SEYFARTH SHAW LLP
ATTORNEYS

California Labor and Employment Law Update

Wage Hour Developments

Separation from employment need not be involuntary to trigger duty to pay on the spot or waiting time penalties. The California Supreme Court has answered the question of whether the natural end of a contract for services is actually a termination of employment under Labor Code §201 that places an employer who fails to pay an employee on the day of termination at risk for Labor Code §203 penalties. In a ruling that will affect all employers who use temporary employees, casual or day laborers, the Court held that under settled statutory construction principles the "discharge" element of the Labor Code triggering the duty to pay contemplates both types of employment terminations, not just an involuntary termination. The court explained that there is no reason that an employee who is fired for good cause should be entitled to prompt payment but an employee who completes an assignment is not. *Smith v. Superior Court*, 2006 Cal. LEXIS 8354 (Cal. July 10, 2006).

Are you sure your California employees are paid a commission? The concept of commission based compensation narrowed in California. Five telemarketers sued under California's unfair competition law for failing to properly pay them overtime. The court rejected the defendant's argument that they did not have to pay overtime because the employees were paid by commission and were therefore exempt. Under California law, employees are paid on a commission basis only if compensation is a percent of the price of the product or service sold. Here, the employees were actually paid on a point system because the pay was based on a combination of sales points, incentive points, adjustment points, commissions, bonuses, charge backs and deductions. In a published decision, the court of appeals held that a jury would have to decide whether the employer's process for calculating commissions was an unlawful chargeback policy. *Harris v. Investor's Bus. Daily Inc.*, 138 Cal.App.4th 28 (Cal. App. 2d Dist. 2006).

Reporters at a Chinese-language newspaper were not exempt from overtime under the "creative professionals" exemption of the FLSA. A district court found that the reporters work depended upon their "intelligence, diligence, and accuracy rather than invention, imagination, and talent." In a separate order, the court invalidated the "opt out" declarations of 150 employees in the class, finding that they were coerced by the employer to opt out of the litigation. *Wang v. Chinese Daily News Inc.*, 2006 U.S. Dist. LEXIS 40848 (C.D. Cal. June 7, 2006).

California does not support imposing personal liability on corporate officers or agents for unpaid wages. The employer ran science-oriented summer camps. Following some financial hardships, some 555 summer instructors and 147 administrators were left with wages due and unpaid. In August 2000, the Division of Labor Standards Enforcement (DLSE) sued the business for wages owed to 45 former employees. At trial, the jury found for 14 employees who testified. Judgment was entered against not only the corporation but also against the "owner" as well, simply as a

"corporate officer with operational control." Reversing on appeal, the court agreed with the plaintiff that "California does not support imposing personal liability on corporate officers or agents as 'employers.'" The court held that Labor Code §§201, 202, 203 and 227.3 for failure to pay wages, vacation or other compensation did not support a cause of action imposing personal liability on a corporate agent for unpaid employee wages and expenses. The court remanded the matter to the trial court to consider the plaintiffs' alter ego liability theories, which were not ruled yet decided. *Jones v. Gregory*, 137 Cal. App. 4th 798 (Cal. App. 4th Dist. 2006).

Exemption from meal break statute found invalid. Six mine workers sued their employer for refusing to allow them to take a second meal break during their 12.5-hour shifts. Although a statute requires two meal breaks for shifts of that length, an Industrial Welfare Commission (IWC) Wage Order (§10(e)) exempts employees covered by a collective bargaining agreement. The trial court found for the employer, that the exemption applied. The court was asked on appeal to decide whether the IWC exceeded its authority in creating the exemption. The court decided it had and that the Wage Order was invalid. *Bearden v. U.S. Borax*, Inc., 138 Cal.App.4th 429 (Cal. App. 2d Dist. 2006).

Discrimination and Retaliation Update

Liability for harassment by non-employees was retroactive. The California Supreme Court determined that a 2003 amendment to FEHA regarding liability for sexual harassment by non-employees merely clarifies existing law and applies to claims pending at the time of the amendment. The decision revives the hostile environment claim of a former nurse that she was sexually harassed by a resident at a VA facility. *Carter v. California Dep't of Veteran Affairs*, 38 Cal.4th 914 (Cal. 2006).

The pivotal role of the TV show "Friends" in protecting free speech . . . "Sexual antics and coarse sexual talk" on a sitcom held insufficient to support a hostile work environment. The California Supreme Court ruled that a female writers' assistant on the television show *Friends* failed to show the "writers' sexual antics and coarse sexual talk" was sufficiently severe or pervasive to create a hostile work environment. The plaintiff had been warned during her interview that the writers would discuss sex and tell sexual jokes since it was an adult-themed show. The Court acknowledged that the *Friends* writers "did at times go to extremes in the creative process," but cautioned that "[l]awsuits like this one, directed at restricting the creative process in a workplace whose very business is speech related, present a clear and present danger to fundamental free speech rights." In finding that the plaintiff failed to prove that the alleged harassment was "because of sex," the Court explained "it is the disparate treatment of an employee on the basis of sex - not the mere discussion of sex or use of vulgar language - that is the essence of a sexual harassment claim." *Lyle v. Warner Bros. Television Prods*., 38 Cal.4th 264 (Cal. April 20, 2006).

