # _____ Expiration _____

Cardholder Name _____ Signature _____

Judith Droz Keyes is a partner at Davis Wright Tremaine LLP in San Francisco. She received her J.D. from U.C. Berkeley School of Law (Boalt Hall) in 1975, was formerly President of the Alameda County Bar Association and Chair of the Labor & Employment Law Section of the Bar Association of San Francisco, and is a fellow in the College of Labor and Employment Lawyers.



Lonicki v. Sutter Health Central: A Perspective From the Management Trenches

By Judith Droz Keyes

Absent amendment, two important aspects of the California Family Rights Act (CFRA)¹ are now settled, thanks to the decision of the California Supreme Court in *Lonicki v. Sutter Health Central*.² The decision was good news and bad news for employers with 50 or more employees.³ The good news is that the employer can still argue that it need not grant a CFRA leave — even absent a third tie-breaking medical opinion. In a companion article, Elizabeth Kristen points out that this good news isn't really so good because the federal Family and Medical Leave Act (FMLA)⁴ *does* require this. I'm not so sure this is true, but Elizabeth makes a strong argument, and she may be right.

But the clearly bad news for employers is that just about any time a CFRA-eligible employee (that is, an employee who has been employed for a year and has worked 1,250 hours during the previous twelve months) presents medical certification attesting to the employee's mental or physical need for it, the employer will be obligated to grant a leave of absence for up to twelve weeks.⁵ Although not an express obligation under CFRA, the *Lonicki* opinion will discourage risk-adverse employers from denying the request.

Reading between the lines of the *Lonicki* opinion, we see a picture that is not terribly uncommon from the management perspective.⁶ Employee Lonicki, a certified technician at Sutter Hospital, was unhappy with Sutter's change in direction and management. Instead of resigning or searching for a new job, she chose to stay and tough it out — or, maybe, to wait it out. Apparently this caused her stress. When she was told her shift had been changed from morning to afternoon, she promptly asked to go on vacation. When that request was denied, Lonicki became "too upset to work." She walked out in tears. She saw her family

nurse practitioner, who said she should take a month off "for medical reasons."

Knowing that Lonicki had been resistant to the changes it was implementing, and knowing that Lonicki was working as a certified technician at another hospital at the same time she was purportedly unable to work at Sutter, Sutter obtained a second opinion from its own physician. Its suspicion was confirmed: at least according to that doctor, Lonicki could work. Sutter told her she should return; Lonicki said she would not.

Sutter went a step further before insisting that Lonicki return: it contacted Lonicki's union. Apparently, the union saw the situation in much the same way Sutter did, because the union representative agreed that Lonicki should be required (or expected) to return to work by a date certain. This agreement was conveyed to Lonicki. She did not return by that date, but instead, two days afterwards, presented a note from a psychologist saying she needed another month off for work-related depression.⁷

Managers in this situation, which occurs with remarkable frequency, are typically frustrated. They are under constant pressure to maintain appropriate staffing levels. They suspect that the employee on leave, e.g., Lonicki, will not adjust to the restructuring that triggered the leave in the first place. They suspect the clearly disgruntled employee will remain disgruntled, exacerbating an already difficult situation. They see no value in waiting when the solution seems obvious: terminate the relationship and fill the position with a new employee.

Although not necessarily vindictive, managers in these circumstances typically do not see why they should have to exalt form over substance, or accept what appears to be a disingenuous claim of illness. After all, the employer must con-

tinue to pay the absent employee's health insurance, to allow use of accrued sick leave, and to hold a job open — all when the prospects for a successful return to work seem negligible.

Management attorneys typically advise patience in this situation. They point out that employees such as Lonicki ultimately run out of options. In time, they resign, exhaust their leave rights, or underperform, triggering a termination.⁸ Management, in turn, typically finds such advice impractical. They see the unmet work needs growing by the day, while the threat of litigation is remote and theoretical.

I'm guessing that's more or less what happened in *Lonicki*. In any case, we know from the opinion that Sutter stuck to its guns, and with what it thought was the agreement of the union on Lonicki's behalf. It terminated Lonicki's employment because she failed to return on the date that had been conveyed to her as the deadline. She sued, and although it won at the court of appeal, Sutter lost at the California Supreme Court, 4 – 3.

Over a perceptible (to management) dissent by Justices Chin, Baxter and Corrigan, the majority held that an employee seeking a leave under CFRA need not prove an inability to perform the generic job duties of his or her position. The protection is broader. The court held:

We therefore conclude that under section 12945.2's subdivision (c)(3)(C), which entitles an employee to medical leave when suffering from a "serious health condition" that "makes the employee unable to perform the *functions of the position of that employee*" (*italics added*), the italicized phrase refers to *the job assigned to the employee by his or her employer*; it does not refer, as

continued on page 29

Legal Challenges Raised by Employer-Mandated Wellness Programs

By Theodora R. Lee



Theodora R. Lee is a Shareholder at Littler Mendelson, P.C. in San Francisco. Ms. Lee specializes in representing employers in all aspects of employment and labor relations law, including class action litigation. Ms. Lee has presented several seminars and written numerous articles on a wide variety of employment issues. She can be reached at tlee@littler.com.

INTRODUCTION

Joe Pellegrini, who cycles thirty-six miles a day to and from work, may have had a suspicion that someday he would become renowned in connection with the wellness movement. But he never could have imagined why *Business Week* used his story to introduce the topic of workplace wellness in its February 26, 2007 issue.¹

Mr. Pellegrini is a supply-chain executive working at Scotts Miracle-Gro's headquarters in Maryville, Ohio. The \$2.7 billion dollar employer gave employees the choice of taking screening tests and, if needed, getting a health coach, or losing a significant portion of the employer's contribution toward medical insurance.

Mr. Pellegrini's high protein diet apparently merited him a bad cholesterol score and a health coach. After several calls, a persistent coach persuaded the athletic Mr. Pellegrini to undergo a series of diagnostic tests. The results were shocking. A 95 percent blockage in two arteries gave him less than a week to live. Within hours of the diagnosis, two life-saving stents were inserted.

The fact that this almost certainly would not have happened without his employer's wellness program made Mr. Pellegrini a national celebrity. Scotts Miracle-Gro's program saved the life of at least one corporate executive, but also led to a lawsuit, still pending in federal court, by another employee whose employment was terminated when he tested positive for nicotine.²

Stories like Mr. Pellegrini's are being repeated in thousands of workplaces as the decade-old trend of employer support for wellness programs matures. But the real question posed by Michelle Conlin in her *Business Week* article is captured by its title, *Get Healthy—Or Else*: How far can an employer go toward mandating wellness in the workplace?

Employers are experiencing the development of a "perfect storm" in the

workplace. Three forces are combining, threatening balance sheets and, in many cases, raising the question of business survival. Medical costs are accelerating and, with the coming health needs of the baby boomers, the increases promise to continue for at least another decade. In addition, employees have more health care needs than ever before in light of the obesity epidemic, tobacco-related illnesses and deaths, and sedentary lifestyles. Finally, a significant worker shortage lies ahead, especially in skilled positions. These factors mandate that employers offer competitive benefits as an essential component of keeping and attracting talent. The force of this perfect storm promises to be so severe that the "wellness" of the workforce will become one of the most important corporate assets.

There has been at least a decade of experience with voluntary workplace wellness programs. While the reports from these programs have been generally positive, the programs have also raised many questions: At what point do the programs become so intrusive that they impact employee rights? What protections are available for employee privacy? Are disabilities accommodated? Are certain protected categories of employees being treated adversely under these plans? Voluntary workplace wellness plans suggest the potential for conflict with individual employee rights, but have also started a serious debate about what happens as the elements of a wellness plan move from strictly voluntary to strongly encouraged, and finally to required. While it would be easy to legally approve voluntary plans and prohibit mandatory ones, the economic realities of the perfect storm make it certain that employers will have no choice but to move closer to making workplace wellness a requirement.

This article explores the legal issues associated with employer-mandated wellness plans as they evolve from programs that offer information and counseling, to

programs that require employees to participate or face some penalty.

LEGAL CHALLENGES PRESENTED BY MANDATORY WELLNESS PLANS

Employers must carefully draft and implement any wellness program to avoid liability for violating one or more of the many applicable federal and state laws. Some of the applicable laws are complex, and there are many traps for the unwary.

Compliance With HIPAA

The Health Insurance Portability and Accounting Act (HIPAA) prohibits group health plans regulated by the Employee Retirement Income Security Act (ERISA)³ from discriminating based on a health factor, including but not limited to health status, medical condition, claims experience, receipt of health care, and medical history.⁴ The HIPAA non-discrimination rules consider as health factors both nicotine addiction and body mass index.⁵

On December 13, 2006, the U.S. Department of Labor (DOL) and the Internal Revenue Service issued final regulations relating to wellness programs that are applicable to wellness plans with a plan year beginning on or after July 1, 2007.⁶

On February 14, 2008, the DOL issued Field Assistance Bulletin (FAB) No. 2008-02, which includes a Wellness Program Checklist, in response to questions concerning which types of programs must comply with the final HIPAA regulations. The DOL intended its Wellness Program Checklist to clarify which wellness programs offered by a group health plan must comply with the final regulations. This simple, straightforward checklist will assist a plan sponsor in determining: (1) whether a group health plan offers a program of health promotion or disease prevention that must comply with the final regulations; and (2) whether that program complies with the final regulations. The checklist consists of

continued on page 15

Bruce A. Barsook, a partner in Liebert Cassidy Whitmore's Los Angeles office, is experienced in the defense of public entities in all aspects of labor and employment law, including negotiations and unfair labor practice charges. Mr. Barsook is an advisor to the State Bar Labor & Employment Law Executive Committee and a member of the Editorial Board of this publication. Connie Chuang provides representation and legal counsel to Liebert Cassidy Whitmore clients out of its Los Angeles office in matters pertaining to education, employment and labor law, including discrimination, harassment, employee discipline, labor negotiations, audits of personnel policies, and conducting workplace investigations.



Public Sector Case Notes

By Bruce A. Barsook and
Connie M. Chuang

LABOR RELATIONS

California's First District Court of Appeal — Contrary to the Sixth District — Holds That the PERB Does Not Have Exclusive Jurisdiction Over Strikes Not Involving Unfair Practices

County of Contra Costa v. Public Employees Union Local One, previously published at 163 Cal. App. 4th 139 (2008); reviewed granted by the California Supreme Court

Contra Costa County filed a complaint in the superior court against several public employee unions, seeking to enjoin certain essential employees from participating in a threatened one-day strike. Specifically, the county sought to enjoin approximately 270 employees — including airport operations specialists, animal services workers, probation counselors, and hospital workers — from striking because their striking would create a substantial and imminent threat to public health and safety.

The Public Employment Relations Board (PERB) intervened in the trial court, arguing that it has exclusive jurisdiction over the issue because the unions' proposed strike is protected or prohibited by the Meyers-Milias-Brown Act (MMBA). In a decision at odds with that of the recent decision of the Sixth District California Court of Appeal in *City of San Jose v. Operating Engineers Local Union No. 3*, previously published at 160 Cal. App. 4th 951 (2008), the First District Court of Appeal found that the PERB does not have initial exclusive jurisdiction over all strikes by essential employees that pose an imminent threat to public health and safety.

Under the MMBA, the PERB has exclusive jurisdiction over the initial determination as to whether a charge of an unfair practice is justified, and, if so, the appropriate remedy necessary to effectuate the purposes of the MMBA. The California Supreme Court previously

held that public employee strikes are not per se illegal. But the supreme court also gave public entities the right to go to court to request an injunction based on a showing that the strike by certain essential employees would threaten public health and safety.

The court in this case acknowledged that strikes by essential public employees can potentially involve unfair labor practices. But because there was no allegation or indication of an unfair practice, the MMBA was not implicated and the PERB had no jurisdiction over the complaint.

Note: The California Supreme Court agreed to review the contradicting *City of San Jose v. Operating Engineers Local Union No. 3* decision to determine whether the PERB has the exclusive initial jurisdiction to determine whether certain "essential" public employees covered by the MMBA have the right to strike, or whether that jurisdiction rests with the superior court.

Public Employer Does Not Have to Pay Union Member's Salary for Time Spent Conducting Union Negotiations While on Full-Time Leave of Absence to Conduct Union Business

Berkeley Council of Classified Employees v. Berkeley Unified Sch. Dist., PERB Dec. No. 1954-E [32 PERC ¶ 73] (2008)

Tim Donnelly, President of the Berkeley Council of Classified Employees, was on a full-time leave of absence from his position with the Berkeley Unified School District (District) to work on union business. For many years, the union president has been on full-time leave of absence, and the union has reimbursed the District for the full amount of salary and benefits provided to the president. During the next round of negotiations, the union argued that it was not required to reimburse the District for the time Donnelly spent meeting and negotiating. The parties went to impasse.

The union filed an unfair practice charge with the Public Employment Relations Board (PERB), alleging that the District engaged in surface bargaining. The PERB agent dismissed the charge, finding that the union failed to offer any facts demonstrating that the District bargained in bad faith. The PERB upheld the dismissal.

The Educational Employment Relations Act prohibits an employer from engaging in bad faith or surface bargaining. Although a party may not merely go through the motions of negotiations, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith.

Education Code section 45210 mandates that classified school district employees be granted leaves of absence, at the union's expense, to serve as elected officers of local, national, or statewide school district employee organizations.

The Education Code also requires a school district to give a reasonable number of representatives release time without loss of compensation when meeting and negotiating and for the processing of grievances. Release time is time during an employee's workday during which the employee is excused from work. The union argued that Donnelly is entitled to both a leave of absence and release time. The PERB disagreed.

The leave of absence is allowed so that the employee may carry out his or her duties as a union officer while on leave from his or her normal work duties. The union directs the employee's duties. In contrast, release time is for employees who continue to carry out their normal work duties for the school district, but who are afforded reasonable paid time off to participate in negotiations and grievance processing. While a union officer

continued on page 19

Employment Law Case Notes

By Anthony J. Oncidi



Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is (310) 284-5690 and his email address is aoncidi@proskauer.com.

Employer Bears Burden of Showing Reasonableness Of Layoff Criteria in Age Discrimination Case

Meacham v. Knolls Atomic Power Lab., 554 U.S. ___, 128 S. Ct. 2395 (2008)

When the United States government ordered Knolls (one of the contractors that maintains the nation's fleet of nuclear-powered warships) to reduce its workforce, the company conducted an involuntary reduction in force, resulting in the layoff of thirty-one employees, thirty of whom were age 40 or older. Twenty-eight of the laid-off employees filed suit asserting a disparate impact claim under the Age Discrimination in Employment Act. At trial, the employees prevailed by showing that Knolls' layoff criteria failed the "business necessity" test and because there existed alternative criteria that could have achieved the same results without disadvantaging a protected group of employees. After an earlier review by the Supreme Court, the Second Circuit Court of Appeals reversed the judgment, holding that the burden remained with the employees who were required to prove (and did not) that Knolls' reasons for the layoff were unreasonable. In a 7-to-1 ruling, the Supreme Court reversed the Second Circuit and held that when an employer defends against a disparate-impact claim on the basis of "reasonable factors other than age," the employer must not only produce evidence raising the defense, but also must persuade the factfinder of its merit. *See also Ky Ret. Systems v. EEOC*, 554 U.S. ___, 128 S. Ct. 2361 (2008) (disability benefits formula did not discriminate against older workers who became disabled after retirement age); *cf. Hearn v. San Bernardino Police Dep't*, 530 F.3d 1124 (9th Cir. 2008) (discrimination complaint containing excessively detailed factual allegations was improperly dismissed under F.R.C.P. 8).

Employer That Provides Unlimited Sick Leave Is Subject to Requirements of "Kin Care" Statute

McCarther v. Pacific Telesis Group, 163 Cal. App. 4th 176 (2008)

Kimberly McCarther alleged that her employer, SBC Services, violated Cal. Labor Code § 233 (the "kin care" leave statute) when it failed to pay her for her absence for seven consecutive workdays in 2004 to care for two of her children who were ill. McCarther and another employee sued on behalf of themselves and all similarly situated employees. Section 233 states that an employee may use in any calendar year the amount of sick leave accrued by the employee during a six-month period "to attend to an illness of a child, parent, spouse, or domestic partner of the employee." The collective bargaining agreement between plaintiffs' union and the employer provided that "there is no cap or limit on the number of days that employees may be absent from work and receive full sickness absence payments...." In interpreting the statute, the court of appeal held that Section 233 plainly applies to the "sickness absence" policy at issue in this case even though that policy provided employees with an unlimited number of days of paid sick leave. *Cf. Farrell v. Tri-County Metro. Transp. Dist.*, 530 F.3d 1023 (9th Cir. 2008) (employee was properly awarded lost wages for absences from work that were caused by emotional condition that resulted from employer's wrongful denial of FMLA leave).

Court Affirms Judgment and Attorney's Fees Award To Employee Who Suffered Retaliation
Steele v. Youthful Offender Parole Bd., 162 Cal. App. 4th 1241 (2008)

Lisa Steele worked as an office assistant/receptionist for the Youth Offender Parole Board (YOPB). In her spare time, Steele competed in several bikini contests that were sponsored by a local radio sta-

tion. On the day of the final contest, Raul Galindo, chairman of the YOPB, asked Steele if she was going to participate in any other bikini contests, and Steele told Galindo that there was one scheduled for that night. Galindo attended the contest and, after it was over, tried to kiss Steele on the mouth. Steele told a co-worker about the incident, and the co-worker in turn told another co-worker (Kym Kaslar), who later filed a complaint with the Department of Fair Employment and Housing (DFEH), claiming she was retaliated against for reporting the incident. Although Steele told the YOPB that she was not offended by Galindo's behavior, Galindo was reprimanded for fraternizing with the staff and for being involved in a "social situation of questionable taste." Steele was subsequently reprimanded for various performance deficiencies and misconduct. Eventually, Steele resigned from her employment but before she left, she was asked to and did sign statements denying the kissing incident and any inappropriate conduct on Galindo's part. In her subsequent lawsuit, Steele alleged she had been constructively terminated because she was a potential witness in Kaslar's retaliation case and because the YOPB wanted the DFEH investigators to rely exclusively on the (false) statements Steele had been asked to sign before she quit. The jury awarded Steele \$9,046 in lost wages and \$146,705 in attorney's fees. The court of appeal affirmed the judgment, finding substantial evidence of constructive termination of Steele's employment that was causally linked to her potential participation as a witness in Kaslar's DFEH proceeding. *Cf. CBOCS West, Inc. v. Humphries*, 553 U.S. ___, 128 S. Ct. 1951 (2008) (retaliation claim may be asserted under 42 U.S.C. § 1981); *Gómez-Pérez v. Potter*, 553 U.S. ___, 128 S. Ct. 1931 (2008) (federal employee may sue for retaliation under Age Discrimination in Employment Act).

continued on page 11

Jeffrey S. Bosley is a partner in the Labor and Employment Department of Winston & Strawn LLP, and represents employers and management in labor and employment law matters. He can be reached by email at jbosley@winston.com.



