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California Labor & Employment Law Update

U.S. Supreme Court Update

Four Employment Cases Pending Before The Court. The U.S. Supreme Court, which opened a new term October 2nd, has four employment law cases and a False Claims Act whistleblower case (that might have implications for employers) currently pending. The cases are:

State ex. rel. P.D.C. v. W.E.A., 156 Wn.2d 543 (Wash. 2005), *cert. granted*, 2006 U.S. LEXIS 5417 (U.S. Sept. 26, 2006), consolidated with *Washington v.Washington Educ. Ass'n*, 156 Wn.2d 543 (Wash. 2005), *cert. granted*, 2006 U.S. LEXIS 5418 (U.S. Sept. 26, 2006). The Court will determine the constitutionality of a Washington law that requires unions to obtain each nonmember's authorization before using any part of his or her agency fee for political purposes. The Court will review the Washington Supreme Court's decision that the law is unconstitutional.

Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169 (11th Cir. 1005), *cert. granted*, 126 S. Ct. 2965 (2006). The Court will review an Eleventh Circuit decision in a Title VII Equal Pay Act case that a supervisor at Goodyear Tire, who alleged that she was paid less than her male co-workers, could look back beyond the statute of limitations only to her last periodic review of salary in submitting evidence of pay bias.

Norfolk S. Ry. Co. v. Sorrell, 170 S.W.3d 35 (Mo. Ct. App. 2005), *cert. granted*, 126 S. Ct. 2018 (2006). The Court will decide what the causation standard should be for employee contributory negligence in a FELA case brought by an employee of Norfolk Southern Railway Co. who was injured in a truck accident involving another employee. Oral argument took place on October 10, 2006.

Osborn v. Haley, 442 F.3d 359 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2017 (2006). This case arising under the Westfall Act addresses the procedural ramifications of a certification that denies the occurrence of an injury-causing event and the jurisdictional consequences of allowing the United States to be substituted for the sued employee as a party and allowing the government to remove the case from state to federal court. The Sixth Circuit held, as have a majority of the Circuits, that where the Attorney General's certification is based on a denial of the harm-causing incident, the district court must resolve the factual dispute. Oral argument is set for Oct. 30, 2006.

Wage-Hour Developments

California Court of Appeal Confirms Employer Right To Recover Advanced Commissions. Several former sales associates sued claiming that their employer's recovery of commissions it had advanced to the employees was unlawful. The plaintiffs, who sold internet services, were compensated with a base pay plus a commission for each sale. The commissions were paid when an order was "booked," but the employer could "recover or charge back" the commission from the sales associates' commissions (not base pay) if certain conditions were not met. The fundamental question for the court was whether the commissions were wages, making the charge backs unlawful under California Labor Code § 221. The trial court determined that the commissions were not wages and entered judgment for the employer. The California Court of Appeal agreed and affirmed the judgment for the employer. The court held that it was "clearly the law" in California that a salesperson must pay back the excess of advances made over commissions earned when there is

an express agreement on the part of the salesperson to do so. Furthermore, the court went one step further in finding that Labor Code § 224 provides an independent basis to allow charge backs in certain situations. Therefore, even if advance payments were considered "wages," an employer may withhold or divert them if the deduction is: 1) authorized in writing and 2) does not reduce the employee's "standard wage." *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313 (Cal. App. 1st Dist. 2006). (A Management Alert was distributed on this case on October 3, 2006.)