Where comments could be interpreted as either "innocuous or invidious," summary judgment is not proper. A former Boeing employee who lost his job during a large-scale reduction-in-force sued for age discrimination under the California fair employment law. A federal district court granted summary judgment to the employer. On appeal, the Ninth Circuit determined that there was sufficient evidence to warrant a trial under the California FEHA, which follows the same framework as federal civil rights laws in terms of proving a case of discrimination. The court found that the plaintiff made out a *prima facie* case of age discrimination, and the company provided a "legitimate, nondiscriminatory reason" for the discharge. However, the court reversed finding that comments made by the plaintiff's supervisor were sufficient to overcome summary judgment. Indeed, the parties did not dispute that on multiple occasions the plaintiff's supervisor

remarked: "You've been around a long time, have you considered retirement?" and "You're an old man, you've been doing this a long time." While "stray remarks" are generally insufficient to establish discrimination, in this case the court found that the supervisor's comments "could be innocuous or invidious," depending on the specific circumstances. It should, therefore, be up to a jury to decide the question and it should not have been resolved on summary judgment. *Phillips v. Boeing Co.*, 2006 U.S. App. LEXIS 4883 (9th Cir. Feb. 28, 2006) (unpublished).

Private sector whistleblowers gets more protection -- U.S. Supreme Court finds an employee can bring a retaliation claim based on conduct that does not directly impact the terms and conditions of employment. The Court upheld a jury award for a female forklift operator who was transferred to a more physically demanding job after she filed a lawsuit accusing her employer of sexual harassment. According to the Court, a reassignment can constitute retaliatory discrimination where both the former and present duties fall within the same job description but the new job is less desirable. Here, the plaintiff was transferred to a more physically demanding job. In addition, although she was awarded back-pay following her suspension, the Court observed that many employees would find 30 days without pay to be a serious hardship. Thus, the Court affirmed the jury's findings that these two employment actions were materially adverse to the plaintiff and supported her retaliation claim. *Burlington N. & Santa Fe Ry. Co. v. White*, 2006 U.S. LEXIS 4895 (U.S. June 22, 2006).

The Ninth Circuit *En Banc* affirmed the dismissal of a bartender's claims that her employer's "personal best" policy that required female but not male servers to wear makeup is sex discrimination. The Ninth Circuit *en banc* rejected the plaintiff's unequal burden and sex stereotyping theories. The court found that there was no "evidence to establish that complying with the 'Personal Best' standards caused burdens to fall unequally on men or women, and there is no evidence to suggest Harrah's motivation was to stereotype the women bartenders." The court emphasized that it was not holding that sex-based grooming and appearance codes could never give rise to a valid Title VII claim for sex stereotyping. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

The Pregnancy Act does not have retroactive effect. The plaintiffs, four female employees, filed a Title VII claim against their employer alleging that they were not given proper service credit for pre-1979 pregnancy and related leaves of absence under benefit plans of the company's predecessor. The district court granted summary judgment to the plaintiffs, finding that the post-Pregnancy Discrimination Act (PDA) benefits determinations violated the PDA. Reversing and ordering a dismissal of the Title VII claims, the Ninth Circuit held that new statutory law generally is not intended to be given retroactive effect unless the legislature expressly provides otherwise. According to the court, "there is nothing in the text of the PDA to indicate a clear congressional intent that the provisions of the statute are to be applied in such a way as to change the legal consequences of conduct that occurred prior to the statute's enactment." Therefore, the employees had no claim under Title VII. *Hulteen v. AT&T Corp.*, 441 F.3d 653 (9th Cir. 2006).

Circumstantial evidence of race discrimination does not have to be better than direct evidence. The employer is a credit union that provides financial services, including banking and lending, to its members. In 1993, the plaintiff, who is African-American, was hired as Director of Lending. Late, in 2000, he was promoted to Vice President and Chief Operating Officer. In 1999, the company adopted a policy to create a "sales culture," to promote sales of its financial products. Part of this transition included the hiring of a new Chief Executive Officer (CEO). The new CEO reorganized the company, demoting the plaintiff. The plaintiff was the only management team member to be demoted and the only African-American on the management team. The plaintiff eventually resigned and sought severance. When negotiations broke down, the

plaintiff sued alleging he was demoted, fired and retaliated against because of his race. The parties filed cross motions for summary judgment. The district court granted the defendant's summary judgment. Reversing in part and affirming in part, the Court of Appeals reinstated the plaintiff's wrongful demotion claim but affirmed summary judgment on the wrongful termination and retaliation claims. As a preliminary matter, the court held that a plaintiff who offers circumstantial evidence to establish a race discrimination claim does not have to produce more or better evidence than plaintiffs who present direct evidence. Applying that standard here, the court concluded that the plaintiff had presented sufficient evidence to avoid summary judgment. *Cornwell v. Electra Ctr. Credit Union*, 439 F.3d 1018 (9th Cir. 2006).

Plaintiff exhausted her administrative remedies even though she did not serve a copy on her employer. Reversing the trial court, the Court of Appeal held that the trial court erred in dismissing a former employee's sex and pregnancy complaint on jurisdictional grounds because the plaintiff did exhaust her administrative remedies. The court observed that the statutory language is plain that Gov't Code §12962 only imposes a service requirement upon FEHA claims that are submitted to the Department for "investigation." The plaintiff here merely sought a right-to-sue letter. The court noted that the 2003 amendments to FEHA were intended to eliminate the service requirement where an employee opts to seek a right-to-sue letter without having the agency first investigate the allegations. Thus, it was "without consequence" that the plaintiff did not serve a copy of the charge on her former employer. In addition, the 2003 amendments did not change the service requirements for unrepresented employees; there are no service requirements for employees who are not represented by counsel. Thus, having exhausted her administrative remedies by securing a right-to-sue letter, "[the plaintiff] is entitled to her day in court." *Wasti v. Superior Court,* 140 Cal.App.4th 667 (4th App. Dist. 2006).