NLRA Case Notes

By Jeff Bosley

United States Supreme Court Invalidates California Statute Prohibiting Use of State Funds for Organizing-Related Activities

Chamber of Commerce of the United States v. Brown, 554 U.S. ___, 128 S. Ct. 2408 (2008)

In a 7-2 decision, the United States Supreme Court held that the National Labor Relations Act (NLRA) preempts California Assembly Bill 1889 (AB 1889), a statute prohibiting certain employers that receive state funds from using those funds “to assist, promote, or deter union organizing.” Reversing the Ninth Circuit, Justice Stevens’ majority opinion found it “beyond dispute” that the provisions of the California statute sought to regulate “a zone protected and reserved for market freedom.”

The Court applied the preemption doctrine set forth in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976), which is based on the premise that “Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.” The *Machinists* preemption prevents states from regulating non-coercive speech in order to fulfill Congress’s intention of encouraging free debate on issues dividing labor and management.

The Court rejected arguments that the *Machinists* preemption should not apply because the state was acting as a market-participant or proprietor rather than a regulator, and that the statute restricts only the use, rather than receipt, of state funds. It found that instead of imposing a neutral affirmative requirement that state funds be used for their intended purpose, the statute “imposed a targeted negative restriction on employer speech about unionization”

while exempting certain expenses that promote unionization, including the negotiation and carrying out of voluntary recognition agreements. The Court noted that the statute’s enforcement scheme created compliance costs and litigation risks that made organizing-related advocacy prohibitively expensive for employers that receive state funds. These aspects of the statute represent the state legislature’s attempts to inhibit employers from engaging in partisan, non-coercive speech, a policy judgment renounced by Congress when it amended the NLRA in 1947.

The Court also rejected an argument that similar language in three federal statutes supports enforcement of AB 1889. The Ninth Circuit reasoned that the Workforce Investment Act, the Head Start Programs Act, and the National Community Service Act, which contain provisions forbidding the use of grant and program funds for organizing-related activity, limit the preemptive scope of the Act. The Supreme Court disagreed, stressing that, unlike the states, Congress has the authority to create tailored exceptions to otherwise broad federal policies “in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor practices.”

Justice Breyer, in his dissent, agreed with the majority that congressional policy favors “free debate” between labor and management; however, he argued that AB 1889 did not amount to an impermissible regulation that interferes with that policy. Rather, AB 1889 simply prohibits the use of state funds on contested labor-related activity. Justice Breyer stressed that the law typically gives legislatures “broad authority to decide how to spend the People’s money.”

Ninth Circuit Affirms Arbitrator’s Award Reinstating Employees Terminated Based on No-Match Letter

Aramark Facility Servs. v. Serv. Employees Int’l Union Local 1877, 530 F.3d 817 (9th Cir. 2008)

Reversing the district court, the Ninth Circuit reinstated an arbitration award in favor of thirty-three janitors whose employer fired them after receiving notification from the Social Security Administration (SSA) that it could not match the workers to information in its database. The Ninth Circuit held that the employer lacked constructive knowledge that the workers were undocumented.

After receiving the no-match letters, the employer gave the workers three days to submit proof that they had begun the process of applying for new Social Security cards. It terminated the employment of those who had failed to comply within ten days, citing the prohibition on employing workers with knowledge of their undocumented status, as set forth in the Immigration Reform and Control Act of 1986 (IRCA). The employer offered to rehire any individual who subsequently obtained proper documentation.

The Service Employees International Union filed a grievance, arguing that the terminations lacked just cause and violated the parties’ collective bargaining agreement. The employer argued that the no-match letter, considered with the employees’ failure to resolve the mismatch, provided constructive notice that the employees were undocumented.

The arbitrator held that there was no “convincing information” that the workers were undocumented, and ordered back pay and reinstatement. The district court vacated the arbitration award on public policy grounds, finding that the

continued on page 23

Wage and Hour Update

By Lois M. Kosch



Lois M. Kosch is a partner at Wilson Petty Kosmo & Turner in San Diego. She specializes in counseling and representation of employers on all aspects of employment law and litigation. Ms. Kosch is a member of the Labor and Employment Law Section's Executive Committee.

Court of Appeal Clarifies Meal and Rest Period Issues

Brinker Rest. Corp. v. Super. Ct., ____ Cal. App. 4th ____, 2008 WL 2806613 (July 22, 2008)

The California Court of Appeal for the Fourth District issued its eagerly awaited opinion in the matter of *Brinker Restaurant Corporation v. Superior Court* (Case No. D049331). This case addressed the administration of meal breaks, rest breaks and off-the-clock work, and considered whether violations are amenable to class certification.

The court concluded that class certification was inappropriate, and provided much needed guidance on issues such as whether an employer must ensure meal periods have been taken and whether a meal period must be provided every five hours.

Relying on recent federal case law and distinguishing unclear California authority in similar meal and rest period cases, the court made the following key rulings:

- Employers need only *provide*, not ensure, rest periods are taken.
- Where it is not practicable to do so, rest periods need not occur in the middle of each four-hour work period.
- Employers cannot “impede, discourage, or dissuade” employees from taking meal periods, but need not force employees to take meal breaks, and need not “ensure” the meal breaks are taken. Like rest breaks, an employer need only *provide* an employee with the opportunity to take a meal period.
- Employers are not required to provide a meal period for each five hours an employee works (the “rolling five hour” requirement). Instead, Labor Code section 512 only requires an employer to pro-

vide a meal period if an employee’s shift is more than five hours in a day. The court thus endorsed Brinker’s policy of “early lunching” – that is, having Brinker’s servers and wait staff take meal periods shortly after the start of their shifts, then working a full shift without a meal break. (Meal periods may still be waived if the work period does not exceed six hours.)

- Employers cannot “coerce, require, or compel” employees to work off the clock, but are only liable for an employee’s decision to work off the clock if the employer “knew or should have known” the employee was doing so.

Based on these holdings, the court concluded that class certification was inappropriate in meal and rest break cases where an employer’s policy permits employees to take breaks. It further held that off-the-clock claims are not generally amenable to class certification because individual issues will likely predominate with respect to the reasons individuals have worked off the clock and whether the employer had knowledge.

The case was brought on behalf of servers and other hourly employees of Brinker’s 137 California restaurants. The proposed class was estimated to consist of more than 59,000 employees.

On July 25, 2008 California Labor Commissioner Angela Bradstreet issued a memo to the Division of Labor Standards Enforcement staff informing them that the decision in *Brinker* is binding on the agency, that all staff must follow the rulings in the *Brinker* decision “effective immediately,” and the decision is to be applied to pending matters. A copy of the memo may be obtained at http://www.dir.ca.gov/DLSE/Brinker_memo_to_staff-7-25-08.pdf.

Proposed Meal Break Legislation Reactivated by California Senate

After sitting dormant for nine months, Assembly Bill 1711, meant to clarify the rules on administration of meal periods, was significantly amended in June 2008. The California State Senate Committee on Industrial Relations had scheduled hearings for June 25, 2008, but they were cancelled and had not been rescheduled at the time this publication went to press.

While employers had hoped that legislation would provide more flexibility in administering meal periods, under the current wording, it looks like the legislation will actually provide *less* flexibility.

The current wording of the bill says that meal periods have to be completed before the sixth hour of work, *but cannot commence before the beginning of the third hour*. (The issue of so-called “early lunching” is addressed by the Fourth Appellate District in *Brinker Restaurant Corp. v. Superior Court*.) Under the wording of the proposed legislation, a meal would have to be taken basically within a two and a half hour period of time, which would seem to present a challenging scenario for many businesses, especially restaurants. It also would not allow an employee to choose to take an early lunch to run a personal errand or go to an appointment. The meal period requirements would not apply to union employees if the collective bargaining agreement expressly provides for meal periods.

The proposed legislation would allow second meal periods to be waived *only in writing*, and such waivers must be revocable. On-duty meal periods will be allowed only where mutually agreed to by the employer and employee, *in writing*, and where the nature of the work prevents an employee from being

continued on page 30

Phyllis W. Cheng is the Director of the California Department of Fair Employment and Housing.



Cases Pending Before the California Supreme Court

By Phyllis W. Cheng

ATTORNEYS' FEES

Vasquez v. State of Cal., 154 Cal. App. 4th 406 (2007), *review granted*, 68 Cal. Rptr. 3d 529 (2007). S156793/D048371. Petition for review after order affirming award of attorneys' fees. Briefing deferred pending decision in *Vasquez v. State of California* (S143710), which presents the following issue: Does the rule that, in order to receive attorney fees under Cal. Code Civ. Proc. § 1021.5, the plaintiff must first reasonably attempt to settle the matter short of litigation, apply to this case? Holding for lead case.

Chavez v. City of Los Angeles, 160 Cal.App.4th 410 (2008), *review granted*, 76 Cal. Rptr. 3d 681 (2008). S162313/B192375. Petition for review after reversal of order denying attorneys' fees. Does Code of Civil Procedure section 1033 permit a trial court to deny Government Code section 12965 attorney fees to the prevailing plaintiff in an action under the Fair Employment and Housing Act (Gov't Code § 12900 et seq.) if the judgment obtained in a court with jurisdiction over "unlimited" civil cases (see Cal. Code Civ. Proc. § 88) could have been rendered in a court with jurisdiction over "limited" civil cases (see Cal. Code Civ. Proc. § 85(a))? Answer brief due.

CLASS ACTION

Arias v. Super. Ct., 153 Cal. App. 4th 777 (2007), *review granted*, 67 Cal. Rptr. 3d 460 (2007). S155965/C054185. Petition for review after issuance of peremptory writ of mandate. (1) Must an employee who is suing an employer for labor law violations on behalf of himself and others under the Unfair Competition Law (Cal. Bus. & Prof. Code § 17203) bring his representative claims as a class action? (2) Must an employee who is pursuing such claims under the Private Attorneys General Act (Cal. Lab. Code § 2699) bring them as a class action? Fully briefed.

COMPENSATION

Schachter v. Citigroup, Inc., 159 Cal.App.4th 10 (2008), *review granted*, 76 Cal. Rptr. 3d 681 (2008). S161385/B193713. Petition for review after reversal and remand of summary judgment. Does the forfeiture provision of a voluntary incentive compensation plan, which gives employees the option of using a portion of their earnings to purchase shares in the company's stock below market price but provides that employees forfeit both the stock and the money used to purchase it if they resign or are terminated for cause within a two-year period, violate Cal. Lab. Code § 201 or 202? Review granted/brief due.

EMPLOYMENT DISCRIMINATION

McDonald v. Antelope Valley Cmty. Coll. Dist., 151 Cal. App. 4th 961 (2007), *review granted*, 65 Cal. Rptr. 3d 144 (2007). S153964/B188077. Petition for review after part affirmance and part reversal of summary judgment. In an employment discrimination action, is the one-year statute of limitations for filing an administrative complaint with the Department of Fair Employment and Housing set forth in Cal. Gov't Code § 12960 subject to equitable tolling while the employee pursues an internal administrative remedy, such as a complaint with the community college chancellor filed pursuant to Cal. Code Regs. tit. 5, § 59300 et seq.? Fully briefed.

GOVERNMENT EMPLOYMENT

City of San Jose v. Operating Eng'rs Local Union No. 3, 160 Cal. App. 4th 951 (2008), *review granted*, 2008 Cal. LEXIS 7421 (2008). S162647/H030272. Petition for review after the Court of Appeal affirmed a judgment of dismissal of a civil action. This case presents the following issue: Does the Public Employment Relations Board have the exclusive initial jurisdiction to determine whether certain "essen-

tial" public employees covered by Meyers-Milias-Brown Act (Cal. Gov't Code §§ 3500, 3511) have the right to strike, or does that jurisdiction rest with the superior court? Review granted/brief due.

County of Contra Costa v. Pub. Employees Union Local No. 1, 163 Cal. App. 4th 139 (2008), *review granted*, 77 Cal. Rptr. 3d 374 (2008). S164640/A115095, A115118. Petition for review after the Court of Appeal affirmed orders. Further action in this matter is deferred pending consideration and disposition of a related issue in *City of San Jose v. Operating Engineers Local Union No. 3*, S162647, *supra* (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

HARASSMENT AND DAMAGES

Roby v. McKesson HBOC, 146 Cal. App. 4th 63 (2006), *review granted*, 57 Cal. Rptr. 3d 541 (2007). S149752/C047617, C048799. Petition for review after reversal, modification and affirmance in part of judgment. (1) In an action for employment discrimination and harassment by hostile work environment, does *Reno v. Baird*, 18 Cal. 4th 640 (1998) require that the claim for harassment be established entirely by reference to a supervisor's acts that have no connection with matters of business and personnel management, or may such management-related acts be considered as part of the totality of the circumstances allegedly creating a hostile work environment? (2) May an appellate court determine the maximum constitutionally permissible award of punitive damages when it has reduced the accompanying award of compensatory damages, or should the court remand for a new determination of punitive damages in light of the reduced award of compensatory damages? Fully briefed.

PENSION

Lexin v. Super. Ct. (People), 154 Cal. App. 4th 1425 (2007), *review granted*, 68 Cal. Rptr. 3d 529 (2007). S157341/D049251. Petition for review after denial of petition for writ of prohibition. Did petitioners' service on the board of the San Diego Retirement System, as it related to an increase in pension benefits for members of the system, violate the conflict of interest provisions of Cal. Gov't Code § 1090, and subject them to criminal prosecution, or did the non-interest exemption of Cal. Gov't Code § 1091.5(a)(9) apply? Reply brief due.

PRIVACY

Hernandez v. Hillsides, Inc., 142 Cal. App. 4th 1377 (2006), *review granted*, 53 Cal. Rptr. 3d 801 (2007). S147552/B183713. Petition for review after reversal and remand on grant of summary judgment. May employees assert a cause of action for invasion of privacy when their employer installed a hidden surveillance camera in the office to investigate whether someone was using an office computer for improper purposes, only operated the camera after normal working hours, and did not actually capture any video of the employees who worked in the office? Fully briefed.

PROPOSITION 209

Coral Constr., Inc. v. City & County of San Francisco, 149 Cal. App. 4th 1218 (2007), *review granted*, 65 Cal. Rptr. 3d 761 (2007). S152934/A107803. Petition for review after part affirmance and part reversal of grant of summary judgment. (1) Does article I, section 31 of the California Constitution, which prohibits government entities from discrimination or preference on the basis of race, sex, or color in public contracting, improperly disadvantage minority groups and violate equal protection principles by making it more difficult to enact legislation on their behalf? (See *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).) (2) Is section 31 preempted by the International Convention on the Elimination of Racial Discrimination? (3) Does an ordinance that provides certain advantages to minority- and female-owned business enterprises with respect to the award of city contracts fall within an exception to

section 31 for actions required of a local governmental entity to maintain eligibility for federal funds? Fully briefed.

REPRESENTATIVE CLAIMS

Amalgamated Transit Union., Local 1756, AFL-CIO v. Super. Ct. (First Transit, Inc.), 148 Cal. App. 4th 39 (2006), *review granted*, 61 Cal. Rptr. 3d 459 (2007). S151615/B191879. Petition for review after denial of peremptory writ of mandate. (1) Does a worker's assignment to the worker's union of a cause of action for meal and rest period violations carry with it the worker's right to sue in a representative capacity under the Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code § 2698 et seq.) or the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.)? (2) Does Cal. Bus. & Prof. Code § 17203, as amended by Proposition 64, which provides that representative claims may be brought only if the injured claimant "complies with section 382 of the Code of Civil Procedure," require that private representative claims meet the procedural requirements applicable to class action lawsuits? Fully briefed.

San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist., 154 Cal. App. 4th 866 (2007), *review granted*, 68 Cal. Rptr. 3d 528 (2007). S156961/A114679, A115686. Petition for review after reversal of trial court order granting petition for peremptory writ of mandate. (1) Does Cal. Educ. Code § 7054 permit a school district to prohibit the teachers union from using the school's mailboxes to distribute a union newsletter to its members, if the newsletter includes endorsements for school board candidates? (2) Does the guarantee of liberty of speech in Cal. Const., art. I, § 2, assure that an employee organization may distribute its message to its members concerning electoral politics via school mailboxes? Fully briefed.

TERMINATION AND SUSPENSION

Spielbauer v. County of Santa Clara, 146 Cal. App. 4th 914 (2007), *review granted*, 59 Cal. Rptr. 3d 437 (2007). S150402/H029345. Petition for review after reversal of denial of writ of mandate. If a public employee exercises his or her Fifth Amendment right against self-incrimination in a public employer's investigation

of the employee's conduct, must the public employer offer immunity from prosecution before it can dismiss the employee for refusing to answer questions asked in connection with the investigation? Fully briefed.

WAGE AND HOUR

Martinez v. Combs, decision without published opinion (2003), *review granted*, 2004 Cal. LEXIS 1914 (2004). S121552/B161773. Petition for review after partial reversal and partial affirmance of summary judgment. Briefing originally deferred pending decision in *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005), which included the following issue: Can the officers and directors of a corporate employer personally be held civilly liable for causing the corporation to violate the statutory duty to pay minimum and overtime minimum wages, either on the ground such officers and directors fall within the definition of "employer" in Industrial Welfare Commission Wage Order 9 or on another basis? Fully briefed.