Exhaustion Requirements Of Private Attorneys General Act (PAG Act) Did Not Apply Where Statutory Penalties Were Available To Employees Under The Labor Code Prior To Enactment Of The PAG Act. A former bank employee filed a proposed class action under the PAG Act alleging wage and hour violations on behalf of current and former bank employees as well as the general public. The complaint sought damages as well as statutory penalties. The Bank moved to strike the portions of the complaint relating to the statutory penalties because the plaintiff failed to exhaust his administrative remedies under the PAG Act. The Bank also argued that the trial court lacked jurisdiction to hear these claims because the plaintiff never exhausted his administrative remedies. In response, the plaintiff argued that PAG Act § 2699.5 lists the Labor Code sections subject to the exhaustion requirement and § 218 is not listed, thus demonstrating the Legislature's intent that PAG Act does not apply to actions brought pursuant to § 218. In reply, the Bank argued that the plaintiff had to follow the administrative exhaustion procedures outlined in § 2699.3. The trial court agreed with the Bank and struck the counts for failing to exhaust the administrative remedies. The plaintiff then filed this petition seeking a writ to direct the trial court to vacate its order granting the motion to strike. The appellate court agreed with the plaintiff and entered an order finding that the trial judge erred in striking the portions of the complaint. In so ruling, the court noted that the only penalties being sought were penalties recoverable by employees under the Labor Code prior to the adoption of the PAG Act. Therefore, the plaintiff was not required to comply with the PAG Act's prefiling requirements. *Dunlap v. The Superior Court*, 142 Cal. App. 4th 330 (Cal. App. 2d Dist. 2006).

Dairy Workers Were Not Compelled To Arbitrate Their Claims That They Were Denied Rest Breaks And Itemized Wage Statements. The plaintiffs, workers at a dairy, filed a class action raising an unfair business practices cause of action and two wage and hour claims under the Labor Code and two wage orders issued by the Industrial Welfare Commission concerning failing to provide itemized wage statements and statutory rest periods. The trial court denied the Dairy's motion to compel arbitration under the parties' collective bargaining agreement (CBA). Affirming, the appellate court agreed that the plaintiffs should not be compelled to arbitrate their claims because the CBA's arbitration provision was not binding since the Union could not waive the plaintiffs' rights to bring statutory labor-rights claims in court and because the claims did not arise under the parties' CBA. The Union could not waive the plaintiffs' statutory rights to receive both rest periods and a wage-statement itemization. Therefore, the plaintiffs may raise claims in a judicial forum to protect those rights. Further, under Labor Code § 219(a), the Legislature made both rest breaks and wage-stub itemizations non-waivable and non-abridgeable by a CBA. In addition, the court determined that the plaintiffs are not precluded from raising their statutory claims because the Union already has grieved the rest break issue under the CBA. The court noted that "courts have repeatedly held that prior submission of certain statutory claims to final and binding arbitration does not bar a subsequent lawsuit where the employees have not waived their statutorily protected rights to a judicial resolution." Therefore, according to the court, the rights the plaintiffs seek to assert in this civil action are independent of the collective-bargaining process. *Zavala v. Scott Brothers Dairy*, 2006 Cal. App. LEXIS 1513 (Cal. App. 2d Dist. Sept. 28, 2006).

The Prompt Payment Of Wages Statute Requires Employees Be Paid From An In-State Bank Or Without Delay Or Cost If It Is From An Out-of-State Bank. Refusing to dismiss a lawsuit, a federal district court ruled

that a California law that guarantees employees "prompt payment of wages" requires employers pay its California employees paychecks drawn on an in-state bank or to make arrangements for employees to cash checks without incurring delays or costs. The court determined that a Labor Code exemption for checks where "the drawee is a bank" only applied to employers that are banks. The court ruled that the plaintiffs can seek restitution and penalties for claims going back as far as four years. The employer indicated that even if it were only responsible for claims relating to one year's paychecks, its liability could exceed $10 million. *Fleming v. Dollar Tree Stores Inc.*, 2006 U.S. Dist. LEXIS 67749 (N.D. Cal. Sept. 15, 2006).