Law barring bias-based violence applies to employment actions. The plaintiff, who is African-American, worked as a tunnel miner. He alleged that, because of his race, his supervisor verbally harassed him with racist remarks, yelled at him in an intimidating manner, and threatened him with physical violence. He also alleged that he was placed in unsafe work situations, resulting in an injury that required the amputation of several of his toes. He was terminated as a result of the injury. The trial court ruled that the plaintiff could not sue his former employer, a mining company, under California Civil Code §§51.7 and 52.1, finding that these sections are part of the Unruh Civil Rights Act (Cal. Civ. Code §51), which does not apply to job disputes. In a case of first impression, the appellate court reversed, ruling that an employee may raise claims against his employer for discriminatory violence and intimidation and denial of civil rights stemming from threats and intimidation separate from claims under the state's employment discrimination law. The Court held that §51.7, which provides all persons with "the right to be free from violence and intimidation by threat of violence based on, among other things, race, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute," and §52.1, which authorizes the award of damages for violations of that right, are not part of the Unruh Act, and therefore, are actionable claims. *Stamps v. Superior Court of Los Angeles County*, 136 Cal.App.4th 1441 (Cal. App. 2d Dist. 2006).

Court affirms jury's award to white male employee. An airport employee sued the city, county, and individuals associated with the airport, claiming race discrimination. In his complaint, the employee alleged that the defendants terminated an all-white provisional pool, of which he was a member, and appointed a non-white acting supervisor, without interviewing members of the plaintiff's former pool. In agreeing that race was a motivating factor in terminating the provisional pool, the court looked to a memorandum distributed by the city's equal employment opportunity manager indicating an intent to increase minority appointments without balancing

policy interests. Accordingly, the court affirmed the judgment for damages, but reversed the award of attorney fees. *Harman v. City and County of San Francisco*, 136 Cal.App.4th 1279 (Cal. App. 1st Dist. 2006).

The 15 employee threshold in Title VII is nonjurisdictional. In a unanimous ruling (8-0), the Supreme Court held that the requirement that an employer have 15 employees to be covered by Title VII is an element of a plaintiff's claim but it is not a jurisdictional issue that determines whether a federal court is entitled to hear the case. Reversing a decision by the Fifth Circuit on an issue that has divided the federal circuits, the Court adopted a bright-line rule that a threshold limitation on a statute's scope will only be treated as jurisdictional if Congress clearly specifies that it is. Absent that, courts "should treat the restriction as non-jurisdictional in character." *Arbaugh v. Y & H Corp*, 126 S. Ct. 1235 (U.S. 2006).

Punitive damages award reduced to six times the compensatory award. A jury found for four female employees who were sexually harassed by the director of the grocery store where they worked. Each was awarded $5 million in punitive damages, which was anywhere from 25 to 100 times their compensatory awards. Finding the awards were excessive, the court reduced the punitive damages to six times the compensatory award. The California Supreme Court let stand the appellate court opinion limiting the punitive damage award to six times the compensatory award. The court noted that the 6-to-1 ratio follows a pair of California Supreme Court rulings last year that held that "courts must consider the potential harm to the plaintiff and the defendant's misconduct in calculating punitive damages." *Gober v. Ralphs Grocery Co*.,137 Cal. App. 4th 204 (4th App. Dist.), reh'g denied and opinion modified, 2006 Cal. App. LEXIS 390 (Cal. March 22, 2006), review denied, 2006 Cal. LEXIS 7184 (Cal. June 14, 2006).

Speech in the Workplace

No First Amendment violation where employer prohibited employee from discussing religion with clients, displaying religious items in his cubicle, and using a conference room for prayer meetings. The plaintiff is a self-described "evangelical Christian who holds sincere religious beliefs that require him to share his faith, when appropriate, and to pray with other Christians." His official duties involved assisting the unemployed and underemployed in their transition out of welfare programs, and he frequently had to conduct client interviews in his cubicle. Since he interviewed clients in his work cubicle he was told not to display religious items there and was reprimanded when he did display such items. He argued that his employer's refusal to allow him to display a Bible or a "Happy Birthday Jesus" sign was "viewpoint discrimination." The trial court granted the employer summary judgment and the Ninth Circuit affirmed. First, the Ninth Circuit determined that under a balancing test that weighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," the restrictions placed on the plaintiff were reasonable. The court concluded that the employer's need to avoid appearing as endorsing religion outweighed the curtailment on the employee's ability to display religious items in his cubicle, a place frequented by clients. As for the use of the nonpublic room for prayer, the court concluded that the employer's decision to allow the room to be used for birthday parties and baby showers, but not by employee social organizations, was a "reasonable" limitation. *Berry v. Dep't of Soc. Serv.*, 447 F.3d 642 (9th Cir. 2006).

The First Amendment does not however protect everything a government lawyer says in the course of performing duties. The Court ruled that government workers cannot always speak out about what they do and enjoy First Amendment protection from discipline. A deputy district

attorney (DA) investigated whether a sheriff deputy made false statements in an affidavit to obtain a search warrant and concluded that the officer had lied and circulated a memorandum recommending that the criminal charges be dismissed. Trial commences with the DA, testifying for the defense. The DA claimed that in retaliation for his testimony he was demoted, transferred to a less desirable office, and given less desirable cases and, of course, sued claiming that he had been punished for exercising his First Amendment right to free speech. The trial court ruled for the employer, finding that because the memorandum was created as part of his job, his supervisors were protected by sovereign immunity. The Ninth Circuit disagreed based on the view that allegations of police wrongdoing, was a matter of a public concern, and therefore, protected speech. The Supreme Court overruled the Ninth Circuit stating that the controlling factor was that the DA's statements were made pursuant to his duties and when public employees make comments pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes. Thus, the Constitution does not insulate their communications from employer discipline. The Court noted that to allow the DA's memorandum to be protected First Amendment speech when he was merely performing his job, required the courts to become immersed in the employee-supervisor relationship of government employers. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (U.S. 2006).