Harris v. Super. Ct. (Liberty Mut. Ins.), 154 Cal. App. 4th 164 (2007), *review granted*, 68 Cal. Rptr. 3d 528 (2007). S156555/B195121 (lead), B195370. Petition for review after grant of petition for writ of mandate. Do claims adjusters employed by insurance companies fall within the administrative exemption (Cal. Code Regs. tit. 8, § 11040) to the requirement that employees are entitled to overtime compensation? Fully briefed.

WHISTLEBLOWER PROTECTION ACT

State Bd. of Chiropractic Exam'rs v. Super. Ct. (Arbuckle), 148 Cal. App. 4th 142 (2007), *review granted*, 2007 Cal. LEXIS 6811 (2007). S151705/C052554. Petition for review after grant of petition for peremptory writ of mandate. Whether, under the Whistleblower Protection Act (Cal. Gov't Code § 8547 et seq.), a state employee may bring a civil action after suffering an adverse decision by the State Personnel Board without successfully seeking a writ of administrative mandate to set aside that decision. Fully briefed.

Ramirez v. Dep't of Health Servs., decision without published opinion, *review granted*, 161 P.3d 1 (2007). S152195/C050718.

Petition for review after affirmance of judgment. Briefing deferred pending decision in *State Board of Chiropractic Examiners v. Superior Court*, *supra*. Holding for lead case.

Brand v. Regents of UC, 159 Cal. App. 4th 1349 (2008), review granted, 76 Cal. Rptr. 3d 681 (2008). S162019/D049350. Petition for review after affirmance in part and reversal in part following sustaining of demurrer. Further action in this matter is deferred pending consideration and disposition of a related issue in *State Board of Chiropractic Examiners v. Superior Court* (Arbuckle), S151705, *supra* (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court. Holding for lead case. ⁴

Place Your Ad

in the

CALIFORNIA LABOR AND
EMPLOYMENT LAW

Review

For more information,
contact Section
Coordinator
Susan Orloff at
susan.orloff@calbar.ca.gov.

Employment Law Case Notes

continued from page 6

Police Officer Had Reasonable Expectation of Privacy In Text Messages Sent and Received on Pager

Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008)

Arch Wireless contracted to provide wireless text-messaging services for the City of Ontario, including its police department. Pursuant to the city's general Computer Usage, Internet and E-mail Policy (Policy), the use of the city's computers and other electronic equipment, networks, etc., was limited to city-related business, access was not confidential and "users should have no expectation of privacy or confidentiality when using these resources." Sergeant Jeff Quon, a member of the city's SWAT team, signed an employee acknowledgement of the Policy; he also attended a meeting in which he and others were informed that text messages were considered to be the same as e-mail and could be audited by the department. Quon was later told that the content of his text messages would not be audited so long as he paid the department for any charges associated with texting more than 25,000 characters in a billing cycle. When a lieutenant in the department "grew weary" of being a bill collector for officers who exceeded the 25,000 character limit, the department contacted Arch Wireless and requested transcripts of the text messages. After the department received the transcripts from Arch, an investigation was conducted by internal affairs to determine "if someone was wasting city time not doing work when they should be." The investigation revealed that many of Quon's messages were personal in nature and were sexually explicit.

Quon (and those with whom he had texted) sued Arch for violation of the Stored Communications Act (SCA) and the Ontario Police Department and its chief for violating the Fourth Amendment and the privacy protection provision of the California Constitution. The Ninth Circuit held that Arch violated the SCA by turning over the text transcripts to the city, which was only a "sub-

scriber" and not "an addressee or intended recipient of such communication." The court further determined that Quon and those with whom he texted had a reasonable expectation of privacy in the text messages given the informal policy and "operational reality" of the department. Although the chief of police was shielded from liability by qualified immunity, the city and department were not. *See also Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008) ("low-risk" NASA contract employees were entitled to injunction precluding in-depth background investigations).

Employee Who Reported Disability During Investigation Into His Alleged Wrongdoing Was Not Discriminated Against

Arteaga v. Brink's, Inc., 163 Cal. App. 4th 327 (2008)

Brink's employee Carlos Arteaga was the subject of an internal investigation into various shortages totaling \$7,668 that occurred while he was acting in his capacity as an ATM messenger. The investigation was conducted after one of Arteaga's managers noticed there had been sixteen shortages in five months on runs in which Arteaga had been the messenger. Shortly after he learned of the investigation, Arteaga informed Brink's for the first time that he was feeling a combination of "pain" and "numbness" in his arms, fingers, shoulders and feet and that he was feeling "stress" after being "accused over and over of stealing money." Arteaga filed a workers' compensation claim. Following the investigation, Arteaga's employment was terminated as a result of the multiple shortages. Arteaga then sued Brink's for disability discrimination and for failure to engage in a good-faith interactive process with him in order to determine effective reasonable accommodations for his alleged disability. The trial court granted summary judgment to Brink's, and the court of appeal affirmed, holding that (1) Arteaga was not disabled because his symptoms (pain and numbness) did not make it difficult for him to achieve the life activity of working and (2) Brink's terminated him for a legitimate, nondiscriminatory reason – "the closeness in time between Arteaga's disclosure of his symptoms and his subsequent termination does not create a triable issue as to

pretext, especially since his performance had been questioned before he disclosed his symptoms, and he was eventually terminated for those performance issues.” *Compare Gribben v. United Parcel Serv.*, 528 F.3d 1166 (9th Cir. 2008) (employee with congestive heart failure and cardiomyopathy may have been disabled under the Americans with Disabilities Act, but was not retaliated against).

Injuries Sustained by Professional Stuntman Were Covered by Workers’ Compensation

Caso v. Nimrod Prods., Inc., 163 Cal. App. 4th 881 (2008)

Christopher Caso, a professional stuntman, suffered severe head injuries while performing a stunt during the production of a television show. Caso and his wife (who sought damages for loss of consortium) sued defendants (the director and the stunt coordinators and their respective loan-out corporations) for negligence. The trial court granted defendants’ motion for summary judgment on the ground that the individual defendants were special employees of Touchstone Television Productions who had been acting within the scope of that employment at the time of the accident. Accordingly, the Casos’ lawsuit was barred by the California Workers’ Compensation Act, California Labor Code section 3601. Further, the trial court concluded the loan-out corporations had relinquished all control over their employees and could not be held vicariously liable for the employees’ acts. The court of appeal affirmed summary judgment in favor of defendants. *See also Antelope Valley Press v. Poizner*, 162 Cal App. 4th 839 (2008) (newspaper deliverers were employees and not independent

contractors for purposes of workers’ compensation coverage); *Tomlin v. Workers’ Comp. Appeals Bd.*, 162 Cal. App. 4th 1423 (2008) (police officer who was injured while training during his vacation for an upcoming department physical fitness test was eligible for workers’ compensation benefits); *Golden v. CH2M Hill Hanford Group, Inc.*, 528 F.3d 681 (9th Cir. 2008) (Price-Anderson Act preempted Hanford Nuclear Reservation employee’s claim for injuries arising from exposure to radioactive materials but his claim for emotional distress associated with exposure to non-radioactive heavy metals would not be preempted); *cf. Ericson v. Fed. Express Corp.*, 162 Cal. App. 4th 1291 (2008) (property owner was not liable for injuries sustained by employee of independent contractor who was injured during assault on the premises).

Employer Waived Insurance Coverage By Failing to Timely Notify Carrier of Claim

Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co., 163 Cal. App. 4th 1387 (2008)

Westrec sued its insurance carrier, Arrowood, after the carrier refused to provide a defense to an employment discrimination lawsuit on the ground that Westrec had failed to timely report the third-party claim as required under the terms of two successive directors and officers liability insurance policies issued by Arrowood. Bette Clark filed a complaint with the California Department of Fair Employment and Housing (DFEH) on April 14, 2003, alleging gender bias by Westrec and requesting a right-to-sue letter. On June 23, 2003, Clark’s attorney sent a letter to Westrec “alleging discriminatory and demeaning treatment by male employees based upon sex.” Westrec

failed to notify Arrowood of the DFEH filing or the attorney’s letter within thirty days after the expiration of the policy. Clark filed her lawsuit on December 19, 2003, and Westrec notified Arrowood of the action on January 30, 2004, tendered its defense and requested indemnity. Arrowood declined to defend or indemnify on the ground that Westrec had not timely notified it of the “claim,” which it deemed to be the DFEH filing and/or the attorney’s letter. Arrowood prevailed following a nonjury trial on Westrec’s breach of contract claim. The court of appeal affirmed, holding that Westrec had failed to timely report the claim to its insurance carrier and thereby waived coverage.

Statute of Limitations for Trade Secrets Claim Dates From Time of Owner’s Knowledge

CypressSemiconductor Corp. v. Super. Ct., 163 Cal. App. 4th 575 (2008)

Trade secret owner Silvaco Data Systems develops and licenses electronic design automation software. In late 1998, a former Silvaco employee, working for Circuit Systems, Inc. (CSI), incorporated Silvaco’s “SmartSpice” trade secrets into CSI’s product, “DynaSpice.” Silvaco sued the employee as well as CSI, and in 2003 entered into a settlement agreement and stipulated judgment. Silvaco contacted CypressSemiconductor (Cypress) (one of CSI’s customers who had purchased DynaSpice) in September 2003 and demanded that Cypress cease its use of Silvaco’s trade secrets (as incorporated in the DynaSpice software). When Cypress continued to use the product after receiving notice from Silvaco, the latter company sued the former for trade secret misappropriation under the California Uniform Trade Secrets Act (CUTSA).

Online
CLE

Need MCLE Credits?

The Labor and Employment Law Section
has nearly 70 online CLE, CLE to Go,
Tele-Seminars, and Webinars

www.calbar.org/online-cle

Cypress defended in part based on CUTSA's three-year statute of limitations. Silvaco, however, argued that because Cypress did not know of CSI's misappropriation until August of 2003, the statute of limitations did not commence running until that date because one of the elements of a trade secret misappropriation claim is the defendant's knowledge of the wrongfulness of its conduct. The court of appeal held that a plaintiff may have more than one claim for misappropriation, each with its own statute of limitations, when more than one defendant is involved. However, the court further held that the statute commences running when the plaintiff knows or has reason to know the third party has knowingly acquired, used or disclosed its trade secrets. The court held that Cypress was entitled to a jury trial to determine when Silvaco first had reason to know that a CSI customer such as Cypress had obtained or used DynaSpice knowing, or with reason to know, that the software contained Silvaco's trade secrets.

California Law Limiting Use of State Funds To Deter Union Organizing Is Unconstitutional

Chamber of Commerce v. Brown, 554 U.S. ___, 128 S. Ct. 2408 (2008)

Assembly Bill 1889, enacted in 2000, prohibited private employers that receive state funds – whether by reimbursement, grant, contract, use of state property or pursuant to a state program – from using such funds to “assist, promote, or deter union organizing.” Violators were to be liable to the state for the amount of funds used for the prohibited purposes plus a civil penalty equal to twice the amount of those funds. The Chamber of Commerce challenged the law on the ground that it was preempted by the National Labor Relations Act (NLRA). The Ninth Circuit held the law was not preempted by the NLRA, but the United States Supreme Court reversed, holding by a vote of 7 to 2 (Breyer and Ginsburg, JJ., dissenting) that the state statute was preempted by federal labor law. *Cf. Adkins v. Mireles*, 526 F.3d 531 (9th Cir. 2008) (Labor Management Relations Act preempted employees' claims against their union). ⁴¹

The Labor & Employment Law Review is published by the Labor and Employment Law Section of the State Bar of California

Co-Editors-in-Chief

Emily Prescott and Julia Lapis Blakeslee

Associate Editor

Rene Judkiewicz

Editorial Board

Bruce Barsook
Phyllis W. Cheng
Karen Clopton
Barbara A. Cotter
John Cumming
Dorothy Bacskai Egel
Carol Koenig
Lois M. Kosch
Anthony Oncidi
Tyler M. Paetkau
Patti Roberts
Mary Topliff
Katherine Thomson
Timothy G. Yeung

Design & Production

Shawna Monson, Documation LLC

www.calbar.ca.gov/laborlaw

Labor and Employment Law Section

Case Law Alerts

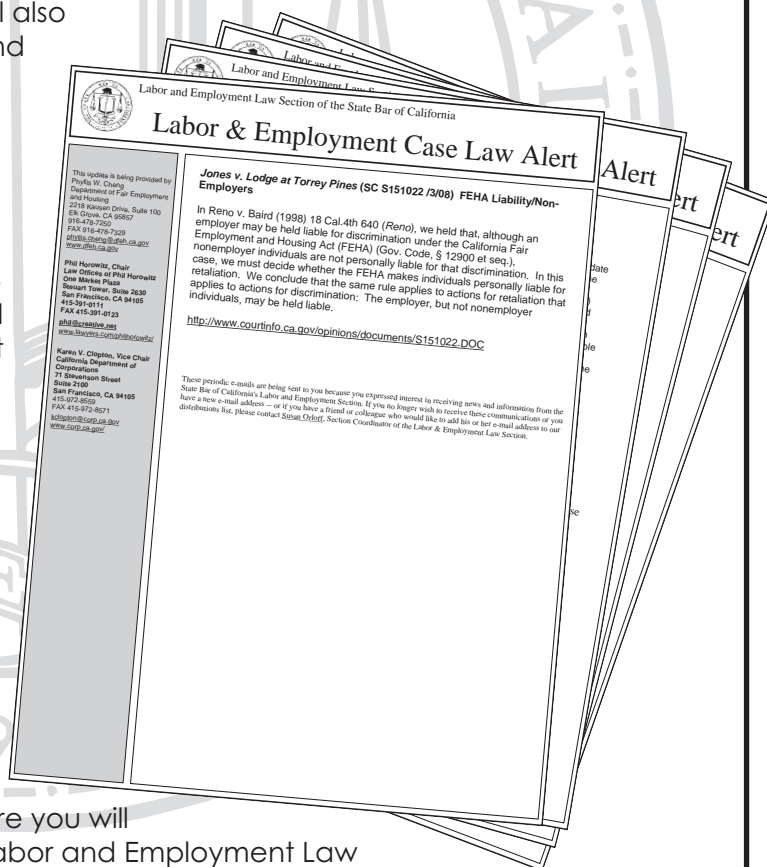
The Labor and Employment Law Section is offering members a FREE “electronic alert service” that will allow Section members to receive brief notices as soon as the courts issue new decisions on labor and employment law cases or grant reviews. These alerts are offered virtually contemporaneously with publication or announcement of these new decisions and reviews.

Members who subscribe to this service will also receive immediate alerts on legislation and more. On a within-the-hour basis and as they are published, members will access new California Supreme and Court of Appeal, Ninth Circuit and U.S. Supreme Court decisions, as well as new statutes. Section member and attorney Phyllis Cheng will provide you with a flash headline subject alert, a very brief excerpt and relevant links on matters that could affect your practice.

In order to receive these alerts you will need to subscribe to an electronic distribution list, which you can easily do via your State Bar Online Member Profile. Go to www.calbar.ca.gov (the State Bar home page) and log on to your Profile by entering your State Bar member # and password in the white boxes in the left margin. Once in your Profile, click on the link entitled “Change My Email List Preferences” and scroll down to the Labor and Employment Law Section where you will see an option to check a box marked “Labor and Employment Law Case Law Alerts.” Check the box to subscribe to the list.

(If you have not yet set up a Profile, contact our Section Coordinator, Susan Orloff, at susan.orloff@calbar.ca.gov, and she will provide complete instructions.)

Even if you do not subscribe to this free service, do not forget to read Phyllis Cheng's column on cases pending before the California Supreme Court in the California Labor & Employment Law Review.



Wellness Programs

continued from page 4

ten “yes” or “no” questions, along with examples and tips that serve to clarify the intent and purpose of those questions.

The first five checklist questions establish the period used as the plan year, whether there is a wellness program in place, whether it is part of a group health plan and whether the program discriminates on the basis of a health factor:

1. Is the first day of the current plan year after July 1, 2007?
2. Does the plan have a wellness program?
3. Is the wellness program part of a group health plan?
4. Does the program discriminate based on a health factor?
5. If the program discriminates based on a health factor, is the program saved by the benign discrimination provisions?

If the employer answers “no” to any of the first four questions, it need not continue with the checklist because the final regulations do not cover the plan. If the employer answers “yes” to all five questions, it need not continue with the checklist because the final regulations cover the plan and it complies. A “no” response to the fifth question requires completion of the next section of the checklist regarding compliance criteria:

6. Is the amount of the reward offered under the plan limited to 20 percent of the applicable cost of coverage?
7. Is the plan reasonably designed to promote health or prevent disease?
8. Are individuals who are eligible to participate given a chance to qualify at least once per year?
9. Is the reward available to all similarly situated individuals? Does the program offer a reasonable alternative standard?
10. Does the plan disclose the availability of a reasonable alternative in all plan materials describing the program?

Although the final HIPAA regula-

tions address discrimination, the FAB makes it clear to employers that the covered programs must meet either a benign discrimination exception or offer a reasonable alternative standard in order to comply with the final rules. Permissible benign discrimination may occur under a “participation-based” wellness program that offers a reward based solely on participation in the program and does not condition the reward on achievement of a specific health-related outcome. Therefore, although the wellness program may “discriminate” in mandating that only certain employees will be required to participate in a particular program (i.e., you must be a smoker to participate in a smoking cessation program), there is no goal that must be met to procure the reward. The FAB offers, for example, a plan that grants participants with diabetes a waiver of the annual deductible if they enroll in a disease management program that consists of attending educational classes and following their doctors’ recommendations regarding exercise and medication, concluding that this is benign discrimination because the program is offering a reward to individuals based on an adverse health factor.

The FAB also clarifies how a reasonable “alternative standard” may be required under a program that requires that a particular goal be met in order for a reward to be given. This means that although a reward may only be available to those who meet a certain standard (e.g., the attainment of cholesterol target), there must be an alternative standard (e.g., nutrition counseling sessions) that are made available to those for whom satisfying the otherwise applicable standard is: (1) unreasonably difficult due to a medical condition; or (2) medically inadvisable. The FAB notes that it is permissible for the plan or issuer to seek verification, such as a certificate from the individual’s health care provider, that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the otherwise applicable standard.

