



New Trend: Lawsuits for Wage Order Violations Concerning Work Conditions

The tail end of 2010 delivered some bad news for California employers in the form of twin rulings from the California Court of Appeal holding that employees may sue their employers and recover civil penalties under the Private Attorneys General Act of 2004 (PAGA) for violations of the seating provisions of Wage Order No. 7. The cases are *Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472 and *Home Depot U.S.A., Inc. v. Superior Court* (Case No. B223184, decided on December 22, 2010).

PAGA gives private citizens the right to sue their employers for violations of the California Labor Code and recover civil penalties that previously could only be collected by the State of California. In addition, where the Labor Code has not established a penalty for a particular violation, PAGA sets a default penalty of \$100 to \$200 for **each aggrieved employee per pay period**, with the State of California receiving 75 percent of the penalties and the aggrieved employees receiving 25 percent. Needless to say, in a class action, such penalties could easily amount to millions of dollars in liability.

In *Bright* and *Home Depot*, the Courts of Appeal confirmed that PAGA also allows employees to sue their employers for violations of wage orders issued by the California Industrial Welfare Commission. These cases also hold that PAGA’s more costly default penalties apply to violations of the seating provisions of Wage Order No. 7, because the wage order’s own penalty provision applies only to the underpayment of wages.

The rulings effectively open the door to lawsuits concerning all previously unenforced “labor condition” requirements

found in all wage orders, such as those concerning uniforms, changing rooms and work area temperatures. Unfortunately, employers are often unfamiliar with these requirements. Many California merchants, for example, do not realize that they must provide seats to all their cashiers, not just to those needing a reasonable accommodation. Now that employees can more easily seek to enforce any provision in any wage order, all California employers should carefully review and ensure compliance with the wage order(s) applicable to them.

Another California Appellate Court Concludes That Employers Need Not “Ensure” Employees Take Meal Breaks

Employers anxiously await the California Supreme Court’s decision in *Brinker Restaurant v. Superior Court* (Case No. S166350, review granted Oct. 22, 2008) as to whether employers can merely offer their employees meal breaks or whether they must instead ensure that the employees take the breaks. Meanwhile, California appellate courts continue to side with employers on the issue. The Supreme Court recently granted review of the latest case to hold that employers must provide employees with breaks but need not ensure employees take breaks (*Hernandez v. Chipotle Mexican Grill* (2010) 189 Cal.App.4th 751). While we hope that this trend indicates the way the Supreme Court will ultimately come down on the issue, until the Supreme Court makes a decision, cautious employers should continue to:

- Ensure that employees are taking a second 30-minute uninterrupted meal period if the employee works in excess of 10 hours;
- Provide employees with penalty pay (one hour of pay) if and when they do not receive a meal period; and
- Maintain records evidencing that employees took their meal periods or, where appropriate, have waived a meal period in writing.

Reminder for Computer Software Employers

The minimum hourly and annual salary rate to satisfy the computer software employees exemption remains unchanged for 2011. The minimum hourly rate is still \$37.94 and the minimum annual salary is still \$79,050.

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Generous Employers Beware: Coordination of Disability Payments Just Got More Complicated

Once again California is a trendsetter. As of December 10, 2010, the state's Employment Development Department (EDD) began sending payments for state disability insurance and paid family leave via a Visa-branded EDD debit card. This is terrific news for employees out on a leave of absence who now will not have to wait for EDD checks by U.S. mail. Instead, they will get a debit card to use to pay bills directly, or they can transfer funds posted to the card directly to their personal bank accounts.

If you are a generous employer that pays your employees for time off due to disability, maternity or family leave issues, coordinating those employer-provided benefits with state-provided benefits just became more complicated. Until recently, many employers had simply "advanced" wages to employees on a leave of absence, paying them full pay on normal pay

periods and requiring employees to sign over their EDD checks when they arrived weeks later. This process allowed employees to maintain consistent income even when out of work and also simplified the process for employers. Unfortunately, that simple process will no longer work.