Disability Discrimination Update

Allowing employee to take extended medical leave is accommodation, and no further accommodation was necessary. The plaintiff, who worked as a receptionist, was criticized for how she handled a "security" situation (allowing a woman on a watchlist to enter the building). The reprimand upset her so much that she was taken to the hospital, apparently suffering from asthma (she often suffered from stress and anxiety). She began a medical leave in October 2000. In January 2001, the employee was advised that in accordance with office policy her position would not be held any longer and a replacement would be hired. The employee eventually returned to work in May 2001, and was given 60 days to find a new position within the company. Nothing was available for her qualifications so she was terminated in July 2001. She sued for race and disability discrimination. The trial court granted the employer summary judgment. The appellate court affirmed finding that the employer's actions were reasonable and her firing was not discriminatory. The court further concluded that allowing her to be on an extended medical leave was an accommodation and no additional accommodation was required. *Williams v. Genentech, Inc*., 139 Cal.App.4th 357 (Cal. App. 1st Dist. 2006).

Employer must engage in interactive process or accommodate an employee or applicant it regards as disabled. Deciding a case of first impression, the state appellate court ruled that the FEHA requires an employer to engage in the interactive process with and reasonably accommodate an employee or job applicant it regards as or perceives to be disabled. The court noted that the federal appeals courts have split on the issue in cases decided under the ADA. The court's decision aligns with decisions by the Third, Tenth, and Eleventh circuits. In contrast, the Fifth, Sixth, Eighth and Ninth circuits have held that employees who are regarded as disabled under the ADA have no right to a reasonable accommodation. *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34 (2d App. Dist. 2006).

Court reinstates ADA claim of epileptic heavy-equipment operator. The plaintiff has suffered from epilepsy since he was 16 years old. He controls the condition with medication but still has an occasional seizure. His seizures are usually preceded by an "aura," which is a physical manifestation "akin to a nervous jerk." Typically, the seizure comes no sooner than one hour after the aura but a seizure follows an aura only approximately half of the time. The plaintiff, who worked as a "Maintenance and Construction Worker III," operated heavy equipment such as construction vehicles. One day, despite an aura, the plaintiff reported for work and suffered a seizure while driving a county pickup truck. Fortunately, his passenger

gained control of the vehicle and stopped it without any injuries. In response to this incident, the county requested that the plaintiff undergo a medical examination by a neurologist. The doctor opined that the plaintiff requires some limitations on his job. Concluding that he was unable to perform the essential functions of his job, the county fired the plaintiff. The Board affirmed the dismissal. The plaintiff then filed a charge with the EEOC; however, the EEOC declined to sue. The plaintiff sued alleging that the county improperly fired him and refused to reasonably accommodate his disability. The trial court granted summary judgment to the county. Reversing, the Ninth Circuit found that the employee was entitled to a trial on his ADA claim. First, the court concluded that the county's reason for termination was suspect for several reasons: a) it claimed that he was terminated for misconduct but his termination letter only mentioned that he was unfit to perform his position, b) the misconduct resulted from his disability, and c) if he truly was terminated because of misconduct, the company would not have required him to take the medical exam. According to the court, there was a material question of fact whether the plaintiff's disability was a motivating factor for his termination. Second, as for reassignment as an accommodation, the court adopts the Tenth Circuit's rule that requires an employer to not only consider jobs currently available but also those that will become available within a reasonable period. Thus, the court determined that there is a genuine issue of material fact as to whether the plaintiff could have been accommodated through reassignment. Finally, the court determined that there is a question whether the plaintiff would pose a threat to others if he were given a reasonable accommodation. Thus, the county was not entitled to summary judgment. *Dark v. Curry County Road Dep't*, 2006 U.S. App. LEXIS 16838 (9th Cir. July 6, 2006).

Family Medical Leave Update

Employee properly terminated for inappropriate behavior, not for requesting FMLA leave. The plaintiff, a train conductor, became insubordinate when his supervisor denied his request for intermittent FMLA leave. The plaintiff swore at his supervisor and asked to "take it outside." Affirming summary judgment for the employer on the plaintiff's FMLA retaliation claim, the Ninth Circuit held that the issue in the case was "not what the [plaintiff] actually said, but whether the [defendant] fired him because of what the [defendant] believed he said, rather than for a reason prohibited by the FMLA." Therefore, according to the court, it was a permissible view of the evidence for the district court to conclude that the plaintiff's request for FMLA leave was not a factor in the defendant's decision to terminate him and that he was terminated for swearing at his supervisor and offering to take the argument outside. However, according to the dissent, once the plaintiff made a legitimate request for leave, the ensuing altercation was protected activity and could not justify the firing. *Denny v. Union Pacific R.R. Co.*, 2006 U.S. App. LEXIS 5993 (9th Cir. March 9, 2006) (unpublished).

More on Class Actions

In search of an eligible plaintiff - - - - permitting discovery to find a class representative is acceptable in California. An attorney who was also a disgruntled customer filed a class action over a retailer's restocking fee, efficiently proposing to be both the class representative and the attorney of record. That sort of wearing of two hats is not acceptable, even in California, and raises a conflict of interest. The trial court ordered the attorney/client to show cause why the case should not be dismissed. Perhaps in recognition that more money was to be made in fees as the lawyer than in recovery as the client, the attorney sought pre-certification discovery from the retailer of its customers to identify a substitute plaintiff. The trial court found that to be an acceptable solution as did the court of appeals. On appeal the court affirmed that a third party should send a letter to costumers to allow them to become class members. Perhaps as a concession to privacy concerns, the court cautioned that the names of parties who do not respond to the letter will not be turned over to the attorney. *Best Buy Stores, L.P. v. Superior Court*, 137 Cal.App.4th 772 (Cal. App. 4th Dist. 2006).