Discrimination Against Persons with Disabilities

Under the Americans With Disabilities Act (ADA), an employer may not discriminate against a qualified individual with a disability with regard to,

among other things, employee compensation and benefits available by virtue of employment.⁷ ADA issues arise in mandatory wellness programs for three reasons. First, the ADA limits the circumstances under which an employer may ask questions about an employee’s health or require the employee to have a medical examination. Second, the ADA imposes strict confidentiality requirements on the disclosure of medical information. Third, the ADA will certainly apply if an employee is able to perform the essential functions of his or her job but, because of a disability, is unable to achieve a health factor requirement under a mandatory wellness plan.

Medical inquiries or examinations of current employees regarding the existence, nature or severity of a disability are generally prohibited unless job-related and consistent with business necessity.⁸ All employees are entitled to this ADA protection (i.e., they do not have to be a qualified individual with a disability).⁹ To avoid the first and second ADA obstacles, most employers that adopt wellness plans retain an independent third party to administer the program. The third-party administrator collects and analyzes all medical information and does not disclose individual health data to the employer.

The Equal Employment Opportunity Commission (EEOC) has taken the position that it is permissible to ask medical information as part of a voluntary wellness program that focuses on early detection, screening, and management of disease.¹⁰ A wellness program is considered voluntary so long as an employer neither requires participation nor penalizes employees who do not participate.¹¹ Information collected during the permissible inquiries or examinations must be maintained in separate medical files and treated as confidential medical information.¹² The EEOC’s position implicitly suggests that it would not reach the same conclusion with respect to a mandatory wellness program. However, when the program only requires the employee to participate in a health assessment and does not require the employee to achieve any specific health standard, and only the third-party administrator has the individual’s medical data, the same conclusion should be reached.

But what if the wellness plan mandates that employees achieve some measurable health standard *as a condition of*

employment? While at the riskier edge of the wellness continuum, the concept of a reasonable accommodation, both under the ADA and the HIPAA regulations, suggests that even the third obstacle can be overcome. The employee may be able to meet a less stringent health factor or be given the alternative of participating in a program designed to manage or mitigate the medical condition. If a physical or mental disability prevents an employee from participating in such an alternative, and the employee is able to perform the essential functions of the job, a waiver may be necessary. Obviously, an employer that learns of a mandatory health assessment will need to take extra precautions to assure that the knowledge obtained in the health assessment truly is not used as the basis for an adverse employment action.

Employers should also be mindful that not all at-risk health conditions are tied to a disability. An employee's excess weight may be tied to poor diet and exercise habits, not an endocrine imbalance. Smoking, excessive drinking (short of alcoholism), and recreational drug use (short of addiction) are poor health habits that are not *per se* protected by the ADA.

An employer might also argue that a wellness program does not discriminate on the basis of disability because its terms apply equally to the disabled and nondisabled. A handful of cases have discussed this defense with respect to employee benefits plans.¹³

The employer might also defend an ADA claim by arguing that it implemented the wellness program for underwriting, classifying, or administering risks.¹⁴ However, an employer may not use risk-assessment activities as a subterfuge to evade the ADA's nondiscrimination requirements (e.g., refusing to hire disabled persons solely because their disabilities may increase the employer's future health care costs; or denying disabled employees equal access to health insurance based on disability alone, if the disability does not pose increased insurance risks).¹⁵

Age Discrimination in Employment Act

Employers can craft a mandatory wellness program to correspond to the reasonable expectations of the older worker. Wellness programs do not demand that employees become super athletes or achieve perfect health. If a

mandatory program requires an employee to achieve a certain health standard, that standard should take into account, and, if necessary, be adjusted for, the age of the employee. Programs can mandate participation in an exercise or fitness plan without requiring, for example, that everyone be able to run a certain distance at a certain speed.

Potential Title VII and FEHA Claims

In addition to age, a mandatory wellness program may implicate other protected classes under Title VII of the Civil Rights Act¹⁶ and the Fair Employment and Housing Act (FEHA),¹⁷ such as gender and religion.¹⁸ Reasonable accommodation should lessen the risk of litigation.

If an employer sets specific health standards, it must be able to objectively demonstrate with reliable expert data that the standards do not discriminate against women. In the early 1980s, many airlines' weight limitations for flight attendants were challenged because they were overly restrictive when it came to women, allowing more tolerance for excess weight in male flight attendants. Wellness programs should set goals based on what is a healthy weight, even if a female employee might look more attractive if she were thinner. There are generally accepted Body Mass Index (BMI) standards based on age and gender that could be incorporated into a wellness program. Women carry a greater percentage of body fat than do men, and that is factored into the BMI.

Religion could be a challenge if, in order to manage a health risk, an employee should be on medication but, for religious reasons, the employee does not take medication. If medication were the only way the employee could achieve a stated health standard, a reasonable accommodation would have to be offered. For example, an employee with high blood pressure may not be able to get his or her blood pressure into a normal range without medication, but may be able to reduce it somewhat with diet and exercise, even though it remains higher than desired levels.

Collective Bargaining Statutes

Employers in a unionized environment may also face significant challenges in implementing a wellness program. Under the National Labor Relations Act (NLRA) and the Meyers-Milias-Brown

Act, employers must bargain in good faith over mandatory subjects of bargaining, defined to include wages, hours, and other terms and conditions of employment. Given that many wellness programs are likely to impact an employee's wages (via reduced health premiums) and mandatory programs certainly will impact the terms and conditions of employment, an employer in a union environment most likely will not be able to unilaterally implement a wellness program. Rather, such an employer likely will be required to propose its wellness program to the union and engage in bargaining over the terms of the program.

Employee benefits such as health insurance plans are mandatory subjects of bargaining.¹⁹ Thus, should an employer's wellness program change the structure of employee contributions, co-pays, and deductibles, or offer new programs on topics such as smoking cessation and weight loss, the employer will likely be required to bargain over such changes.

In addition, the National Labor Relations Board (Board) has held that health and safety issues are mandatory subjects of bargaining. For example, the Board has held that an employer must bargain over its implementation of a non-smoking policy.²⁰ Thus, should an employer's wellness program seek to restrict on-site use of tobacco products, the employer will likely need to bargain with the union over such a decision.

Some wellness programs might also require that employees submit to physical examinations. Unionized employers must also bargain with the union over these aspects of the program.²¹ Accordingly, cholesterol, blood pressure, and other types of physical examination programs are likely mandatory subjects of bargaining. Even an employer's decision to significantly change dining alternatives in its cafeteria may trigger its duty to bargain with the union, particularly where services are altered or prices affected.²²

Privacy and Other Statutes

California has enacted laws that employers must consider when designing a mandatory wellness program.

1. State Health Information Privacy Statutes

The California Confidentiality of Medical Information Act requires employers to establish procedures to pro-

protect the confidentiality of an employee's medical information and limits how employee health information may be used and disclosed without the employee's authorization.²³ The latter requirement would bar the disclosure to managers of health information generated by a mandatory wellness program. Moreover, employers are barred from retaliating against an employee who refuses to sign an authorization for disclosure, although an employer may take actions necessitated by the lack of information resulting from the employee's refusal. The statute also imposes requirements on the form and content of an authorization.

2. State Laws Prohibiting Adverse Action on the Basis of Lawful Off-Duty Conduct

California law also prohibits employers from taking adverse employment action for lawful off-duty conduct.²⁴ Although using tobacco or drinking too much is unhealthy, it is not illegal. Thus, in California, employers must be careful not to implement mandatory wellness programs, or even target goals within those programs, that permit adverse employment action, for example, based on an employee's failure to abstain from smoking. The scope of California law regarding lawful off-duty conduct should be examined carefully before a mandatory wellness program is put in place so that an employer can determine the types of "carrots and sticks" that would be permissible.

3. State Laws Prohibiting Adverse Action Based on the Results of Genetic Testing

Employers implementing mandatory wellness programs that include genetic testing must also comply with state laws that regulate whether and how employers may obtain, use, and disclose genetic information. For example, the FEHA includes within the definition of medical condition genetic characteristics.²⁵ Therefore, California employers must be careful before implementing an employee medical screening initiative that evaluates an employee's propensity for genetically linked medical conditions, such as sickle-cell anemia or certain types of cancer. Accordingly, employers must evaluate the effect of genetic testing laws before implementing a mandatory wellness program.

CONCLUSION

With health costs rising dramatically, and with the continued focus on health and wellness issues, employers must now navigate complex legal requirements and restrictions as they move toward implementing mandatory wellness programs.

Employers need to anticipate the future as they balance business needs with compliance challenges and risk. An initial wellness program should be reviewed semi-annually to measure legal compliance and the opportunity for new features as case law, regulations, and statutes develop and change. ²⁶

ENDNOTES

1. Michelle Conlin, *Get Healthy—Or Else*, Bus. Week, Feb. 26, 2007, available at http://www.businessweek.com/magazine/content/07_09/b4023001.htm.
2. *Rodriguez v. The Scotts Co., L.L.C.*, Case No. C.A. 07-10104-GAO (D. Mass 2007).
3. 29 U.S.C. § 1001 et seq.
4. *Id.* at § 1182; 26 U.S.C. § 9801 et seq.
5. 29 C.F.R. § 2590.702.
6. *Id.* at § 54.9802 et seq.
7. 42 U.S.C. § 12112(a), (b).
8. *Id.* at § 12112(d)(4)(A).
9. See, e.g., *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 94 (2d Cir. 2003); *Fredenburg v. Contra Costa Co. Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999).
10. 42 U.S.C. § 12112(d)(4).
11. *Enforcement Guidance: Disability-Related Inquiries & Med. Examinations of Employees Under the Americans With Disabilities Act (ADA)*, available at www.eeoc.gov/policy/docs/guidance.
12. 42 U.S.C. §§ 12112(d)(3)(B), (4)(C).
13. *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144 (2d Cir. 2000) (in the context of a long term disability plan, offering different benefits for mental and physical disabilities does not violate the ADA, because every employee was offered the same plan regardless of disability status); *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995) (health plan's exclusion for infertility treatments was not a distinction based on disability, because it applied to individuals who did and did not have disabilities).
14. 42 U.S.C. § 12201(c)(2), (3).
15. *Id.* at § 12201(c)(2). See, e.g., *Barnes v. Benham Group, Inc.*, 22 F. Supp. 2d 1013 (D. Minn. 1998) (holding

in favor of the employer on an ADA claim, where the employer terminated an employee who refused to complete a health insurance enrollment form, because the form was used by the insurer to classify or underwrite risk); *McLaughlin v. General Am. Life Ins.*, 1998 U.S. Dist. LEXIS 16994 (E.D. La. Oct. 21, 1998) (preexisting condition limitation excluding payment of claims for which the insured had been treated during the previous 12 months did not violate ADA).

16. 42 U.S.C. § 2000e et seq.
17. Cal. Gov't Code § 12900 et seq.
18. *Id.* at § 12940(a)-(d), (j).
19. *Hardesty Co., Inc. d/b/a Mid-Continent Concrete Co.*, 336 NLRB 157, enforced 308 F.3d 859 (8th Cir. 2002) (employer violated 8(a)(5) by unilaterally changing the health insurance benefit plan); *Brook Meade Health Care Acquirers*, 330 NLRB 775 (2000) (unilateral increase in employee contributions to health insurance premiums constitutes a violation of the NLRA).
20. *See-Tech Corp.*, 309 NLRB 3 (1992), aff'd sub nom. *NLRB v. High Tech. Cable Corp.*, 25 F.3d 1044 (5th Cir. 1994) (management rights provision relied on by employer not sufficient to constitute clear and unequivocal waiver of union's right to bargain over specific no-tobacco rule); *Allied Signal, Inc.*, 307 NLRB 752 (1992) (union's agreement to "safety and health" clause was deemed conscious waiver of union's right to bargain prior to employer's implementation of new policies affecting health and safety, such as change in smoking policy).
21. *Colgate-Palmolive Co.*, 323 NLRB 515 (1997); *Leroy Mach. Co.*, 147 NLRB 1431 (1964) (management-prerogatives clause constituted union waiver of right to require employer to bargain about physical examinations during term of existing agreement).
22. *Mercy Hosp. of Buffalo*, 311 NLRB 869 (1993) (elimination of late night cafeteria service); *O'Land, Inc.*, 206 NLRB 210 (1973) (employer violated section 8(a)(5) by unilaterally granting free meals to non-striking employees; the employer failed to notify employees that the free meals were a temporary measure for the purpose of protecting nonstriking employees).
23. Cal. Civil Code § 56.10 et seq.
24. Cal. Labor Code, § 96(k).
25. Cal. Gov't Code § 12926(h)(2).

MCLE Self-Assessment Test

MCLE CREDIT

Earn one hour of general MCLE credit by reading “Legal Challenges Raised by Employer-Mandated Wellness Programs” and answering the questions that follow, choosing the one best answer to each question. Mail your answers and a \$25 processing fee (\$20 for Labor and Employment Law Section members) to:

Labor and Employment Law Section • State Bar of California
180 Howard Street
San Francisco, CA 94105

Make checks payable to The State Bar of California. You will receive the correct answers with explanations and an MCLE certificate within six weeks. *Please include your bar number and e-mail.*

CERTIFICATION

The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing education. This activity has been approved for minimum education credit in the amount of one hour.

Name _____	Bar Number _____	E-mail _____
1) The Health Insurance Portability and Accounting Act (HIPAA) prohibits group health plans regulated by the Employee Retirement Income Security Act from discriminating based on a health factor. <input type="checkbox"/> True <input type="checkbox"/> False	11) ADA issues arise in employer mandatory wellness programs for three reasons, including the ADA's allowance for open, unlimited access to employee medical information. <input type="checkbox"/> True <input type="checkbox"/> False	
2) The HIPAA non-discrimination rules exclude body mass index as a health factor, but include nicotine addiction. <input type="checkbox"/> True <input type="checkbox"/> False	12) Medical inquiries or examinations of current employees regarding the existence, nature, or severity of a disability are generally allowed. <input type="checkbox"/> True <input type="checkbox"/> False	
3) In 2006, the U.S. Department of Labor (DOL) promulgated regulations concerning wellness plans with plan years beginning on or after July 1, 2007. <input type="checkbox"/> True <input type="checkbox"/> False	13) The Equal Employment Opportunity Commission (EEOC) has taken the position that it is impermissible to ask for medical information as part of a voluntary wellness program that focuses on early detection, screening, and management of a disease. <input type="checkbox"/> True <input type="checkbox"/> False	
4) On February 14, 2008, the DOL issued a bulletin setting forth a Wellness Program Checklist on which types of wellness programs need not comply with HIPAA regulations. <input type="checkbox"/> True <input type="checkbox"/> False	14) The EEOC has expressly taken the position that it is permissible to ask for medical information as part of an involuntary wellness program. <input type="checkbox"/> True <input type="checkbox"/> False	
5) The first five questions on the DOL's Wellness Program Checklist establish the period used as the group health plan year, whether there is a wellness program planned for the future, whether the wellness program will be part of an individual health plan as opposed to a group health plan, and whether the program will discriminate based on a health factor. <input type="checkbox"/> True <input type="checkbox"/> False	15) An employer may not use risk-assessment activities to evade the ADA's nondiscrimination requirements. <input type="checkbox"/> True <input type="checkbox"/> False	
6) If an employer filling out the DOL's Wellness Program Checklist answers "no" to any of the checklist's first five questions, the employer need not continue with the checklist because the HIPAA regulations do not apply. <input type="checkbox"/> True <input type="checkbox"/> False	16) Where an employer provides for reasonable accommodation of protected classes, the employer who has reasonable expectations of employees may have a mandatory wellness program. <input type="checkbox"/> True <input type="checkbox"/> False	
7) The DOL's bulletin issued on February 14, 2008 requires employers with wellness programs subject to the HIPAA either to have a non-benign discrimination exception to HIPAA compliance or to offer an unreasonable alternative standard. <input type="checkbox"/> True <input type="checkbox"/> False	17) In addition to implicating the Age Discrimination in Employment Act, an employer's mandatory wellness program may implicate protected classes under Title VII of the federal Civil Rights Act and the California Fair Employment and Housing Act. <input type="checkbox"/> True <input type="checkbox"/> False	
8) An employer's "participation based" wellness program that offers a reward based solely on an employee's participation in the program, and that does not condition the reward on a specific health-related outcome, constitutes permissible benign discrimination. <input type="checkbox"/> True <input type="checkbox"/> False	18) An employer with union-member employees will likely be required to propose a wellness program to the union and engage in collective bargaining over its terms. <input type="checkbox"/> True <input type="checkbox"/> False	
9) An example of benign discrimination permissible under the HIPAA is a smoking cessation program required for employees who smoke, which mandates that the smokers provide proof that they have stopped smoking for a period of at least twelve months. <input type="checkbox"/> True <input type="checkbox"/> False	19) The California Confidentiality of Medical Information Act contains restrictions on the use of employee medical information, including the disclosure of such information in the absence of an employee's authorization, thereby barring employers from revealing information generated by a mandatory wellness program to managers. <input type="checkbox"/> True <input type="checkbox"/> False	
10) The Americans With Disabilities Act (ADA) prohibits an employer from discriminating against a qualified disabled person as to employee compensation and benefits available by virtue of employment. <input type="checkbox"/> True <input type="checkbox"/> False	20) Since the Fair Employment and Housing Act includes genetic characteristics within the definition of the term "medical condition," an employer in California must be careful before implementing an employee medical screening initiative that evaluates an employee's propensity for genetically-linked medical conditions. <input type="checkbox"/> True <input type="checkbox"/> False	

Public Sector Case Notes

continued from page 5

on leave of absence could engage in negotiations and grievance processing, the possible overlap does not change the fact that the employee is on leave from his or her normal work duties to serve as a union officer. Because the employee is already on leave, it stands to reason that release time is not possible.