Discrimination and Retaliation Update

Claimant Did Not Satisfy Her Burden Of Establishing That She Sustained A Compensable Industrial Injury Where Her Entire Psychiatric Disability Was Not Predominantly Work Induced But One Of Several Diagnosed Psychiatric Conditions Was Entirely Work Induced. A police dispatcher for a university filed a workers' compensation claim for "an injury to her psyche arising out of and in the course of her employment." She alleged that the injury resulted from cumulative trauma. An agreed medical evaluator (AME) examined the claimant and reported that the claimant stated that her job was stressful due to frequent and unexpected false fire and burglar alarms. However, the AME further reported that other events and circumstances in her life also contributed to her difficulties. The AME opined that 65% of her current psychological disability was attributable to nonindustrial factors and the remaining 35% to industrial factors. The AME diagnosed her as suffering from an adjustment disorder that was "Industrially Caused." At issue before the workers' compensation judge (WCJ) was whether the claimant had satisfied her burden of establishing a compensable industrial injury; in other words, that she had proven that her psychological injury was "predominantly caused by actual events of employment." The WCJ found the claimant had met that burden and the WCAB upheld the decision of the WCJ. According to the WCAB, even though only 35% of the claimant's permanent disability was work related, because 100% of her *adjustment disorder* was industrially caused, her injury was compensable. Under workers' compensation law, a psychiatric injury is not compensable unless the employee can demonstrate that events of employment "were predominant as to all causes combined of the psychiatric injury." Concluding that a psychiatric injury could not be "parsed into separately diagnosable components" to satisfy the threshold requirement, the appellate court annulled the WCAB's decision. By amending the statute to require that the psychiatric injury be *predominantly* caused by employment, the Legislature set the threshold standard high. The court concluded that the WCAB's reading of the statute frustrated this legislative purpose. Therefore, the court concluded that a psychiatric injury is compensable only if it is proven that events of employment were *predominant* as to all causes combined of the psychiatric disability taken as a whole. *Sonoma State Univ. v. WCAB*, 142 Cal. App. 4th 500 (Cal. App. 1st Dist. 2006).

Appellate Court Reverses Retaliation Jury Award For The Second Time. Revisiting a retaliation and discrimination action following the California Supreme Court's order to do so, the appellate court again found that the plaintiff – a doctor with the Department of Corrections & Rehabilitation (the Department) –failed to present sufficient evidence of retaliation. The doctor worked at a prison facility as a surgeon. When she was passed over for a promotion, she filed a complaint with the Department of Fair Employment and Housing (DFEH). She claimed that the filing of this complaint triggered a number of retaliatory actions that culminated in her involuntary transfer to another facility. In all, she filed three DFEH complaints. She sued for discrimination and retaliation. A jury found for the Department on her discrimination claim but awarded her damages on her retaliation claim. The appellate court reversed but the California Supreme Court granted review and transferred the case back to the appellate court to reconsider its decision in light of *Yanowitz v. L'Oreal USA, Inc.* The appellate court concluded that although *Yanowitz* affected its analyses, it did not alter the ultimate decision and it again reversed, finding that there was insufficient evidence of

retaliation. The court concluded that what the doctor contended was a "continuous course of conduct" was actually a series of events "each bearing little relationship to the other." Nor was the transfer part of progressive discipline. In addition, the actions taken against the plaintiff were by different persons, thereby distinguishing it from *Yanowitz*, where the allegedly wrongful acts were committed by the same two people and all related to one protected act. The court further ruled that the involuntary transfer was not an adverse employment action because it did not entail a demotion, reduction in pay or loss of benefits. In fact, the doctor's relationship with the staff had deteriorated to such an extent that the doctor took leave for a year. Therefore, the Department presented a legitimate reason for her transfer (her poor relationship with the staff) and the doctor was unable to provide sufficient evidence of pretext. *McRae v. Dep't of Corr. & Rehabilitation*, 142 Cal. App. 4th 377 (Cal. App. 1st Dist. 2006).