Now employers will have to require employees to write them checks or transfer EDD-provided funds back to the employer to reimburse such "advances." Asking employees to pay the employer back for "advances" is not practical, will be hard to enforce and may have tax consequences for both the employer and the employee.

More likely, employers will now need to do the calculations they have tried to avoid and pay employees only the **difference** between their wages and the EDD benefits. If you provide paid time off to employees in California, make sure to revise your procedures accordingly.

Spotlight on San Francisco

San Francisco Health Care Security Ordinance: Managers, supervisors or confidential employees who earn at or above an annual salary of \$81,450 (or \$39.16 per hour) are exempt from coverage under the SFHCO. The 2011 health care expenditure rate for large employers (100+ employees) will be \$2.06/hour. For medium-sized employers (20-99 employees), the rate will be \$1.37/hour. Effective January 1, 2011.

San Francisco Minimum Wage: Minimum wage in San Francisco has increased to \$9.92 per hour, effective January 1, 2011.

Meal and Rest Break Litigation Gets More Expensive

Until now, there was no definitive authority on how meal period and rest period compensation should be calculated. Labor Code § 226.7(b) provides that employers must pay employees "one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Employers have argued that employees were therefore due just one

hour of compensation regardless of how many breaks were missed in a day. Employees, on the other hand, argued in favor of receiving two hours of compensation on any day that they missed both a meal break and a rest break.

In a blow to employers defending meal and rest break litigation, a California Court of Appeal recently decided, to the favor of employees, that employees are entitled to

up to two additional hours of wages each day for missed meal and rest breaks. The case is *United Parcel Service, Inc. v. Superior Court*, No. B227190 (Feb. 16, 2011). While we anticipate that this decision will soon be appealed to the Supreme Court, employers should continue to monitor their meal and rest break compliance and evaluate their payroll practices to comply with this decision.

Litigation Alert: Federal Rules on Experts Change

Since 1993, the Federal Rules of Civil Procedure have required full discovery of draft expert reports and broad disclosure of any communications between an expert and trial counsel. Effective December 1, 2010, the rules have been eased to provide that such information is now covered

under the protection of the work-product doctrine. With these changes, attorneys are no longer required to produce draft expert reports and discovery of attorney-expert communications is greatly reduced. While full discovery of the expert's opinions and the facts or data used to support them will

still occur, these changes should streamline the expert retention process, allow for greater communication with experts and hopefully reduce the costs associated with retaining experts for litigation.

New Employment Laws for 2011

Workers' Compensation Stop Orders:

The registrar of contractors is authorized to issue a stop order to any contractor who failed to secure workers' compensation coverage for his/her employees.

Employees affected by the work stoppage must be paid by the employer for lost time, up to 10 days, while the employer becomes compliant with the law. Failure to observe the stop order is punishable by a misdemeanor and/or a fine up to \$10,000. California Business and Professions Code § 7127. Effective: January 1, 2011.

Organ and Bone Marrow Donor

Leave: Employers with 15 or more employees must provide paid leave to an employee who chooses to donate organs

or bone marrow. Labor Code § 1508 – 1513. Effective: January 1, 2011.

Exemptions for Meal Breaks:

Construction workers, commercial drivers, some security officers and employees employed by an electrical corporation, a gas corporation or a local publicly owned electric utility are exempt from California's meal break requirements if those employees are covered by a valid collective bargaining agreement that contains specified terms, including meal period provisions. Labor Code § 512(e). Effective: January 1, 2011.

Cal/OSHA Serious Safety Violations:

There are new procedures and standards for the investigation and citation of serious

violations of health and safety laws in the workplace. The changes create a rebuttable presumption that a serious violation exists if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard. Labor Code § 6432. Effective: January 1, 2011.

Food Handler Cards: The law establishes new training procedures and certification for food handlers. Most employees who handle food must have a California Food Handler Card on or before July 1, 2011. Employees hired after June 1, 2011, will have 30 days from the date of hire to acquire a food handler card. Health and Safety Code § 113948. Effective: January 1, 2011.