ARBITRATION

School Board Could Not Vacate Arbitrator's Decision That Employee's Alleged Misconduct Was Not Serious Enough to Warrant Bypassing the Contractual Requirement of Progressive Discipline

California Sch. Employees Ass'n v. Bonita Unified Sch. Dist., 163 Cal. App. 4th 387 (2008)

Donald Roberts worked for the Bonita Unified School District (District). In June 2004, the District served Roberts with a Notice of Termination and Suspension without Pay for various alleged acts of misconduct, including communicating regularly with staff members in rude, abusive, sexually explicit, and threatening language and failing to comply with supervisors' directions. The District's collective bargaining agreement (CBA) with the union stated that the District was required to use progressive discipline which could not be bypassed unless the serious nature of the offense warrants it. The CBA also provides that whether or not the nature of the offense was so serious as to warrant bypassing progressive discipline steps may be submitted to arbitration.

Roberts requested a traditional hearing before a hearing officer appointed by the District's board regarding the disciplinary charges against him, and a grievance arbitration to determine if the nature of the offense was adequately serious to call for bypassing the progressive discipline steps. To streamline the process, the parties agreed to conduct the arbitration and the board hearing in a consolidated proceeding before a third-party arbitrator.

The arbitrator would first determine if the nature of the offenses was so serious to require bypassing progressive discipline steps. If the conduct were sufficiently severe, then the third-party would serve as the board's hearing officer for the disciplinary appeal. The District board's ability to review the arbitration award regarding the bypassing of progressive discipline was limited by statute to violation of the standards imposed by the California Arbitration Act.

The third-party arbitrator prepared a lengthy decision in which he held that many of the District's charges were not fully supported. He determined that the charges were not sufficiently serious as to require bypassing progressive discipline steps. The acts were not so outrageous and egregious as to either have required no prior warning that severe discipline would occur or some similar outrageous conduct that any employee would reasonably know would result in termination of his employment. Because the arbitrator found in favor of the employee in the arbitration, the hearing on the disciplinary charges was unnecessary. The board reviewed the arbitration award and the evidence, and found that the arbitrator had exceeded his powers by improperly defining "serious nature of the offense." Consequently, the board vacated the arbitration award and upheld the termination.

Roberts' union filed a petition in trial court to confirm the arbitration award and to obtain a writ of mandate directing the District to reverse the board's decision. The trial court confirmed the arbitration award and directed the board to reverse its decision. The California Court of Appeal affirmed.

Education Code section 45113 permits classified employees to submit certain disciplinary disputes to arbitration pursuant to the terms of a CBA. That is exactly what was done here. The parties agreed that if the arbitrator determined that the nature of the offenses against Roberts was not so serious as to require bypassing progressive discipline steps, the termination decision could not stand. The arbitrator so found. And the arbitration award explained that any lesser discipline could not be imposed because the deadlines for such discipline had expired.

The court held that the arbitration provision in the CBA was valid. Section 45113 allows these determinations to be made in final and binding arbitrations with limited review. As such, the board was only allowed to vacate the arbitration award if the arbitrator exceeded his powers. Contrary to the board's determination, the arbitrator did not exceed his authority when he defined a serious offense as an act that was so outrageous as to either have required no prior warning that severe discipline would occur or some similar outrageous conduct that any employee would or reasonably should know was not only prohibited, but also would likely result in termination. Because the board did not sustain its burden of establishing a violation of the California Arbitration Act, the trial court properly confirmed the arbitration award.

EMPLOYEE TRAINING COSTS

Agency Can Require Employee to Reimburse for Training Costs, But Cannot Deduct Amount From Employee's Paycheck

City of Oakland v. Hassey, 163 Cal. App. 4th 1477 (2008)

The City of Oakland (City) found that it lost money when it trained officers who left its police department within a few years after receiving training. Consequently, the City entered into a memorandum of understanding (MOU) with the union authorizing the City to require those who went through training at its academy to reimburse the City for training costs if the person left the City's police department before completing five years of service. The MOU provided that repayment would be due and payable at the time of separation, and the City would deduct any amounts owed from the employee's final paycheck. If the deduction was not sufficient, the balance would be due.

Kenny Hassey signed a conditional offer to work as a police officer trainee for the City. His offer was subject to the condition that he repay his \$8,000 training expenses if he voluntarily terminated with the police department before the end of five years. Hassey also signed a reimbursement agreement, which contained the same repayment provision. After he completed his training, Hassey



INTERESTED IN

Writing?

The State Bar Labor & Employment Law Section is drafting a companion volume to our Public Sector Labor Relations treatise on Public Sector Employment Law.

If you are a good writer, knowledgeable about the public sector, and are interested in writing on one of the topics listed below, we need your help.

Topics include the following: wage/hour laws, leaves of absence, retirement, privacy rights, hiring/selection process, discipline/wrongful termination, conflict of interest/ethics, political activities, litigation, nepotism/no fraternization policies and special employment categories (e.g., education, law enforcement, fire).

*Please contact one of the following editors
no later than October 1, 2008:*

Bruce Barsook
bbarsook@lcwlegal.com

Carol Vendrillo
cvendrill@berkeley.edu

Chris Platten
cplatten@wmpirlaw.com



worked as a City police officer for only three months before he voluntarily resigned. When he resigned, Hassey signed a repayment agreement, acknowledging that he owed the City \$8,000 in training costs, to be paid in twenty-four monthly installments. The City withheld Hassey's final paycheck to cover some of the money owed. The City sent a series of collection notices to Hassey for the balance, but he did not respond.

The City sued Hassey for breach of contract, seeking the amount owed under the repayment agreement, plus collection fees, interest, attorney fees, and costs. Hassey argued that the contract was unenforceable because it violated the Fair Labor Standards Act (FLSA) and various state laws. Hassey filed a cross-complaint for a variety of claims, including violation of the FLSA and violation of Labor Code sections 221 and 223. The trial court held that the City was entitled to the repayment costs and that Hassey's claims were barred by the statute of limitations. The California Court of Appeal reversed in part and affirmed in part.

The court found that the conditional offer, reimbursement agreement, and repayment agreement were valid and did not violate the FLSA. But it was unlawful for the City to withhold Hassey's final paycheck in order to satisfy his debt. Under the FLSA, Hassey was entitled to at least minimum wage for the final pay period he worked. Similarly, California law prohibits an employer from withholding an employee's wages in order to set off a debt owed. Although the MOU authorized deductions from final paychecks to cover reimbursement for training costs, under the FLSA, the prohibition against withholding money due under a debt to an employer applies whether or not the employee agreed in writing to the withholding.

RETIREMENT LAW

Disabled Retiree's Effective Retirement Date, Which Is the Day After the Last Day She Receives Regular Compensation, Is Based on the Date the Retiree Exhausts Sick Leave and Not When She Actually Stops Working

Katosh v. Sonoma County Employees' Ret. Ass'n, 163 Cal. App. 4th 56 (2008)

Donna Katosh was a youth supervisor for the Sonoma County Department of Human Services. She stopped working on June 26, 2000. Her county health insurance lapsed in March 2001. In 2002, she applied for disability retirement. While her application was pending, she returned to "in pay status" with the county for a two-week period ending December 9, 2002. She did not actually provide services for the county during that period, but she received a payment of approximately forty hours of sick leave previously accrued while she was working.

The Sonoma County Employees' Retirement Association notified Katosh in October 2004 that she had to have active county health insurance at the time of her retirement in order to receive retiree health insurance benefits. Consequently, the county allowed her to return to "in pay status" effective October 12, 2004, and to run out her sick leave and vacation hours to give her the forty hours needed to reinstate her health insurance prior to the county's retirement board reaching its decision regarding her disability retirement application. The county's letter advised her that taking this action would mean her retirement date would be in October 2004, and she would not receive retroactive retirement benefits if she were granted a disability retirement. But she would get health insurance benefits as a retiree. Katosh accepted the offer. The board later granted her disability retirement application, confirmed its decision that sick leave is regular compensation, and set Katosh's retirement date as the day after her last day on payroll, October 28, 2004.

Katosh filed a petition for writ of mandate arguing that the board abused its discretion by characterizing the sick leave compensation as "regular compensation" under Government Code section 31724. The trial court denied the petition. The California Court of Appeal affirmed.

Government Code section 31724 provides that when an employee retires based on disability, the disability retirement allowance will be effective not earlier than the day following the last day for which the employee received "regular

compensation." The retirement of a member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation unless the member consents to his or her retirement at an earlier date. The court found that "regular compensation," as set forth in section 31724, includes sick leave and vacation. Consequently, Katosh's last day for which she received regular compensation was October 27, 2004.

WORKER'S COMPENSATION

SWAT Police Officer Who Injures Himself While on Vacation and Running for Mandatory Fitness for Duty Examination Was Entitled to Worker's Compensation Benefit.

Tomlin v. Workers' Comp. Appeals Bd., 162 Cal. App. 4th 1423 (2008)

Dave Tomlin is a member of the City of Beverly Hills Police Department Special Weapons and Tactics Unit (SWAT). SWAT assignment is voluntary. Officers are required to pass a physical fitness test prior to joining SWAT and to pass an annual physical fitness test involving a half-mile run, climbing a wall, and dragging 150 pounds. Those officers not in SWAT do not have to pass such periodic physical fitness tests. Tomlin testified that a SWAT member was recently reprimanded for not being physically fit when the officer failed to climb a wall while on assignment.

The city pays Tomlin to train four days each month, and has sent him to train at Camp Pendleton and out of state. He otherwise maintains his physical fitness by running, bicycling, and weightlifting outside of work.

In November 2005, a supervisor informed the SWAT members that the annual physical fitness test would be administered in January 2006. Tomlin began training to prepare for the test and expected to continue training during a two-week vacation he scheduled from late December to early January 2006. Tomlin's supervisor did not direct him to train during his vacation, and Tomlin did not inform his supervisors that he would continue training during vacation. However, Tomlin believed that the city expected him to train while on vaca-

Visit the Section's Website

Those who haven't visited the Labor & Employment Law Section's website in a while are in for a surprise.

www.calbar.ca.gov/laborlaw

We've added news of upcoming Section events and activities and full length articles and excerpts from past issues of the Review. Additionally, there is a comprehensive set of "links" to websites that all labor and employment lawyers should have at their fingertips, including links to legal research sites, state and federal resources, and the official websites of the EEOC, NLRB, DLSE, DFEH, DOL, FCC, OSHA and many others.


Log on Today!



tion. While on vacation in Jackson, Wyoming, Tomlin went for a three-mile run, slipped on a sidewalk, and broke his ankle.

Tomlin applied for workers' compensation benefits arising out of his injury, and the city denied his claim. The workers' compensation administrative law judge (WCJ) found in favor of the city. The Workers Compensation Appeals Board (Board) denied reconsideration, adopting the WCJ's decision. The California Court of Appeal annulled the Board's decision denying Tomlin's benefits.

An employee who sustains an injury during voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties may be entitled to workers' compensation benefits if the activity is a reasonable expectancy of, or expressly or impliedly required by, the employment. The test of reasonable expectancy of employment consists of two elements: (1) whether the employee subjectively believes his or her participation in an activity is expected by the employer, and (2) whether that belief is objectively reasonable. Here, Tomlin believed that the city expected him to train for the SWAT physical fitness test while on vacation. The issue is whether that belief was objectively reasonable.

The California Court of Appeal found that it was objectively reasonable for Tomlin to believe that the city expected him to train during his vacation because he was a SWAT member and required to pass a physical fitness test each year. The city paid SWAT members to engage in paid, on-duty physical fitness training each month. In addition, the other SWAT member's reprimand for not being physically fit enough to perform the job-related task of climbing a wall demonstrates that physical fitness is a requirement of membership. Tomlin was injured while training for an imminent, mandatory, work-related physical fitness test. His supervisor had advised the SWAT members that they were required to pass the fitness test. Consequently, Tomlin's training activities when he was injured were a reasonable expectancy of his employment. 

NLRA Case Notes

continued from page 7

employer had constructive notice of the workers' undocumented status, so continued employment would violate the IRCA.

Deferring to the arbitrator's findings, the Ninth Circuit held that constructive knowledge under the IRCA must be narrowly construed and requires "positive information" of a worker's undocumented status. Relying on language in the no-match letters, the court held that the main purpose of these letters is to indicate to workers that their earnings are not being properly credited by the government, and thus the letters alone could not constitute constructive knowledge of a lack of documentation. The court stressed that the three-day window to apply for a new card made it

best," the court remanded the case with instructions to reinstate the order of the administrative law judge (ALJ), who found that the hospital's button ban violated the rights of employees under the NLRA.

Sacred Heart, an acute care hospital in Spokane, Washington, initiated the button ban in February 2004, while the Washington State Nurses Association was negotiating for a new collective bargaining agreement. The ban prohibited nurses from wearing the "Safe Staffing" button in any area where they may encounter patients or family members. The hospital singled out the "Safe Staffing" button from three other union buttons for exclusion, alleging that its message implied that the hospital lacked safe staffing, and that nurse managers were concerned about the possible impact on patients and their families.

Under existing Board precedent concerning health care facilities, such bans are presumptively valid in immedi-

contradicted by the fact that the record contained no evidence that any patients or family members raised concerns regarding the button's message. The court agreed with dissenting Board Member Liebman's observation that any patient viewing the button would likely identify it as a garden-variety union button worn by nurses during the course of labor negotiations.

Board Has No Jurisdiction Over Dispute Which Primarily Involved Parties and Issues Subject to the RLA

Air Line Pilots Ass'n v. NLRB, 525 F.3d 862 (9th Cir. 2008)

The Ninth Circuit held that the Board improperly asserted jurisdiction under NLRA over a dispute among the Air Line Pilots Association, DHL, and ABX Air, Inc. rather than allowing the dispute to be resolved under the Railway Labor Act (RLA).

In 2003, DHL, a package delivery firm, merged with its competitor

"[C]onstructive knowledge under the IRCA must be narrowly construed and requires 'positive information' of a worker's undocumented status."

likely that many of the employees concluded they could not meet the initial deadline and stopped trying.

The court also refused to consider post-termination evidence that none of the terminated employees returned with proper documentation. The court deferred to the arbitrator's refusal to consider the evidence, stressing that courts cannot second-guess arbitrators' findings.

Ninth Circuit Refuses to Enforce Board Decision Allowing Ban of "RNs Demand Safe Staffing" Button

Wash. State Nurses Ass'n v. NLRB, 526 F.3d 577 (9th Cir. 2008)

The Ninth Circuit refused to enforce a decision by the National Labor Relations Board (Board) that allowed a hospital to prohibit nurses from wearing union buttons bearing the message "RNs Demand Safe Staffing." Rejecting the hospital's concerns about the disruptive effect of the buttons as "speculative at

ate patient care areas. *Casa San Miguel*, 320 NLRB 534, 540 (1995). Bans extending beyond immediate patient care areas, such as the ban in this case, can only be legally enforced upon a showing of special circumstances.

The ALJ concluded that the employer committed an unfair labor practice by "promulgating, maintaining, and enforcing" the button ban. The Board reversed, finding that although the button prohibition was presumptively invalid, the employer had demonstrated "special circumstances" in that the button's message would disturb patients.

The Ninth Circuit panel, however, rejected the Board's determination that special circumstances justified the ban, finding no substantial evidence in the record to support such a finding. Stating that the Board's approach was contrary to the "basic adjudicatory principle that conjecture is no substitute for evidence," the court found the employer's concern

Airborne, Inc. Each firm had its own flying subsidiary, ASTAR (formerly DHL Airways) and ABX, respectively. After the merger, each flying subsidiary was spun off and new agreements were signed that allowed DHL and Airborne to continue operating their businesses in the same fashion as before the merger. The charge arose from a grievance filed by the union representing ASTAR pilots, claiming that the new agreement between ABX and Airborne (now a subsidiary of DHL), violated a collective bargaining agreement providing that all flying performed by DHL subsidiaries would be performed by ASTAR pilots. The union made similar claims as part of a counterclaim in its litigation with DHL Holdings concerning the enforceability of the collective bargaining agreement. ABX then filed an unfair labor practice charge against the union, alleging that the grievance and counterclaim violated the NLRA's secondary boycott provisions.

In a 2-1 decision, the Board found that the union was a labor organization within the meaning of the NLRA and that it had misused the grievance procedure in an attempt to coerce DHL and Airborne to cease doing business with ABX, in violation of the NLRA's secondary boycott prohibition. The Board had jurisdiction over the union because it represented seventeen employees covered by the NLRA at an unrelated employer.

Member Liebman, dissenting, sharply criticized the majority's finding, noting that the seventeen employees comprised only .027 percent of the 62,000 pilots that the union represented. The Board ordered the union to cease and desist from violating the NLRA, withdraw its grievance and counterclaim, and reimburse DHL Holdings for reasonable expenses and legal fees in defending against the grievance and counterclaim.

The Ninth Circuit reversed, finding that the Board misapplied the law of *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), which held that disputes covered by the RLA remained exempt from the NLRA if the substance of the dispute is covered by the RLA. In finding RLA jurisdiction to be appropriate, the court found that the primary dispute involved parties and contracts primarily governed by the RLA, and that the parties had already begun court proceedings under the RLA to resolve the dispute.

Letters From Elected Officials Claiming To Have Certified a Card- Check Majority Insufficient To Set Aside Election

Trump Plaza Associates d/b/a Trump Plaza Hotel and Casino, 352 NLRB No. 76 (May 30, 2008)

The Board certified the United Auto Workers as the bargaining representative for approximately 530 dealers at the Trump Plaza Hotel and Casino in Atlantic City, despite the employer's contention that the results should have been set aside because the union engaged in objectionable campaigning. The Board concluded that Trump Plaza failed to meet its heavy burden of demonstrating that the union's conduct reasonably tended to interfere with employees' free and uncoerced choice in the election,

especially in light of the 175-vote margin favoring the union.

Trump Plaza's objections centered on a union press conference, held six days prior to the election, during which three elected officials signed a poster titled "Certification of Majority Status." The document stated that, pursuant to a confidential card-check conducted by the signers, a majority of the dealers had already authorized the union to represent them for collective bargaining purposes. Although the poster was kept in the union's office for five days prior to the election, only two employees attended the event and no evidence was offered that any employee saw television newscasts covering the conference.

Trump Plaza also objected to the union's use of letters and resolutions from elected officials that expressed support for the union's campaign to organize dealers in Atlantic City. The union posted these materials on its web site and mailed them to many of the dealers.