A Plaintiff Filing A State Whistleblowing Claim Need Not Exhaust His Federal Administrative Procedures Under SOX Before Filing His State Law Claim. A district court determined that a sales director who claimed he was terminated in retaliation for saying he was going to "spill the beans" about company activities when he was called to testify before the SEC may pursue a state law claim for wrongful discharge based on the "public policy" reflected in the Sarbanes-Oxley Act (SOX). According to the court, the plaintiff was not required to exhaust his federal administrative procedures under SOX before filing his state law claim, even though he would have been required to file a complaint with the DOL before commencing a lawsuit under SOX itself. Therefore, the court denied the employer's motion for summary judgment on the plaintiff's public policy claim. However, the court did grant the employer summary judgment on a separate state whistleblower claim under the California Labor Code, finding that the statute did require exhaustion of state administrative procedures. *Romaneck v. Deutsche Asset Mgmt.*, 2006 U.S. Dist. LEXIS 59397 (N.D. Cal. Aug. 17, 2006).

An Arbitrator's Award Is Not Reviewable For Claimed Errors Of Law. Pursuant to their arbitration agreement, the parties submitted the plaintiff's wrongful termination claim to arbitration. The agreement required the arbitrator to apply California law. The arbitrator found for the former employee. Upon appeal to a trial court, the employer argued that the arbitrator had failed to correctly apply California law. The employee argued that the trial court lacked jurisdiction to review the arbitrator's award for an error of law. The trial court agreed and entered judgment for the former employee. Affirming on appeal, the appellate court observed that there was no evidence that the arbitrator was applying any law other than that of California. The employer argued that the arbitrator did not apply California law correctly, which would be an error of law that was not reviewable. Therefore, the court affirmed the award for the former employee. *Baize v. The Eastridge Cos. LLC*, 142 Cal. App. 4th 293 (Cal. App. 2d Dist. 2006).

Constructive Discharge May Be Reasonable Finding By A Jury Even Though Job Improved Before The Employee Quit His Position. The Ninth Circuit reinstated a jury verdict of $256,800 for a police sergeant who claimed that he was constructively discharged from his position even though he was given a favorable transfer shortly before he quit the force. According to the court, his receipt of the transfer did not negate his claim that he was discriminated against based on his military service as a reserve in Iraq and Bosnia. *Wallace v. San Diego*, 460 F.3d 1181 (9th Cir. 2006).

Attorney Allowed To Verify DFEH Discrimination Charge. In his first amended complaint, the plaintiff sued for wrongful termination raising 22 causes of action. 12 of them asserted various violations of the FEHA (the California Fair Employment and Housing Act) and the other 10 asserted parallel public policy violations. The court dismissed the FEHA counts because the plaintiff's attorney, and not the plaintiff, had verified the discrimination complaints filed with the Department of Fair Employment and Housing (DFEH). In a case of first impression, a unanimous panel determined that an attorney may verify a client's administrative bias charge. The court noted that while most DFEH complaints are filed before counsel has been retained, a plaintiff should not be penalized for retaining counsel. *Blum v. Superior Ct.*, 141 Cal. App. 4th 418 (Cal. App. 2d Dist. 2006).

Dismissal of Claim Was Proper Sanction For Destruction of Electronic Evidence. The Ninth Circuit ruled that it was proper to dismiss the retaliation claim of a former technology director for a medical software company because he willfully and intentionally destroyed 2,200 computer files that were evidence relevant to the litigation. The court concluded that the plaintiff acted in bad faith when it destroyed the files warranting dismissal of his claim. Not only had dates been wiped but also pornography had been downloaded. Though public policy favors hearing matters on their merits, that factor standing alone was insufficient to outweigh the others that supported dismissal. *Leon v. IDX Sys. Corp.*, 2006 U.S. App. LEXIS 23820 (9th Cir. Sept. 20, 2006).

Appellate Court Upholds $5 Million Jury Verdict For Discriminating Against Plaintiff Due To Her Gender, Pregnancy, And Use Of Pregnancy-Related Leave. The defendant, an offshoot of Hewlett-Packard and itself a Fortune 500 technology firm, hired the plaintiff as a project manager to prepare for an upcoming computer chip testing program. It was known that the unit she was to manage had significant morale and employee problems. Her position was terminated while she was on maternity leave. In affirming the jury's verdict, the court highlighted that despite a commitment to employees, the employer never gave the plaintiff any coaching to improve any performance deficiencies, nor was she ever given an opportunity to respond to the critical assessments against her. She was completely in the dark; as far as she knew, when she left for leave her performance was satisfactory. The court found that the employer's conduct "was not accidental," and was "egregious and demonstrated intentional malice or trickery." *Wrysinksi v. Agilent Techs. Inc.*, 2006 Cal. App. Unpub. LEXIS 8597 (Cal. App. 3d Dist. Sept. 27, 2006).