Employee Benefits

Ninth Circuit rules that Xerox Corp.'s method of reducing pension benefits at final retirement to account for earlier benefit distributions received by plan participants violated ERISA. The lawsuit was brought by three employees who received lump-sum distributions when they left the company in 1983. According to the court, because the distribution from the defined benefit plan exceeded the lump-sum present value of each employee's accrued benefit under the plan, no payment was made under the defined benefit plan, but instead the lump-sum distributions came from the profit-sharing plan. In 1989, Xerox amended the defined benefit plan and eliminated the profit-sharing plan, replacing it with two new components: a cash balance retirement account and a transitional account. On retirement, each participant would receive the largest of the three benefits using the traditional defined benefit formula, the cash balance formula, or the transitional retirement account formula. After exhausting their administrative remedies, the three employees sued alleging that Xerox's use of the phantom accounts violated ERISA. The district court granted judgment in favor of Xerox, finding that the phantom account mechanism did not violate ERISA. The Ninth Circuit reversed, finding the phantom account offset violated ERISA "by overestimating the value of distributions made upon a previous separation from employment, and the corresponding reduction in benefits at retirement." *Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 447 F.3d 728 (9th Cir. 2006).

ERISA pension benefits can be garnished under the Mandatory Victims Restitution Act (MVRA). Following a guilty plea to charges of conspiracy to transport stolen goods and filing false income tax returns, the defendant was sentenced to 24 months imprisonment and ordered to pay $3.4 million in restitution. After he was sentenced, the government requested that a writ of garnishment be issued against the defendant's former employer for $142,245 in pension benefits. The defendant objected that ERISA's anti-alienation provision prohibited the garnishment. The District Court agreed with the defendant, but the Ninth Circuit reversed. According to the Ninth Circuit, in enacting MVRA §3613 which states "notwithstanding any other federal law" all property may be garnished, Congress intended restitution orders to be enforced like tax liens, which are enforceable against ERISA pension benefits. *United States v. Novak*, 441 F.3d 819 (9th Cir. 2006).

Plaintiff's performance-based stock options should be considered "predisability earnings" that are included in the calculation for benefits. The plaintiff, Vice-President of Research, participated in the Executive Incentive Compensation Program, which included various benefits such as disability insurance. The plaintiff was injured and rendered a paraplegic. When the plaintiff learned that his stock options would not be considered earnings for calculating the amount of benefits he would receive, he sued. Granting summary judgment for the plaintiff, a federal district court ruled that the disability plan administrator violated ERISA by failing to include the plaintiff's stock options in its calculation of disability benefits. The court ruled that the stock options qualified as earnings. The court rejected the insurance company's argument that the bonuses were not wages because they were "fluid in nature and their value may change over time." *McAfee v. Metro. Life Ins. Co.*, 2006 U.S. Dist. LEXIS 33070 (E.D. Cal. May 24, 2006).

Stock buy back plan is enforceable despite tax problems. The plaintiff retired from Pacific Decision Sciences Corporation, the company that he founded with a business partner. The partners agreed that the company would buy back the plaintiff's stock for $150,000 and would pay him an additional $10,000 per month for the next 23 years. The payments were set up through a "secular trust" so the corporation could deduct the payments from its taxes as ordinary business expenses. Although the plaintiff initially argued that the additional payments were deferred compensation, he eventually conceded that the payments

were compensation for the stock which he sold back to the company. Several years later, the corporation was sold to a new group of investors who refused to make the monthly payments. The plaintiff sued for enforcement of the contract. The trial court held that the payments violated California corporate law because the payment scheme, which was designed to evade taxes, violated Corporations Code §500 and could not be enforced by court. Reversing on appeal, the court held that §500 was not violated because §500 does not require the corporation to have retained earnings higher than the total contract price payable over the life of the contract at the time a contract is executed. Instead, §500 merely requires that the corporation have retained earnings greater than the distribution on the date the distribution is made). The court also found that the plaintiff was not in *parti delicto* with his partner in the tax evasion scheme. Therefore, the corporation was bound by the plaintiff's retirement agreement. *Maudlin v. Pacific Decision Sciences Corp.*, 137 Cal. App. 4th 1001 (4th Dist. 2006).

Labor Law Update

Suspicious timing of subcontracting department work, just days before a union election, sufficiently demonstrated anti-union animus. Union organizers operated openly at Los Angeles acute care hospital. There were 27 respiratory care (RC) therapists in the rc department who worked throughout the hospital. In 1999, the union began a campaign to organize the hospital's technical staff, which included the RC Department. The RC department, which was 25% of the technical staff, overwhelming supported the union. On January 5, 2000, the union filed a petition for an election with the NLRB. Although talks of subcontracting the RC work began in late 1999, the final decision was not made until December 22, 1999. According to the hospital, it decided to outsource the work of its RC department because it was unable to find and train suitable managers. Problems with the RC department were longstanding. The hospital told the workers that effective February 5, 2000, they would no longer be employed by the hospital. The union filed unfair labor practice charges against the hospital claiming that its action prevented the RC therapists from voting in the election. The NLRB affirmed the ALJ's finding for the hospital but the Ninth Circuit reversed finding that there was strong circumstantial evidence of anti-union animus. A hospital violates the NLRA when it subcontracts work for anti-union purposes. The court concluded that the hospital's business justification for subcontracting the work was unreliable, raising the inference that it was a pretext for anti-union animus. In considering whether the hospital violated §8(a)(3), the critical issue is the hospital's motive, not whether the action is ultimately good or bad. *Healthcare Employees Union v. NLRB*, 441 F.3d 670 (9th Cir. 2006).