Relying on *Chipman Union, Inc.*, 316 NLRB 107 (1995), the Board held that the letters and resolutions by government officials were recognizable by the employees as expressions of the authors' individual opinions. The Board refused to find, without evidence to the contrary, that the employees here were susceptible to confusion about the Board's neutrality as a result of the letters.

Further, the Board found that the card-check "Certification" did not warrant setting aside the election. Given the union's wide margin of victory, and the evidence that no more than a few voters were aware of the "Certification," the Board could not infer that the document influenced enough employees to affect election results.

D.C. Circuit Finds Employer Could Not Unilaterally Modify Future Retirement Benefits Without Union Waiver

Southern Nuclear Operating Co. v. NLRB, 524 F.3d 1350 (D.C. Cir. 2008)

The D.C. Circuit held that subsidiaries of an electric utility could not modify the non-vested retirement benefits of union-represented employees without first giving the unions an opportunity to bargain collectively, absent an enforceable waiver by the applicable unions. The court then found that three

of the collective bargaining agreements at issue contained a waiver of some of the unions' bargaining rights.

The action arose when several subsidiaries of Southern Nuclear Operating Co. attempted to make changes that would have reduced the premiums of current employees' non-vested benefits. The benefits at issue consisted of a package referred to as Other Post-Retirement Benefits, which vested only if and when an employee actually retires from his employer. Further, some of the benefit-plan guides contained a "reservation-of-rights clause" that granted the employer the right to terminate or amend the benefits at any time. After the employer denied their requests to bargain, the unions filed unfair labor practice charges, and the Board determined that the failure to bargain violated the NLRA.

The D.C. Circuit partially enforced the Board's order. The court agreed with the Board that current employees' non-vested future retirement benefits are a mandatory subject of bargaining, citing to the U.S. Supreme Court's opinion in *Allied Chemical & Alkali Workers of America, Local Union No.1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Dismissing the subsidiaries' distinction between vested and non-vested benefits, the court noted that non-vested benefits affect current workers by, for example, inducing them to remain with the employer or accept lower compensation. The court also deferred to the Board's opinion, as the classification of bargaining subjects is a matter in which the Board has special expertise.

The court next held that the unions had not waived their bargaining rights by failing to object to earlier modifications to the benefits, or challenge the wording of the reservation-of-rights clauses in the benefit-plan guides. Finally, contrary to the Board, the court found that the unions had contractually surrendered their bargaining rights with respect to the health-care retirement benefits of three of the subsidiaries, as the agreements incorporated reservation-of-rights clauses by express reference. These subsidiaries could unilaterally modify the health-care benefits, but not the life-insurance benefits. ⁴²

EDUCATIONAL SEMINARS



2008 Disability Discrimination Brown Bag Lunch Series

*Offered in Los Angeles
and San Francisco*

**Trial in a
Disability
Discrimination
Case**

Los Angeles *December 10*
San Francisco *December 3*

Annual Labor & Employment Law Conference

San Diego *October 31-November 1*

Sexual Harassment— Train the Trainers

San Diego *October 30*

ERISA Basics for the Employment Law Generalist

San Francisco *October 24*

For additional information, visit us online at www.calbar.ca.gov/laborlaw

Application of the FMLA/CFRA

continued from page 1

representative negotiated an extension until August 23, 1999. On August 17, 1999, Lonicki advised Sutter that she would return to work on August 27, 1999. Instead of requesting additional verification of her serious health condition or stating its concerns about the validity of her leave of absence, Sutter demanded that Lonicki return to work on August 23, 1999.¹²

During her leave of absence Lonicki underwent weekly treatment for major depression, which her psychiatrist diagnosed as "work related." He extended her medical leave to September 26, 1999; however, on August 27, 1999, Sutter informed Lonicki that her employment had been terminated for failing to return

rejected Lonicki's argument that Sutter was precluded from contesting the validity of her medical certification because it failed to follow the statutorily-prescribed procedure for verifying her serious health condition.¹⁸ The California Supreme Court granted review.

OVERVIEW OF THE MEDICAL CERTIFICATION PROCESS

A qualifying employee¹⁹ invokes FMLA/CFRA when she asks for leave for her own serious health condition or that of a family member,²⁰ and need not mention CFRA or FMLA by name in order to be entitled to leave.²¹ The employer may grant the leave without ever requesting medical certification.²² However, if the employer requires medical certification, it should do so either at the time that the employee gives notice of her need for leave or within two business days thereafter (or if the leave is unforeseeable, within two business days after the leave starts).²³ When the employer requests

challenge the medical certification of a family member for whom the employee seeks leave to provide psychological care and comfort. If the medical certification meets the statutory requirements, the employer must accept it and may not seek a second or third opinion.²⁸

Once an employee provides adequate certification of her serious health condition, the employer must grant the leave, unless it has "reason to doubt the validity of the certification."²⁹ *Lonicki's* holding is not to the contrary. Indeed, *Lonicki* makes plain that leave must be granted if the certification is complete and there is no reason to doubt its validity. It is only when an employer has reason to doubt the validity of the certification that the *Lonicki* holding has effect. Even then, an employer who, doubting the validity of a certification, chooses not to use the second and third opinion process but rather denies leave and discharges the employee, "risks a lawsuit by the employee."³⁰

"Regardless of the forum, an employer's doubts about the validity of a medical certification, even where such doubts are in good faith and based upon reliable information, do not serve as a defense to a claim for wrongful denial of leave."

to work on August 23 and 24, 1999.¹³

During the relevant time period, Lonicki was employed part time, sixteen hours per week, at Kaiser Hospital.¹⁴ Lonicki's health care providers allowed her to work there while on leave from Sutter because they believed that the work environments at the two hospitals were significantly different.¹⁵ Sutter was aware of Lonicki's job at Kaiser, and Lonicki's supervisor also worked part time at Kaiser.¹⁶

When Sutter terminated her, Lonicki filed suit asserting CFRA violations. Sutter moved for summary judgment, primarily asserting that because Lonicki was employed at Kaiser in a position with similar job duties during the relevant time period, she was not eligible for CFRA leave from Sutter. The trial court granted summary judgment on this basis, and in a split decision over a strong dissent, the Third District Court of Appeal affirmed.¹⁷ The court of appeal

certification, it must warn the employee of any consequences for failing to provide adequate certification and give her an opportunity to cure any deficiencies.²⁴

Under CFRA, the medical certification is deemed legally sufficient if it includes the dates on which the condition commenced, the likely duration of the condition, and the estimated time the employee will require the leave.²⁵ Importantly, CFRA requires less information than does FMLA to support a medical certification.²⁶ Thus, medical certifications under CFRA are legally sufficient even when they contain less information than FMLA certifications. The California Constitution protects the right to medical privacy and forbids disclosures commonly required under the FMLA, such as diagnoses, methods of treatment and protocol as well as medication.²⁷

Yet another protective cloak of CFRA limits the right of an employer to

In his concurrence and dissent, Justice Moreno provided examples of what types of reasons would constitute "reason to doubt the validity."³¹ The FMLA regulations use the same term.³² FMLA case law explains that "reason to doubt the validity" of a medical certification exists where an employee does not have the condition claimed or the employee is misusing a previously acquired medical certification.³³

If an employee fails to include information in the medical certification form that is not statutorily required, an employer does not, by virtue of that inadequacy alone, have sufficient "reason to doubt the validity" of the certification, and therefore may not invoke the second and third opinion process. Moreover, if an employee's medical certification form is missing required information, the employer must give the employee an opportunity to cure the incomplete certification.³⁴ Thus, reaching the threshold for a second and third opinion could be a

steep one for employers, and continues to be so even after *Lonicki*.

If, and only if, an employer has "reason to doubt the validity" of the medical certification may the employer request that the employee submit to a second medical examination, at the employer's expense.³⁵ If the second medical opinion contradicts the employee's certification, the employer may grant the leave or request that the employee submit to a third medical examination, the results of which would be binding on both parties.³⁶

IMPACT OF LONICKI

In *Lonicki*, the California Supreme Court held that, under CFRA, when an employer doubts the validity of an employee's certification for her serious health condition, it may deny her leave (or discharge her if she nevertheless takes her leave) without requiring her to obtain the opinion of a second doctor.³⁷ The court appeared to view the second and third opinion process as an optional – rather than mandatory – means of resolving a dispute about medical certification.³⁸ However, an employer who chooses to terminate an employee or deny her leave without invoking the second and third opinion process continues to potentially face serious liability for violating CFRA (and FMLA).

Moreover, despite *Lonicki*, employers are still required to obtain the opinions of a second and third doctor before denying leave or terminating an employee because of doubts about the validity of her certification under CFRA's federal counterpart, FMLA. FMLA's mandates apply to all employers subject to CFRA, and it provides a floor of protection below which California law may not fall.³⁹

In 1998, the Northern District of California held in *Sims v. Alameda-Contra Costa Transit District* that under FMLA, if there is reason to doubt the validity of the certification, employers have the option either to accept the certification as adequate or to go through the second and third opinion process.⁴⁰ *Sims* held that FMLA does "not allow an employer to deny a leave request without using the statutory procedures, and then argue in court after engaging in civil dis-

covery that the certification presented by the employee did not accurately represent the employee's medical condition."⁴¹ Since 1998, the *Sims* holding has been cited in the Ninth Circuit and followed in numerous courts around the country.⁴² No court in California has failed to follow *Sims* in interpreting FMLA. Therefore, although *Lonicki* considered and rejected the *Sims* holding,⁴³ plaintiff-side practitioners who face the problem of an employer not using the second and third opinion process may still assert that the process is mandatory by filing in federal court, asserting FMLA claims, and citing *Sims* and its progeny.

The purpose of the second and third opinion process is to ensure that medical professionals are making determinations about medical issues. As the Department of Labor (DOL) observed in connection with its adoption of the final

regulations implementing FMLA:

If the health condition meets the definition in the regulations at §825.114 and, as provided in §§825.305- 825.307, an employee furnishes a completed DOL-prescribed medical certification from the health care provider, the only recourse available to an employer that doubts the validity of the certification is to request a second medical opinion at the employer's expense. Employers may not substitute their personal judgments for the test in the regulations or the medical opinions of the health care providers of employees or their family members to determine whether an employee is entitled to FMLA leave for a serious health condition.⁴⁴



BRIDGEPORT
CONTINUING EDUCATION

presents

Wage & Hour Litigation Conference September 18 & 19, 2008

SFSU Downtown Campus - 835 Market Street
San Francisco



- Recent and Important Case Law & Trends
- Assessing the Merits of a Case: a Roundtable
Discussion of Plaintiff Counsel
- Arguing For and Against Class Certification
- Defense Counsel Roundtable: Should Remedial Steps be Taken at the Onset of Litigation?
- Missed Meal and Rest Breaks
- Trying a Wage & Hour Case
- FLSA Collective Actions as an Alternative to CCP382/Rule 23
- Using Experts in Wage & Hour Cases
- Mediation Preparation, Damage Modeling, and Settlement Issues

Call 818.783.7156 to register or visit
www.reconferences.com

Regardless of the forum, an employer's doubts about the validity of a medical certification, even where such doubts are in good faith and based upon reliable information, do not serve as a defense to a claim for wrongful denial of leave. The liability framework for CFRA and FMLA is quite different than that of other civil rights statutes because they are leave entitlement statutes. Once a violation is shown, the employer has virtually no defense.⁴⁵

CONCLUSION

California employers should continue to utilize the second and third opinion process if they intend to deny leave or otherwise prevent employees from taking advantage of their FMLA/CFRA rights because of doubts about the validity of a medical certification. Because every employee covered by CFRA for his own serious health condition is also covered by FMLA, employers remain bound by the requirement that they utilize the second and third opinion process.

The medical certification process is beneficial for both employees and employers. It allows medical professionals to make the determination about medical issues. It provides a structure for employers to specifically challenge an employee's need for leave for a serious health condition if there is reason to doubt the validity of a certification, and allows resolution of disputes without costly litigation. Moreover, it properly allows employees to take much-needed leave for a serious health condition when a doctor decides that it is necessary. Failing to allow an employee to take medical leave, or terminating a seriously ill employee, cannot be fully cured even if the employee later prevails in litigation and is awarded monetary damages or injunctive and declaratory relief. ⁴⁶

ENDNOTES

1. The author would like to thank Patricia A. Shiu, Christine Clarke and Emily Maglio for significant assistance with this article. However, any errors are the responsibility of the author.
2. 43 Cal. 4th 201 (2008).
3. CAL. GOV'T CODE § 12945.2.
4. The supreme court found that the matter should not have been decided on summary judgment and rejected a per

se rule that an employee cannot ever hold another job while on FMLA/CFRA leave. *Lonicki*, 43 Cal. 4th at 216-17. Importantly, *Lonicki* recognizes that environmental factors such as stress and work hours should be considered when comparing jobs with similar duties. *Id.* at 215, 217 n. 4.

5. 29 U.S.C. §§ 2611-2654.
6. *Lonicki*, 43 Cal. 4th at 206.
7. See LAS-ELC amicus brief at page 3, filed April 6, 2006 (on file with author).
8. See LAS-ELC amicus brief at page 4.
9. See LAS-ELC amicus brief at page 4.
10. *Lonicki*, 43 Cal. 4th at 206-07.
11. *Id.*
12. *Id.*
13. *Id.*
14. LAS-ELC amicus brief at 6-7.
15. LAS-ELC amicus brief at 6-7.
16. LAS-ELC amicus brief at 6-7.
17. *Lonicki v. Sutter Health Cent.*, previously published at 124 Cal. App. 4th 1139 (2004).
18. *Id.* at 1156.
19. A qualifying employee has worked for 1 year and 1250 hours for a company with 50 employees within a 75-mile radius of the worksite. 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.104, 825.110; CAL. GOV'T CODE § 12945.2(a); CAL. CODE REGS. tit. 2, §§ 7297.0(d), (e).
20. CAL. GOV'T CODE § 12945.2(c)(3).
21. CAL. CODE REGS. tit. 2, § 7297.4 (a)(1); 29 C.F.R. § 825.302(c).
22. CAL. GOV'T CODE § 12945.2 (j), (k); 29 C.F.R. § 825.302(c); CAL. CODE REGS. tit. 2, § 7297.4(b)(2).
23. 29 C.F.R. § 825.305(c).
24. *Id.* at § 825.305(d).
25. CAL. GOV'T CODE §§ 12945.2 (j)(1), (k)(1); CAL. CODE REGS. tit. 2, § 7297.0(a).
26. Compare 29 C.F.R. § 825.306 with 2 CAL. CODE REGS. tit. 2, §§ 7297.0(a)(2), 7297.11; and CAL. GOV'T CODE § 12945.2 (j), (k) with 29 U.S.C. § 2613(b).
27. California Const., article 1, section 1.
28. CAL. CODE REGS. tit. 2, § 7297.4 (b)(1).
29. CAL. GOV'T CODE § 12945.2 (k)(3)(A); 2 CAL. CODE REGS. tit. 2, § 7297.4 (b)(2)(A); 29 U.S.C. § 2613(c); 29 C.F.R. § 825.307(a)(2). Justice Moreno's dissent explains that "an employer may have all sorts of reasons to doubt the validity of a medical certification — the employee may have a history of poor credibility, or may have been seen performing activities that indicate his or her ability to perform the employment tasks, or may have been rumored to have told another employee that the certification was fraudulent." *Lonicki*, 43 Cal. 4th at 225.
30. 43 Cal. 4th at 213.
31. *Id.* at 225.
32. 29 C.F.R. § 825.307(a)(2).
33. See, e.g., *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997) (employee claiming to have bronchitis submitted a doctor's note stating he had irritable bowel syndrome), *Whitworth v. Consol. Biscuit Co.*, Civil Action No. 6:06-112-DCR, 2007 WL 1075774 (E.D. Ky. April 6, 2007) (employer claiming employee used fraudulent FMLA claim to spend time with ex-boyfriend), *Porter v. New York Univ. Sch. of Law*, No. 99 Civ. 4693 (TPG), 2003 WL 22004841 (S.D.N.Y. Aug. 25, 2003) (employee medical certification stated incapacity to work began months before employee requested leave).
34. Cf. *Albert v. Runyon*, 6 F. Supp. 2d 57, 64 (D. Mass. 1998) (defendant claiming insufficient medical information given on FMLA medical certification held to not have "reason to doubt the validity" of the certification).
35. CAL. GOV'T CODE § 12945.2 (k)(3)(A); CAL. CODE REGS. tit. 2, § 7297.4 (b)(2)(A); 29 U.S.C. § 2613(c); 29 C.F.R. § 825.307(a)(2).
36. CAL. GOV'T CODE § 12945.2 (k)(3)(C), (D); CAL. CODE REGS. tit. 2, §§ 7297.4(b)(2)(B), (C).
37. *Lonicki*, 43 Cal. 4th at 211-12.
38. *Id.* at 210.
39. 29 C.F.R. § 825.701(a) ("nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA") (emphasis added); CAL. CODE REGS. tit. 2, § 7297.10.
40. *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253, 1263 (N.D. Cal. 1998).
41. *Id.* at 1263.
42. See *Marchisheck v. San Mateo County*, 199 F.3d 1068, 1077 (9th Cir. 1999) (citing the *Sims* analysis that an employer is estopped from challenging the first certification if it foregoes the second opinion process, but declining to apply it as the certification at issue was facially deficient); see also *Regan v. Natural Res. Group, Inc.*, 345 F. Supp. 2d 1000, 1018 (D. Minn. 2004) ("[Defendant] never requested that [plaintiff] get a second opinion, and thereby waived its right to challenge the validity of [plaintiff's] request for a leave."); *Wheeler v. Pioneer Developmental Servs., Inc.*, 349 F. Supp.

Management Trenches

continued from page 3

2d 158, 167 (D. Mass. 2004) (“An employer who disagrees with the employee’s medical certification but does not require the employee to obtain a second or third opinion, cannot challenge the validity of the certification in subsequent civil proceedings”); *Williams v. Rubicon, Inc.*, 754 So.2d 1081, 1086 (La. Ct. App. 1999) (“The structure and internal logic of the Act also suggests that the certification procedures of [29 U.S.C. §] 2613 are the exclusive means for an employer to challenge the medical facts underlying the employee’s certification. Although the regulations explicitly permit an employer to deny leave to an employee who fails to produce ‘a requested medical certification,’ 29 C.F.R. § 825.312(b), there is no explicit authority for an employer to deny leave to an employee who does produce medical certification. To the contrary, Congress stated that if an employee’s medical certification meets certain requirements, it ‘shall be sufficient.’ 29 U.S.C. § 2613(b). If an employer has the choice of skipping the certification process and engaging instead in additional discovery of medical facts, the term ‘sufficient’ is rendered meaningless.”).