Spotlight on the New Medical Donor Leave Law

Effective January 1, 2011, California private employers with 15 or more employees must provide paid leave for any employee donating an organ or bone marrow. An employee may take up to five days of paid leave for bone marrow donation and up to 30 days of paid leave for organ donation. The statute is codified as California Labor Code sections 1508-1513. The leave is in addition to rights to a leave of absence under the Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA). Thus, this leave does **not** run concurrently with FMLA or CFRA. The requirements under this law, however, resemble the requirements under the FMLA:

- Employers must maintain the employee's group health coverage during the leave.
- When the leave ends, employers must restore the employee to the same or comparable position.
- The leave period is a maximum per year (although the law does not specify

whether the year should/must be calculated on a calendar year or rolling year basis or whether either method is appropriate).

- The leave cannot be considered as a break in service for purposes of the employee's right to salary adjustments, sick leave, vacation, annual leave or seniority (thus, employees continue accruing sick leave, vacation and seniority while on a medical donation leave).
- Unless otherwise provided by a collective bargaining agreement, employers can require the employee to use any unused vacation, sick leave or paid time off (PTO) against the five-day bone marrow donation leave, and up to two weeks of unused vacation, sick leave or PTO for any organ donor leave.
- Leave under this provision can be taken intermittently.
- Employers can require the employee to provide written documentation from a

medical provider that the employee is donating an organ or bone marrow and that there is a medical necessity for the donation in order to verify the employee's right to the leave.

- Employers are prohibited from interfering with an employee's right to leave and prohibited from discriminating or retaliating against an employee because he or she utilized this leave.
- The statute allows employees to file suit in superior court to seek monetary and injunctive relief for any violation of this new law.

As a result of this new law, employers should add a medical donor leave policy to employee handbooks, develop medical certification forms specifically tailored for medical donor leave and use this as an opportunity to train supervisors and managers on all leave requirements under California law.

2011 Litigation Watch: Cases Pending in the California Supreme Court

- *Sonic-Calabasa A, Inc. v. Moreno* (2009) 174 Cal.App.4th 546. Petition for review after reversal of order denying motion to compel arbitration. Can a mandatory employment arbitration agreement be enforced prior to the conclusion of an administrative proceeding conducted by the Labor Commissioner concerning an employee's statutory wage claim?
- *Harris v. City of Santa Monica* (2010) 181 Cal.App.4th 1094. Petition for review after reversal and remand of judgment on special jury verdict. Does the "mixed-motive" defense apply to employment discrimination claims under the Fair Employment and Housing Act (Cal. Gov't Code §§ 12900- 12996)?
- *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2008) 80 Cal.Rptr.3d 781. Petition for review after grant of petition for peremptory writ of mandate. This case presents issues concerning the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly workers.

Other cases pending and deferred in the Supreme Court due to *Brinker*:

- *Brinkley v. Public Storage, Inc.* (2008) 167 Cal. App. 4th 1278 (2008).
- *Brookler v. Radioshack Corp.* (2010) 2010 WL 33341816 (non-published opinion).
- *Faulkinbury v. Boyd v. Associates, Inc.* (2010) 185 Cal.App.4th 1363.
- *Hernandez v. Chipotle Mexican Grill* (2010) 189 Cal.App.4th 751.
- *Kirby v. Immoos Fire Protection* (2007) 113 Cal.Rptr.3d 370. Issues limited on review - remand of judgment ordering attorney's fees to employer. (1) Does Labor Code §1194 apply to a cause of action alleging meal and rest period violations or may attorney's fees be awarded under Labor Code § 218.5? (2) Is the analysis affected by whether the claims for meal and rest periods are brought alone or are accompanied by claims for minimum wage and overtime?

- *Sullivan v. Oracle Corp.*, (9th Cir. No. 06-56649; 557 F.3d 979) The Court will decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. The questions presented are: (1) Does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of 40 hours per week? (2) Does Business and Professions Code § 17200, et seq. apply to the overtime work described in question one? (3) Does § 17200, et seq. apply to overtime work performed outside of California for a California-based employer by out-of-state plaintiffs in the circumstances of this case if the employer failed to comply with the overtime provisions of the Fair Labor Standards Act (29 U.S.C. section 207) et seq.?)

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