Successor employer ordered to bargain with union. The district court granted an interim injunction ordering the new owner of a nursing home to bargain with the employees' union representative. The court found that the Board would likely succeed on the merits of their claim that the owner violated the NLRA by refusing to recognize the SEIU as the employees' bargaining representative. In reaching their decision, the district court found that the current business was a successor employer because a majority of its employees were employed by the former owner and the nursing home operations were essentially the same. *Aguayo v. S&F Market St. Healthcare LLC, d/b/a Windsor Convalescent Ctr. Of N. Long Beach*, 2006 U.S. Dist. LEXIS 36470 (C.D. Cal. March 23, 2006).

The Ninth Circuit ruled that an employer failed to bargain in good faith for a new contract by representing that it could not afford the union's proposals but would not provide the requested supporting financial data. The employer manufactures plastics. When it came time to negotiate a new collective bargaining agreement, the company indicated that it could not meet the unions demands because the company "would go broke." The union sought supporting financial records, but the employer refused to

provide access to them. The company later denied that it could not afford the union's proposals. Under longstanding precedent, if an employer asserts an inability to pay for the union's demands in order to meet the standard of bargaining in good faith it must provide some proof of the accuracy of such statements. The union filed an unfair labor practice charge against the company. An ALJ concluded that the company violated §8(a)(5) by refusing to provide the union with the requested information since the combination of its proposals to reduce contractual benefits, warnings that it would go broke if it agreed to the union's proposals, and the layoffs were consistent with a claim of an inability to pay. However, the NLRB reversed the finding that the company's claims that it would "go broke" were not necessarily a claim of an inability to pay. The Ninth Circuit reversed the NLRB finding that the NLRB's decision was too narrow and when considering all of the evidence the company was claiming it could not pay, so it had to turn over the financial documents. *International Chem. Workers Union Council v. NLRB*, 2006 U.S. App. LEXIS 16557 (9th Cir. June 30, 2006).

Employer created unlawful impression of surveillance when it advised employees that it knew of calls made to the labor board. The NLRB concluded that an employer created an unlawful impression of surveillance when he held up a highlighted telephone list and told the employees that he knew of calls made from the jobsite to the Department of Labor and Industry. The employees, who were electricians working for a contractor on the jobsite, were concerned about how the employer was handling their fringe benefits.
In surveillance cases, the issue is "whether the employees would reasonably conclude from the statement in question that their protected activities were being monitored." The Board found that in this case the employees would and found the act was an unfair labor practice. *Rogers Electric*, Inc., 346 N.L.R.B. No. 53 (2006).

Employment Contracts

Disavowal that "cause" is not required is not essential to "at will" status. The temptation to soften "at will" language for various recruiting and HR purposes can be strong, but the risk is that plaintiffs' lawyers will attempt to capitalize on inconsistencies and ambiguities and this can lead to expensive litigation. *Dore v. Arnold Worldwide, Inc*., __ Cal4th ___, 06 C.D.O.S. 7078 decided by the California Supreme Court on August 3, 2006, is a case in point. The employment agreement at issue in this case stated that the employment relationship was "at will," but it went on to say simply that termination was permitted "at any time," It did not include language that the employment relationship could be terminated "with or without reason."

It was this silence that the employee hoped to make golden. He made three arguments: (1) that the statement in the agreement that notice was not required before termination did not rule out a "for cause only" requirement; (2) that failing to explicitly state that the employer could terminate the employee "with or without cause" in the agreement created an ambiguity that the court could resolve only by looking at evidence outside the four corners of the employment agreement, such as oral statements made by the employer at the time the parties entered into the agreement, and comments and conduct by the employer during the employee's employment; and (3) that when the court looked at this "extrinsic evidence," it had to conclude that the parties did not agree that the employee could be discharged "with or without cause."

The trial court found that the employment agreement was unambiguous, and it granted summary judgment for the employer. However, the court of appeals agreed with the employee that the agreement was ambiguous, and it ordered the trial court look at the employee's extrinsic evidence. Fortunately, the Supreme Court stepped in, and it concluded that the phrase "at will" itself was unambiguous, and that the statement that the employment relationship could be

terminated "at any time" also meant that it could be terminated with or without cause. Therefore, the Supreme Court ruled unanimously in favor of the employer.

Although the outcome ultimately was favorable, the Dore case remains a cautionary tale for employers because, in reaching this outcome, the Supreme Court did look beyond the four corners of the agreement to determine whether the phrase "at any time" was ambiguous. This approach is problematic because it gives lower courts, which may be predisposed to not find "at will" status, the opening to reach that result by considering an employee's "extrinsic evidence," To avoid this risk, employers are well-advised to continue to include language in their employment agreements, handbooks, and other employment documents that expressly states not only that the employment relationship is "at-will" and that it may be terminated "at any time," and "with or without notice," but also that it may be terminated "with or without cause."

Choice-of-law and forum selection provisions contained in employment agreement were enforceable. A lawyer who had worked for BMG for 32 years and was 59 years old was fired. A question arose whether his age discrimination claim was subject to his employment agreement's choice-of-law and forum selection provisions (setting New York and New York law). BMG contended that the plaintiff was let go as part of a wide-ranging reorganization. The trial court enforced the choice-of-law and forum selection provisions in the contract and stayed the California action so that the plaintiff could refile a complaint in New York. The appellate court affirmed the enforcement of the choice-of-law and forum selection provisions. Furthermore, the court ruled that since the New York City Human Rights Law provides an adequate remedy, applying the forum selection clause does not violate California's public policy against age discrimination. *Olinick v. BMG Entertainment*, 138 Cal. App. 4th 1286 (Cal. App. 2d Dist. 2006).