43. *Lonicki*, 43 Cal. 4th at 212-13 (stating rather summarily that the court was “not persuaded” by *Sims* and that line of cases, and instead relying on a Fourth Circuit case, *Rhoads v. FDIC*, 257 F.3d 373 (4th Cir. 2001), and cases from the Sixth and Eighth Circuits, *Novak v. MetroHealth Med. Ctr.*, 503 F.3d 572, 579 (6th Cir. 2007) and *Stekloff v. St. John’s Mercy Health Sys.*, 218 F.3d 858, 860 (8th Cir. 2000). These decisions provide no meaningful analysis of the second and third opinion procedure. *Stekloff* treats the question in two paragraphs, and *Rhoads* simply cites *Stekloff*. *Novak*’s analysis also is cursory.
44. 60 Fed. Reg. 2180, 2235 (1995).
45. See *Faust v. Cal. Portland Cement Co.*, 150 Cal. App. 4th 864, 879 (2007) (explaining that “An interference claim under the FMLA (and thus the CFRA) does not involve the [McDonnell Douglas] burden-shifting analysis A violation simply requires that the employer deny the employee’s entitlement to FMLA leave.”) (citation and internal quotation omitted); see also *Bachelor v. Am. W. Airline, Inc.*, 259 F.3d 1112, 1131 (9th Cir. 2001).

the Court of Appeal here held, to “an inability to perform the essential functions generally, rather than for a specific employer.”

So there you have it. The practical implications of *Lonicki* for managers? Listen to your lawyer! The practical implications for management lawyers? When advising a client-employer about a CFRA-eligible employee who seeks time off and presents a doctor’s note attesting to the employee having a physical or mental condition that renders the employee unable to perform his or her current job for the client-employer, explain that the employer denies the leave at its peril. As a real world, practical matter, unless the employer has hard evidence that the employee is lying (for example, that the medical certification is a forgery), or the employer has a second and third opinion attesting to the employee’s ability to work at his or her particular job at his or her particular place of employment, the employee likely will be able to prove a “serious health condition” and thus entitlement to a twelve-week leave with job protection and benefits. In a post-*Lonicki* world, this will be true regardless of whether the employee is gainfully employed performing the same job for a different employer – unless, perhaps, the defendant-employer can prove that there is absolutely no difference between it and the other employer, and no difference between the two jobs.

And while *Lonicki* doesn’t go quite this far, this may be true even if the employee could perform the identical job for the client-employer on a part-time basis, or the employee could perform the identical job for the client-employer if she had a different supervisor or was on a different shift.¹⁰ It may be possible for the employer to prove otherwise, but in the absence of two opinions from qualified medical practitioners in support of its position, the employer will have a difficult burden.

Many manager clients are going to have a tough time believing this is really the law. Nonetheless, the California Supreme Court has made clear that an employer’s belief about an employee’s medical condition – even where such belief is in good faith and well-reasoned, is largely irrelevant when determining an employee’s leave rights. ^{41b}

ENDNOTES

1. Gov’t Code 12945.1 et seq.
2. 43 Cal. 4th 201 (2008).
3. While employers with fewer than fifty employees have a duty to make reasonable accommodation under the disability provisions of the California Fair Employment and Housing Act (Gov’t Code §§ 12940(m) and (n)), and a duty to provide time off under certain circumstances under the Labor Code (see, e.g., Lab. Code § 230 (jury duty)) and under city ordinances (see, e.g., San Francisco Paid Sick Leave Ordinance, Administrative Code Chapter 12W), they are not covered by CFRA.
4. 29 U.S.C. §§ 2611-2654.
5. Employees who have been employed by the employer for less than a year, or who have worked fewer than 1,250 hours during the twelve months preceding the date the leave would begin, are not eligible for a CFRA leave.
6. I have no inside information. I am speculating about what was going on in the background based only on the facts recited in the court’s opinion and applying my own experience in advising employers. I may be way off base.
7. The decision neither addresses *Lonicki*’s rights under workers’ compensation law, nor addresses her seeking a leave under Labor Code section 132a – which in our recitation of real-world realities would certainly have complicated the matter.
8. Of course, *Lonicki* has now engaged in protected activity in taking (or seeking to take) a CFRA leave, so any termination after she returned from leave would be examined under the microscope of a retaliation claim.
9. *Lonicki*, 43 Cal. 4th at 216.
10. *Lonicki* does not address the situation of a request for intermittent leave (imagine if *Lonicki* had sought to work part time at Sutter based on an assertion of a medical need to intermittent CFRA leave, while working part time at Kaiser), or the need for an accommodation under the disability laws (such as, maybe, working the morning shift or working for a different supervisor). Sutter management would have loved that!

Wage & Hour

continued from page 8

relieved of all duty based on one of the following conditions: (1) where the employee is the only employee in his or her job classification who is on duty at the worksite and the essential functions of the job cannot be performed unless the employee remains on duty; or (2) where state or federal law imposes a requirement that the employee not be relieved of all duties. Prior versions of the legislation had allowed for on-duty meal periods where an employee works alone, where the employee works in an isolated location, or where the person is the only employee in the job classification and there are no other employees who can reasonably relieve him or her of all job duties, but these allowable circumstances for on-duty meal periods have, at least for now, been stricken from the proposed amendment.

The current version of the legislation also allows a prevailing party in a wage case to recover expert witness fees, and litigation expenses in addition to the already-provided-for attorney's fees. Finally, it requires an extra hour of compensation to anyone who works a split shift.

For up to date information on the status of AB1711, see www.leginfo.ca.gov/bilinfo.html.

Premium Holiday Pay Not Considered "Regular Rate"

Advanced-Tech Sec. Servs., Inc. v. Super. Ct., 163 Cal. App. 4th 700 (2008)

Ester Roman worked as a security guard for Advanced-Tech Security Services, Inc. (Advanced Tech). The company had six paid holidays (New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas). If an employee worked one of these days, the employee would be paid a premium rate of one and one-half times the regular rate of pay for that day's work. Roman disputed the calculation of overtime in weeks where she worked a holiday, plus overtime. For example, during one week Roman worked twelve hours on Monday, which

was Labor Day, twelve hours on both Tuesday and Wednesday, and eight hours each on Thursday, Friday and Saturday for a total of sixty hours. Her paycheck reflected one and one-half times her regular rate for the four overtime hours worked on Tuesday and Wednesday and the premium rate of pay of one and one-half times for the twelve hours she worked on Labor Day. As such, she was paid for forty hours at her regular rate of pay and twenty hours at time and one-half. Roman argued that the time and one-half pay provision for holidays provided by the company should be part of her regular rate of pay and thus argued she was entitled to additional overtime payments. In other words, she wanted to be paid time and one-half on top of the premium pay she already received for the holiday work.

The court of appeal ruled that she was not entitled to this "premium on top of a premium" and that Advanced-Tech's overtime payments complied with section 510(a) of the California Labor Code. Nothing in section 510 suggests that the Legislature intended to deem premium holiday pay, voluntarily offered by the employer, as regular pay. The employer's position was further supported by Fair Labor Standards Act (FLSA) regulations and case law. In particular, under the FLSA, the "regular rate" does not include "extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the work week where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days." (29 U.S.C. §§ 207(e)(1), 207(e)(6).) Thus, premium holiday pay is not considered as a "regular rate" of pay an employee receives for a normal workday.

Publisher's Newspaper Carriers Found to Be Employees, Not Independent Contractors

Antelope Valley Press v. Poizner, 162 Cal. App. 4th 839 (2008)

A trial court found and the appellate court affirmed that a publisher's newspaper carriers were employees, not independent contractors, for purposes of the

workers' compensation law. The publisher controlled the manner and means of delivery of its publications. The form contract between the publisher and its carriers contained manner and means directives regarding the task of delivering the publications, as well as financial penalties for failure to comply with them. Moreover, a carrier's remuneration in very large part depended on non-negotiated financial terms in the contract rather than on the carrier's initiative, judgment or managerial abilities. Many of the carriers had engaged in prolonged service for the publisher, which was at odds with the notion of an independent contractor as someone hired to achieve a specific result within a finite period of time.

Court of Appeal Upholds Order Striking Class Allegations in Store Manager Overtime Exemption Case

In Re BCBG Overtime Cases, 163 Cal. App. 4th 1293 (2008)

In this case the trial court granted defendant-employer's motion to strike class allegations and rejected plaintiffs' arguments that such a motion presented an improper attempt to circumvent the class certification process. The case was brought as a class action on behalf of all managers and assistant managers in BCBG Maxazria (BCBG)'s thirty-two California stores. It alleged failure to pay overtime compensation, and other claims. Plaintiffs claimed managers and assistant managers were improperly designated as "exempt" to avoid paying them overtime wages, that managers regularly worked more than forty hours a week and spent more than 50 percent of their work time performing the same duties as non-exempt employees. BCBG filed a motion to strike class allegations pursuant to California Rules of Court, rule 1857(a)(3) and/or for judgment on the pleadings. It argued lack of commonality due to the wide variety of operating scenarios in its stores from small boutiques to large destination locations to outlet/discount locations. It also introduced evidence that not all stores carried the same merchandise. BCBG submitted twenty-five declarations from current or former managers and assistant managers to support its contention

that managers are not assigned uniform duties and spend more than 50 percent of their time on exempt work, and to show the ways in which managers are required to exercise discretion in the management of the stores. Three plaintiffs filed a coordinated complaint which joined two separately filed actions. The coordinated complaint was the subject of the motion to strike.

One plaintiff argued that this motion improperly circumvented the class certification process, that the trial court improperly relied on evidence outside the pleadings and erred in striking the class allegations without affording her an opportunity to test the evidence through discovery.

The trial court found the motion was properly before it because “class certification issues may be determined at any time during the litigation.” Moreover, the court found that BCBG had met its burden to show that the action was not suitable for class certification by producing “substantial evidence which establishes that Plaintiffs cannot prove the elements of typicality or commonality necessary for class certification.” The court of appeal affirmed. It noted that trial courts are given broad flexibility when dealing with the certification of class actions and that any party may file a motion to certify a class. While class certification is generally not decided at the pleading stage of a lawsuit, if the defects appear on the face of the complaint or by matters subject to judicial notice, the putative class action may be defeated by a demurrer or motion to strike. The court noted that BCBG’s “motion to strike” was not a motion to strike as used during the pleading stage of a lawsuit. Rather it was “a motion seeking to have the class allegations stricken from the complaint by asking the trial court to hold an evidentiary hearing and determine whether Plaintiffs’ proposed class should be certified.”

The court of appeal found the motion proper given the procedural posture of the case – namely, the motion had been filed twenty-two months after the filing of plaintiffs’ coordinated complaint and four years after the initial complaint filed by the first plaintiff. As such, the plaintiffs had had an opportu-

nity to conduct discovery on class certification issues (although some of the plaintiffs’ efforts had apparently been thwarted by adverse rulings from the trial court on discovery motions). Plaintiffs requested the opportunity to test the veracity of the declarations submitted by BCBG. The court found that this request, made for the first time at oral argument, was raised too late.

City May Establish a Living Wage That Applies to Contractor Employees Outside of City Limit

Amaral v. Cintas Corp., 163 Cal. App. 4th 1157 (2008)

In this case Cintas Corporation (Cintas) challenged the constitutionality and application of a living wage ordinance (LWO) enacted by the City of Hayward (City) and incorporated into its municipal contracts. Cintas entered into such contracts with the City, but did not provide the minimum wages or benefits required by the ordinance to employees who worked in the company’s stockroom or laundry production facilities, located outside of Hayward. Plaintiffs brought a class action for violation of the LWO, Labor Code section 200 et seq., Business and Professions Code section 17200, and breach of contract.

From July 1999 to June 2003 the City contracted with Cintas for certain uniform and linen services. Items from the City were processed at Cintas facilities in Union City and San Leandro. Employees at Cintas’ stockroom in San Leandro provided replacement garments, repaired garments, and applied/removed customer-requested logos. The stock and laundry employees worked on items for many different customers each day, not just on items for the City.

The City adopted the LWO in April 1999. It applied to all service contracts with the City on or after July 1, 1999. It required contractors to pay employees a minimum of \$8.00 per hour if health benefits were provided or \$9.25 per hour if no health benefits were provided. An employee was defined as “any individual employed by a service contractor on or under the authority of any contract for services with the City or proposal for

such contract.” Cintas never complied with the LWO, despite signing agreements year after year indicating it would.

From 1999 to 2003, revenue from the City contract constituted less than 1 percent of the total revenue Cintas received from all customers serviced at the Union City and San Leandro facilities.

The trial court rejected Cintas’s challenges to the constitutionality of the ordinance and found Cintas violated the ordinance, breached its contracts with the City, and violated several Labor Code sections and the Business and Professions Code, and awarded back wages, unpaid benefits, penalties, attorney’s fees, and costs. The court of appeal affirmed.

On appeal, Cintas contended Article XI, section 7 of the California Constitution prohibits attempts by a municipality to exercise power outside its territorial boundaries. The court found, however, that this provision does not apply to contracting or proprietary powers. Hayward, a charter city, had the power to enter contracts to carry out its necessary functions and was entitled to place conditions or specifications on the bidding for such contracts. Essentially, the City was merely specifying the type of employer with which it wished to do business, which the court found to be a permissible exercise of the county’s contracting power. It did not matter, for constitutional purposes, whether contractors may have to perform this required conduct outside the City’s boundaries. The appellate court also rejected Cintas’s argument that the LWO was unconstitutionally vague and found the LWO applied to Cintas’ contracts with the City. It further found the LWO covered all hours worked by employees who worked on the contracts, not just the limited hours they worked on the City’s contract. In the court’s view, the plain language of the ordinance required the contractor to pay every individual it employed to perform work on or under a service contract with the City the minimum wage specified by the LWO. The court of appeal also allowed Private Attorney General Act (PAGA) penalties to be applied retroactively to a timeframe before the PAGA was enacted. ⁴²



The State Bar of California Labor and Employment Law Section presents its

26TH ANNUAL MEETING

THE SHAPE OF THINGS TO COME

October 31 – November 1, 2008

San Diego Mission Bay Hyatt Regency Marina and Spa

*Featuring Keynote Addresses by California Supreme Court Associate Justice
Ming W. Chin, Professor Erwin Chemerinsky, and Professor William Gould*

Join us for a Friday evening happy hour to welcome new attorneys, dinner, and live music by *Incendio*.

Earn up to 12 MCLE Hours Credit, including 1.25 MCLE Hours Credit in Ethics
and 1.25 MCLE Hours Credit in Elimination of Bias in the Legal Profession.

Hotel Deadline:
October 9, 2008

Early Bird Registration:
September 30, 2008

Registration Deadline:
October 24, 2008

SPONSORS:

Directors' Circle:

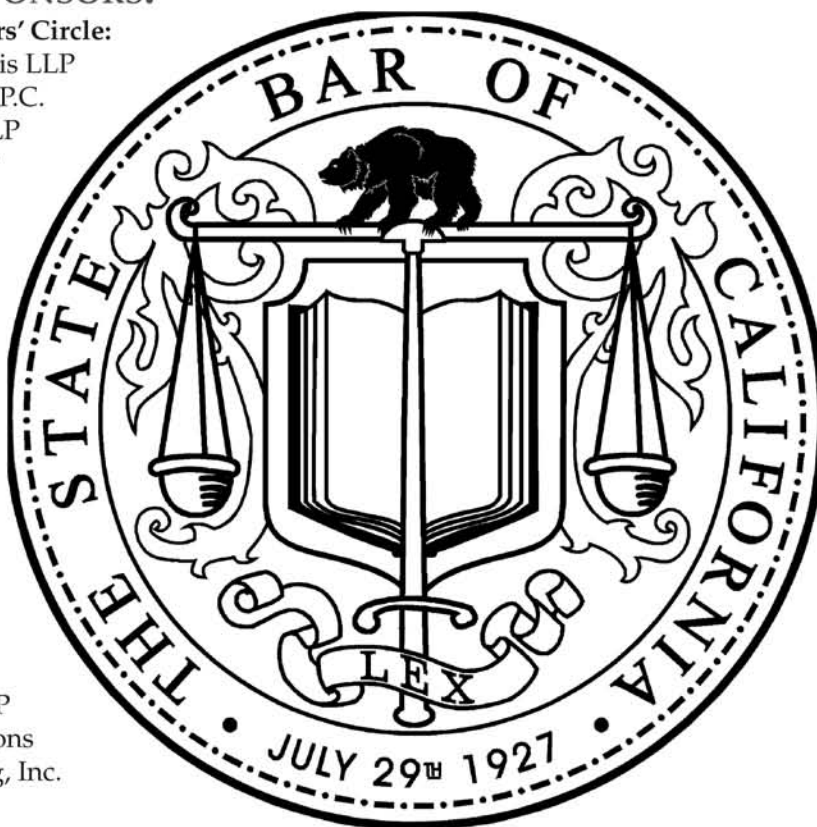
Jackson Lewis LLP
Littler Mendelson, P.C.
Morgan, Lewis & Bockius LLP
Paul, Plevin, Sullivan & Connaughton LLP

Leaders' Circle:

Paul, Hastings, Janofsky & Walker LLP
Seyfarth Shaw LLP
West, a Thomson Reuters business
Wilson Petty Kosmo & Turner LLP
Winston & Strawn LLP

Innovators' Circle:

American Arbitration Association
Amy Oppenheimer
Andre, Morris & Buttery
Arkin & Weissman
Atkinson, Andelson, Loya, Ruud & Romo
Bassis Mediation Group
Bingham McCutchen LLP
Lief Cabraser Heimann & Bernstein, LLP
Merrill Legal Solutions
Puentes Consulting, Inc.



NEW! REGISTER ON-LINE AT

THURSDAY, OCTOBER 30

AB 1825 Train-the-Trainers Workshop

Faculty: Janie Hickok Siess, Senior Staff Counsel, Employment Advocacy and Prosecution Team, Office of Legal Affairs, California Department of Corrections and Rehabilitation; Former Assistant Deputy Director, Program and Policy Development, California Department of Fair Employment and Housing
Suzanne Ambrose, Executive Officer, State Personnel Board; Former Director, California Department of Fair Employment and Housing

FRIDAY, OCTOBER 31

Labor and Employment Annual Update – General Session

Faculty: Anthony Joseph Oncidi, Partner, Proskauer Rose LLP, Los Angeles
Andrew H. Friedman, Partner, Helmer Friedman, LLP, Venice

Today's Electronic Workplace – Best Practices for Proactive Management Policies and Reactive E-Discovery Strategies

Faculty: Robert D. Brownstone, Fenwick & West LLP, Mountain View

Promoting Racial Diversity in the Practice of Law

Faculty: Bill Lann Lee, Lewis Feinberg Lee Renaker & Jackson PC, Oakland
T. Warren Jackson, Hughes Electronics Corp., El Segundo
James M. Finberg, Altshuler Berzon LLP, San Francisco (moderator)

Disability Discrimination: How is Green Shaking out in Practice?

Faculty: Margaret Hart Edwards, Littler Mendelson, P.C., San Francisco
David M. deRubertis, The deRubertis Law Firm, Woodland Hills
Janie Hickok Siess, California Department of Corrections and Rehabilitation, Sacramento
Suzanne Ambrose, State Personnel Board, Sacramento (moderator)

Bringing and Defending Against Attorneys' Fees Motions

Faculty: Richard M. Pearl, Law Offices of Richard M. Pearl
Rocky Delgadillo, Los Angeles City Attorney
Justice Judith Haller, Fourth District Court of Appeal
Amy Oppenheimer, Berkeley (moderator)

Taking the Sex Out of Work: Can Warmed Up Workplaces Survive the Chill of Correctness?

Faculty: Barbara A. Lawless, Lawless & Lawless, San Francisco
Rich A. Paul, Paul, Plevin, Sullivan & Connaughton LLP, San Diego
Julie A. Greenberg, Thomas Jefferson School of Law, San Diego (moderator)

Unions in the Modern Workplace: Fact, Fiction, and the Future

Faculty: Ruth Milkman, Institute for Research on Labor and Employment, University of California, Berkeley
Theodore R. Scott, Littler Mendelson, P.C., San Diego
Alice M. O'Brien, California Teachers Association, Burlingame
Carol Koenig, Wylie, McBride, Platten & Renner, San Jose (moderator)

Personnel Actions in the Public Sector: Is Anything Confidential Anymore?

Faculty: Marilyn Mika Spencer, Spencer, Rice & McCammon LLP, San Diego
David G. Miller, Miller Brown Dannis, Long Beach
Terry Francke, Californians Aware, Carmichael
Arnie R. Braafladt, California School Employees Association, San Jose (moderator)

Hidden Bias: The Implications for Employment Discrimination Litigation

Faculty: Gary L. Blasi, UCLA School of Law, Los Angeles
Karen Jo Noonan, National Jury Project - West, Oakland
Robin A. Wofford, Wilson Petty Kosmo & Turner LLP, San Diego
Amy Oppenheimer, Berkeley (moderator)

BE PART OF THE FUTURE
and join California's foremost labor and employment law practitioners and scholars at this year's Annual Meeting.

What Can A City Do? Living Wage, Sick Leave, Health Care, and Retirement Benefits

Faculty: Michael J. Aguirre, San Diego City Attorney, San Diego
Erika Frank, California Chamber of Commerce, Sacramento
Vince Chhabria, Office of the City Attorney, San Francisco
B.J. Chisholm, Altshuler Berzon LLP (moderator)

SATURDAY, NOVEMBER 1

"Discuss It With The Mediator" Breakfast Round Tables

The Visionaries – General Session

Faculty: Fredericka McGee, General Counsel, Office of Speaker Karen Bass, Sacramento
Phyllis W. Cheng, Director, Department of Fair Employment and Housing, Elk Grove
Robert R. Roginson, Chief Counsel, Division of Labor Standards Enforcement, Los Angeles
William R. Tamayo, Regional Attorney of San Francisco District Office, U.S. Equal Employment Opportunity Commission, San Francisco
Karen V. CLOPTON, General Counsel, Department of Corporations, San Francisco (moderator)

Use of Data and Statistics in Employment Class Actions

Faculty: Brad S. Seligman, The Impact Fund, Berkeley
Gilmore F. Diekmann, Jr., Seyfarth Shaw LLP, San Francisco
Jo Anne Frankfurt, Mediation Office of Jo Anne Frankfurt, San Francisco (moderator)

Arbitration of Employment Cases – What's the Best Strategy for Your Case?

Faculty: Eileen Goldsmith, Altshuler Berzon LLP, San Francisco
Patricia K. Gillette, Orrick Herrington & Sutcliffe, LLP, San Francisco
Hon. William J. Cahill (ret.), JAMS, San Francisco
Henry J. Josefsberg, Long Beach (moderator)

Ethical Issues in Investigations

Faculty: Mary C. Dollarhide, Paul, Hastings, Janofsky & Walker LLP, San Diego
David P. Strauss, Law Office of David P. Strauss, San Diego
Patricia C. Perez, Puente Consulting, Inc., San Diego (moderator)

Family Responsibility Discrimination – Work Life Issues

Faculty: Stephanie Bornstein, UC Hastings College of Law and Center for WorkLife Law, San Francisco
Theodora R. Lee, Littler Mendelson, P.C., San Francisco

"Too Old to Matter?" "Not a Cultural Fit?" – Issues of Age Discrimination & the Baby Boomer Generation

Faculty: Fern M. Steiner, Tosdal, Smith, Steiner & Wax, San Diego
Amy Wintersheimer Findley, Allen Matkins Leck Gamble Mallory & Natsis LLP, San Diego
Claudette Wilson, Wilson Petty Kosmo & Turner LLP, San Diego (moderator)

REGISTER EARLY!

If you register before September 30, 2008, registration fees are: \$325 for members of the Labor & Employment Law Section of the State Bar of California; \$425 for non-members; and \$100 for full-time law students.

Workplace Privacy: Real or Imagined?

Faculty: Hardy R. Murphy, Reed Smith LLP, Los Angeles
William F. Adams, Law Offices, Pleasanton
Wilmer J. Harris, Schonbrun De Simone Seplow Harris & Hoffman LLP, Pasadena (moderator)

Hot Topics in the Public Sector

Faculty: Yuri A. Calderon, Garcia Calderon Ruiz, LLP, San Diego
Michael P. Baranic, Gattley Baranic LLP, San Diego
Timothy Yeung, Renne Sloan Holtzman Sakai LLP, Sacramento (moderator)

Is There Individual Liability After Jones v. Torrey Pines?

Faculty: Christopher H. Whelan, Law Offices of Christopher H. Whelan, Gold River
Robert J. Hendricks, Morgan Lewis & Bockius LLP, Los Angeles
Noah D. Lebowitz, Esq., Duckworth Peters Lebowitz LLP, San Francisco (moderator)

Mistakes Judges Have Seen Even Good Employment Lawyers Make

Faculty: Hon. Frederic L. Link, Superior Court of California, County of San Diego
Hon. Leo S. Papas, Magistrate Judge, United States District Court, Southern District of California
Hon. Patricia Yim Cowett (ret.), Superior Court of California, County of San Diego
Leonid M. Zilberman, Wilson Petty Kosmo & Turner LLP, San Diego (moderator)

Check out the full program, complete with course descriptions, on-line at www.calbar.ca.gov/laborlaw

The State Bar of California Labor and Employment Law Section is an approved MCLE Provider.

WWW.CALBAR.CA.GOV/LABORLAW

Message from the Chair

By Phil Horowitz



Phil Horowitz is past Chair and current Board member of the California Employment Lawyers Association. He volunteer teaches trial advocacy at the University of San Francisco and Stanford Law Schools. Mr. Horowitz has his own San Francisco law firm, representing employees.

I write this final column as Chair of the Labor and Employment Law Section to urge us all to practice labor and employment law on a more human scale and with a more human face.

Part of practicing law on a human scale and with a human face is to keep a balance between practicing law and living the rest of your life. Most large law firms demand a minimum of 1900, 1950 or even 2000 billable hours per year from their associates. Including non-billable hours, that translates into 60 to 70 hours of work per week.

These are merely the minimum required billable hours for associates. Associates are encouraged to work many more hours if they would like to get a good bonus or become partner one day.

Partners at large law firms face similar pressures. Many small law firms also expect their lawyers to work the same drearily-long work weeks.

What do 70-hour workweeks mean? Mathematically, they mean that every week you must work seven 10-hour days. If you would like a day off once a week, you can instead work five 12-hour days and one 10-hour day. If you are ruthlessly efficient and can meet the minimum billable hours requirement in 60 hours a week, you need work "only" six 10-hour days every week.

What else do excessive workweeks mean? They mean little time for family. They mean not much time for romance. They mean only brief visits with dwindling numbers of get-together friends. They mean few chances to exercise, eat out, hear live music, visit a museum, see a play or sit down to read a book that is not about the law. They mean only miserly amounts of time to wander about, ruminate, relax, and dream.

What else do excessive workweeks

mean other than scrunched and constrained personal lives? They mean lawyers scrambling to find more work, whether or not its benefits outweigh its costs. They mean work expanding to fill the time that needs to be filled. They mean lawyers who are so tired or so frustrated by their deformed personal lives that they are too often cranky, irritable, argumentative, testy, disputative, and contentious.

Lawyers' workloads further increase when they fuel the fires of litigation by being cranky and contentious with their opponents, who often respond in kind. This is not, by the way, usually to the advantage of the client being represented. These escalated battles usually only drain the client of time, energy, and money while strengthening the resolve of the opponent.

As much as you possibly can, spend more time with your family and friends, and less time at work. If you work in a law firm or in a legal department, do your best to help your coworkers also restore a balance between their work and the rest of their lives. It will benefit you and your coworkers, and it will benefit your clients as well.

Another part of practicing law with a more human face is for law firms and legal departments to allow lawyers more autonomy and responsibility. Do three lawyers really need to look at each letter before it goes out the door? Must a lawyer who has spent hours meeting and conferring about a discovery dispute really be deprived of the authority to negotiate any compromises? Must newer lawyers spend years before being assigned anything but the most tedious tasks?

If you work in a law firm or in a legal department, do your best to foster law

practice on a more human scale where each lawyer can exercise independent judgment, alone or for more important tasks in conjunction with one or two others. Allowing lawyers to work this way as craftsmen and craftswomen will benefit both the lawyers and their clients.

Yet another part of practicing law with a more human face is to treat all of our coworkers, including people who do not happen to be lawyers, as fellow human beings. Too often those further up in the hierarchy of a law firm or legal department treat those further down like machines instead of like human colleagues. Try to work in smallish teams of people in a collaborative way.

One more part of practicing law with a human face is courtesy to our opponents. No matter how hard we must fight on the merits to protect our clients' interests, there is only good to be had in greeting our opponents good morning, having social conversations about things other than law, and liberally granting professional courtesies.

Establishing a human rapport with your opponents can, at the appropriate moment, help ease the path toward settlement that well over 90% of all civil cases follow. Having human interactions with your opponents can also benefit clients on both sides by helping to minimize unnecessary disputes caused by misunderstanding or distrust.

Whether your opponents always reciprocate it or not, treating your opponents with a measure of human kindness will not only help your clients, but will make you feel better about yourself.

THE SHAPE OF THINGS TO COME

One way you can help to put more humanity back into labor and employment law is to come to our Section's

Annual Meeting this year. The theme of this year's Annual Meeting is *The Shape of Things to Come*. The meeting will be full of many practical panels with information you can take back to your office and use right away. In addition to these practical panels, there will be several panels examining long-term trends in the labor and employment field.

There will be many opportunities at our Annual Meeting to mingle and socialize with practitioners from all sides, and from all parts of the State. We will have an evening reception to welcome new attorneys and section members, followed by a dinner with a keynote address and live music. There will also be numerous opportunities to meet fellow practitioners at breakfast roundtables, lunches, and coffee breaks.

Getting to know one another in a comfortable social atmosphere helps remind us to practice labor and employment law more humanely, fully understanding that our opponents in litigation are generally decent fellow human beings who should be treated as colleagues.

In less than two hours Friday morning, we will give you an update on the most important California labor and employment law cases decided this year.


A breakout panel will also review this year's developments in California public sector labor and employment law.

Other panel topics will address contemporary issues such as age discrimination, workplace privacy, suing individual defendants after *Jones v. Torrey Pines*, arbitration, sexual harassment, family responsibility discrimination, settling at mediation, the future of unions, electronic discovery, disability discrimination, and much more.

Speakers will include preeminent judges, legal scholars, practitioners, and government representatives, including: California Supreme Court Associate Justice Ming W. Chin, Professor (and U.C. Irvine School of Law Dean) Erwin Chemerinsky, former NLRB Chair William Gould, California Court of Appeal Justice Judith Haller, San Diego Superior Court Judge Frederic L. Link, retired San Diego Superior Court Judge Patricia Cowett, United States Magistrate Judge Leo S. Papas, former Assistant U.S. Attorney General for Civil Rights Bill Lee, National Jury Project trial consultant Karen Jo Koonan, DFEH Director Phyllis Cheng, Impact Fund Executive Director Brad Seligman, San Diego City Attorney Michael Aguirre, Los Angeles

City Attorney Rocky Delgadillo, California Chamber of Commerce General Counsel Erika Frank, California Teachers Association General Counsel Alice O'Brien, UCLA Professor Ruth Milkman, and prominent litigators such as Rich Paul, Tony Oncidi, and Wil Harris.

We'll come together for this year's Annual Meeting at the very comfortable but affordable San Diego Mission Bay Hyatt Regency Marina and Spa on Friday, October 31 (that's right, Halloween!) and Saturday, November 1. This Halloween weekend is a great time to forge new paths, scout out new opportunities, and enjoy new experiences at our Annual Meeting.

I hope you can make it to this year's Annual Meeting for a fun and educational Halloween in San Diego. If you have read this column all this way and do come to the Annual Meeting, please come up and say hi. And please don't forget to do something each day to try to practice labor and employment law on a more human scale and with a more human face. 

From the Editors

EDITORIAL POLICY

We would like the *Law Review* to reflect the diversity of the Section's membership in the articles and columns we publish. We therefore invite members of the Section and others to submit articles and columns from the points of view of employees, unions, and management. Our resources are you, the reader, so we count on you to provide us with the variety of viewpoints representative of more than 6,000 members. In addition, although articles may be written from a particular viewpoint (i.e., management or employee/union), whenever possible, submitted articles should at least address the existence of relevant issues from the other perspective. Thank you for all of your high quality submissions to date, and please...keep them coming! Please e-mail your submission to Section Coordinator Susan Orloff at susan.orloff@calbar.ca.gov.

The Review reserves the right to edit articles for reasons of space or for other reasons, to decline to print articles that are submitted, or to invite responses from those with other points of view. We will consult with authors before any significant editing. Authors are responsible for Shepardizing and proofreading their submissions. Articles should be no more than 2,500 words. Please follow the style in the most current edition of *The Bluebook: A Uniform System of Citation* and put all citations in endnotes.

Labor & Employment Law Section Executive Committee 2007-2008

Phil Horowitz, Chair

Law Offices of Phil Horowitz
San Francisco

MEMBERS

Suzanne M. Ambrose
State Personnel Board
Sacramento

Lynne S. Bassis
Bassis Mediation Group
Pasadena

Barbara J. Chisholm
Altshuler Berzon LLP
San Francisco

David M. de Rubertis
The de Rubertis Law Firm
Woodland Hills

Paul C. Glusman
Law Offices of Paul Glusman
Berkeley

Wilmer J. Harris
Schonbrun DeSimone Seplow
Harris & Hoffman
Pasadena

Henry J. Josefsberg
Henry J. Josefsberg, Esq.
Long Beach

Carol Koenig
Wylie, McBride, Platten
& Renner
San Jose

Trudy M. Largent
Largent & Associates
Alta Loma

Noah Lebowitz

Duckworth Peters Lebowitz LLP
San Francisco

Theodora Lee
Littler Mendelson
San Francisco

Emily Prescott
Renne Sloan Holtzman Sakai LLP
San Francisco

Michael Whitaker
California Department of Justice
Los Angeles

Timothy G. Yeung
Renne Sloan Holtzman Sakai LLP
Sacramento

Leonid Zilberman
Wilson Petty Kosmo & Turner LLP
San Diego

ADVISORS

Arnie R. Braafladt
California School Employees
Association
San Jose

Cara M. Ching-Senaha
Jackson Lewis LLP
San Francisco

David J. Duchrow
Law Office of David J. Duchrow
Los Angeles

Jo Anne Frankfurt
Mediator and Trainer
San Francisco

Andrew H. Friedman
Helmer & Friedman LLP
Venice

Alan S. Hersh
School and College Legal Services
Santa Rosa

Toni J. Jaramilla
Law Offices of Toni Jaramilla
Los Angeles

Lois M. Kosch
Wilson Petty Kosmo & Turner LLP
San Diego

Tony Skogen
Littler Mendelson
Los Angeles

Rosario M. Tobias
Office of the City Attorney
Los Angeles

Susan Orloff
State Bar Section Coordinator
San Francisco

Pamela Wilson
State Bar Director of Sections
San Francisco

Karen V. Clopton, Vice Chair
California Department
of Corporations
San Francisco

Patricia C. Perez, Secretary
Puente International
Consulting, Inc.
San Diego

Bruce A. Barsook, Treasurer
Liebert Cassidy Whitmore
Los Angeles

**Wendy P. Rouder, Immediate
Past Chair**
Arbitration & Mediation
San Francisco

State Bar Education Foundation Labor and Employment Law Section

180 Howard Street
San Francisco, CA 94105-1639

www.calbar.ca.gov/laborlaw



Non-Profit Org.
U.S. Postage
PAID
Documentation