Covenant not to compete violated California public policy favoring open competition. Kelton and Stravinski formed a general partnership for developing industrial warehouses. They also executed a covenant not to compete that Stravinski drafted. In it, Kelton agreed not to engage in the business of operating any warehouses and Stravinski agreed not to design or build any warehouses. Five years later, the parties amended the partnership agreement to the management of one property and it stated that the partners were free to engage in other projects. Thereafter, Kelton claimed he was owed an interest in some of Stravinski's projects pursuant to the covenant not to compete. The trial court agreed with Stravinski that the covenant was unenforceable and it granted him summary judgment. The appellate court affirmed, finding that the covenant violated California public policy favoring open competition. Covenants are void except where the person sells the goodwill of a business or a partner agrees not to compete upon dissolution of a partnership. Neither exception applied here. In limited situations, however, illegal contracts will be enforced to "avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff." However, the exception does not apply. *Kelton v. Stravinski*, 138 Cal.App.4th 941 (Cal. App. 5th Dist. 2006).

Ambiguous release of labor dispute did not bar the employee's personal discrimination claim. A stock clerk for Vons alleges that he was harassed for a year and a half. He also was in an altercation with a manager, for which he was suspended. The suspension resulted in the union filing a grievance against the company. The parties settled the grievance and the clerk executed a Release Agreement. About two years later, the clerk filed a racial harassment complaint against the company. At issue was whether the Release Agreement barred the plaintiff's personal discrimination claim or simply settled the labor dispute and any claim arising out of that dispute. It was not contested that the labor dispute was unrelated to the discrimination claims. The trial court found that the Release barred the discrimination action. However, the appellate court reversed, finding that the Release was

ambiguous and, that it was a factual question what the parties intended. *Butler v. The Vons Cos., Inc.*, 2006 Cal.App. LEXIS 925 (Cal. App. 2d Dist. June 22, 2006).

Workers Compensation

General contractors are not liable for injuries suffered when a sub-contractor hires an independent contractor to perform services. In this work site accident case, David Michael, a truck driver hauling hazardous waste, appeals from a summary judgment in favor of defendants Denbeste Transportation, Inc. (a hazardous waste hauler subcontractor and Michael's hirer), Chemical Waste Management, Inc. (CWM) (a hazardous waste handler and Denbeste's hirer), Aman Environmental Construction, Inc. (Aman) (the general contractor for the demolition work on the site and CWM's hirer), and Secor International, Inc. (a consultant hired by the owner of the site, but not the hirer of Michael or the other defendants). While preparing a load of waste to be hauled from the work site, Michael fell from the trailer, broke his spine, and was permanently paralyzed from the chest down. He sued Denbeste, CWM, Aman, and Secor. The district court granted the defendants' summary judgment. Affirming in part on appeal, the California Court of Appeals concluded that the contractors who hired Denbeste corporation (CWM, Aman and Secor) were not liable to Michael under the Privette doctrine. The Privette doctrine, developed by the California Supreme Court, holds that a hirer will not be liable for injuries that occur to a contractor's employees unless the hirer did not inform the contractor of a known, concealed risk, or if the hirer's active participation in the work contributes to the injury. The plaintiff argued that the doctrine should not apply here because the contractor hired an independent contractor, not an employee, to perform the services. The court rejected this argument. The hiring contractors had no duty to investigate whether Denbeste was hiring employees or independent contractors. Thus, the hirers should not be exposed to greater liability simply because the plaintiff was an independent contractor. However, the court reversed the grant of summary judgment to Denbeste because there are triable issues of fact as to its liability. *Michael v. Denbeste Transp., Inc.*, 137 Cal.App.4th 1082 (Cal. App. 2d Dist. 2006).

Residential employee who was injured on his first day on the job is excluded from Workers' Compensation Coverage. Paul Hestehauge was hired by a homeowner to paint a living room, dining room, and kitchen. On his first day he fell from a ladder placed on top of a scaffold and was seriously injured. He applied for and was awarded workers' compensation benefits. The Board upheld the decision but the California Court of Appeals reversed, finding that Hestehauge was not an employee under workers' compensation law and, therefore, not entitled to benefits. Under §3351(d) of the workers' compensation law, residential employees are people hired by the owner or occupant of a residential dwelling to maintain the dwelling or to provide personal services. The employee must work at least 52 hours or earn at least $100 during the 90 days preceding the injury to be considered an employee, and Hestehauge did not meet the 52 hours/$100 requirement. The court also found that the more expansive definition of a residential employee found in §3715 was not applicable because it only applies to uninsured employers. The homeowner here was insured through his homeowner's policy. *California State Auto. Assoc. Inter-Ins. Bureau v. Workers' Compensation Appeals Board*, 137 Cal.App.4th 1040 (1st Dist. 2006).

Federal Administrative and Legislative Update

EEOC numbers. For the third year in a row, the number of charges filed with the EEOC decreased from the previous year. For FY 2005, a total of 75,428 charges were filed. In comparison, in FY 2004, a total of 79,432 charges were filed with the agency. Between FY 2005 and 2004, there was a 5% reduction in the number of charges filed. Race, sex and retaliation claims continue to make up the bulk of the charges filed. In FY 2005, race claims made up 35.5% (26,740) of the charges, while sex discrimination and retaliation claims represented, respectively, 30.6% (23,094) and 29.5% (22,278)

of the charges filed. While the percentage of race, sex and retaliation claims increased slightly from the previous year, the actual number of charges filed in each category declined in FY 2005.

In FY 2005, the EEOC filed a total of 383 direct suits or interventions. This was a slight increase over the previous year when the EEOC filed 379 such suits but does not represent the highest number of direct suits or intervention filed by the agency in a given year. That occurred in 1999 when the EEOC filed 437 such actions. The overwhelming majority of the suits filed by the EEOC continues to be Title VII claims (281) followed by ADEA claims (46).

The EEOC continues to find that a substantial number of the charges filed have no merit. In FY 2005, the EEOC found no reasonable cause in 48,079 (62.2%) of the charges filed. This was down slightly from the previous year, when the EEOC found no reasonable cause in 62.4% of the charges filed. The EEOC found that reasonable cause was present in 5.7% (4,426) of the cases filed in FY 2004, an increase over the previous year when reasonable cause was present in 4.9% of the cases.

In FY 2005, the EEOC settled 8,116 (10.5%) cases, down from 8,665 (10.2%) cases in FY 2004. Through its litigation efforts, the EEOC obtained $107.7 million in monetary benefits in FY 2005. This was significantly down from the previous year when the agency obtained $168.1 million in monetary benefits. Through its non-litigation (administrative) efforts, the EEOC obtained an additional $271.6 million in monetary benefits in FY 2005. While recovering fewer monetary benefits through its litigation efforts, the EEOC collected more monies through its administrative efforts in FY 2005 than in FY 2004, when it collected $251.7 million.

EEOC announces a race-centered focus. The EEOC has announced that it plans to dedicate more time to enforcing straight disparate treatment claims under Title VII, particularly those alleging race discrimination. The Vice Chair stated that she will be pursuing a race-centered focus. The EEOC has developed a task force to examine systemic workplace discrimination. The EEOC hopes that this will result in it bringing more large-scale cases. Daily Lab. Rpt. No. 43, March 6, 2006, A-6.

EEOC will shift to litigation of systemic classwide cases rather than individual claims, and to act like a national law firm. Acting on recommendations by an internal task force, the EEOC is changing its fundamental priorities to systemic cases rather than individual claims. Systemic cases include "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic location." The agency will also become more proactive rather than simply responding to cases that walk in the door. See Daily Lab. Rpt. No. 65, April 5, 2006, AA-1.

DOL ERISA Advisory Council's report issued. The report, which is available on the DOL's website, http://www.dol.gov/ebsa/publications/main.html#section16c, offers both short and long-term recommendations for making benefit plans' summary plan descriptions (SPDs) more understandable and user-friendly. See Daily Lab. Rpt. No. 63, April 3, 2006, A-13.

OFCCP releases finalized interpretive standards for systemic compensation discrimination. On June 16, 2006, the OFCCP released its finalized Interpretive Standards for Systemic Compensation Discrimination Under Executive Order 11246 and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246. (Management Alert available).

The Tax Prevention and Reconciliation Act of 2005. This Act (signed into law on May 17, 2006) retroactively increases taxes for Americans living abroad. The new tax law includes tax year 2006 and changes the way in which taxes are calculated on subsidies, such as housing allowances, given to

ATLANTA
One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603-5577
312-460-5000
312-460-7000 fax

HOUSTON
700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street, Suite 3100
San Francisco, California 94105-2930
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2) 647 60 25
(32)(2) 640 70 71 fax

Americans living abroad by their employers to protect them from high taxes. (One Minute Memo available).

What to do about avian flu. By now, most people are familiar with the "avian influenza," or "bird flu" virus (the avian flu, virus, or disease), which has been reported throughout Asia and, most recently, in Europe. Although the United States has yet to experience a human outbreak of the virus, it is only a matter of time before the disease surfaces. Essentially, basic infection control measures implemented and enforced at the workplace are the cornerstone in preventing and managing the transmission of the virus. Employers should consider that these preventative measures also greatly reduce the risk of serious legal implications in the event of an outbreak among employees. (Management Alert available).

H-1B visas update. There is an annual limit on the number of H-1B petitions that can be approved during the government's 2007 fiscal year (beginning October 1, 2006, and ending September 30, 2007). The H-1B cap for fiscal year 2007 is 65,000 (of which about 6,800 are reserved for nationals of Chile and Singapore under Free Trade Agreements with those countries). U.S. Citizenship and Immigration Services (USCIS) began accepting petitions for FY 2006 as of April 1, 2006. There is an additional quota of 20,000 H-1B's which are reserved for persons who hold a master's degree or higher awarded by a U.S. college or university. This additional quota of 20,000 H-1B's is not in danger of being reached at this time. (One Minute Memo available).

California Administrative and Legislative Developments

Labor Commission precedent decision 2006-0003 (dated July 3, 2001) - hourly cashier was entitled to prompt payment of wages upon termination. Wages were not paid for a week and an expense check (for attending training) was distributed even later. A waiting time penalty was assessed against the employer for delaying the payment of wages.

Labor Commission precedent decision 2006-0004 (dated July 16, 2002) - sales representative tendered his resignation effective November 16th. He did not receive his final wages until November 19th. A waiting time penalty was assessed against the employer for the three-day delay in paying the wages.

Proposed changes to sex harassment supervisor training. Under revised draft regulations, employers and contractors who employ even one worker in California would be required to give supervisors two hours of sexual harassment training. The proposed regulations would cover public and private employers or contractors with 50 or more employers, however, there is no requirement that the workers at the same location or even work or reside in California. The supervisor need not be located in California "so long as [he or she] directly supervise California employees." See Daily Lab. Rpt. No. 132, July 11, 2006, A-13.

ATLANTA
One Peachtree Pointe
1545 Peachtree Street, N.E.
Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
World Trade Center East
Two Seaport Lane
Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603-5803
312-460-5000
312-460-7000 fax

HOUSTON
700 Louisiana Street
Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza, Suite 3300
2029 Century Park East
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas
Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall
Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street
31st Floor
San Francisco, California 94105-2930
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2) 647 60 25
(32)(2) 640 70 71 fax

SEYFARTH SHAW ATTORNEYS LLP

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