Age Discrimination

ADEA Claims Reinstated After Court Finds Waivers Were Not Knowing and Voluntary. Finding waivers employees signed during a reduction in force (RIF) were not "knowing and voluntary," the Ninth Circuit ruled that the employees who received severance and other benefits could sue for age discrimination. According to the court, the broad language used was ambiguous and failed to comply with the Older Workers Benefit Protection Act (OWBPA). The court reversed the trial court and reinstated the claims. Specifically, the plaintiffs argued that the RIF was discriminatory and that the company violated the OWBPA by using a document that appeared to both release the employer from the employees' age discrimination claims and to exclude such claims from the reach of a covenant not to sue the company. *Syverson v. Int'l Bus. Machs. Corp.*, 2006 U.S. App. LEXIS 22504 (9th Cir. Aug. 31, 2006).

Privacy in the Workplace

Employees Can Maintain An Invasion Of Privacy Action Without Showing That The Video Surveillance Camera System Recorded Their Actions Or Was Viewed By Others. Explaining that there is no "publication" requirement, installing a video surveillance camera in an area in which employees have a reasonable expectation of privacy intrudes into the workers' seclusion sufficient to support a privacy claim. The suit was brought by two female clerical employees who worked at a residential facility for abused and neglected children. After learning that someone was accessing workplace computers at night to view pornographic websites, the employer installed a motion-activated video surveillance system in various spots around the facility. Employees were not told about the investigation. The women, who worked regular day shifts, were not suspects in the employer's investigation. Instead, the employer suspected that someone else was entering their office at night to use the computer. On at least four occasions, the employer set up the camera in the women's office after they left work and took it down before they arrived in the morning for their shift. However, the women learned of the surveillance when it was not removed before they arrived for work. They were permitted to view the recordings made of their office; they were not in any of the recordings. *Hernandez v. Hillsides Inc.*, 48 Cal. Rptr. 3d 780 (Cal. App. 2d Dist. 2006).

Employee Has No Expectation Of Privacy For Pornographic Materials Stored On Workplace Computer. The Ninth Circuit ruled that a director of operations who downloaded pornographic images of children from the Internet had no reasonable expectation of privacy when it came to material stored in his workplace computer and images taken from his hard drive were admissible in his criminal trial. The court noted that the employee was aware of the company's policy to monitor internet activity. According to the court, "[e]mployer monitoring is largely an assumed practice, and thus we think a disseminated computer-use policy is entirely sufficient to defeat any expectation that an employee might nonetheless harbor." *United States v. Ziegler*, 456 F.3d 1138 (9th Cir. 2006).

Disability Discrimination Update

Neither the Unruh Civil Rights Act Nor The Disabled Persons Act Address Job Bias And They Do Not Track The Entire ADA. The Ninth Circuit ruled that because California's Unruh Act and Disabled Persons Act (DPA) address public access for the disabled, not job discrimination, they do not incorporate the entire Americans with Disabilities Act, because incorporating the full ADA would "drastically broaden their reach" and permit "an end-run around" state fair employment law. The plaintiffs, who claimed discrimination because their employer failed to accommodate their work-related injuries, argued that Title I of the ADA was incorporated into the Unruh Act and PDA. The district court granted summary judgment in favor of the defendants on all the claims. California courts have historically held that the Unruh Act does not apply to employment claims. Therefore, the court held that only those provisions of the ADA that are germane to the statutes' original subject matter are incorporated into the Unruh Act and PDA. *Bass v. County of Butte*, 458 F.3d 978 (9th Cir. 2006).

Employee Benefits

Ninth Circuit Provides Guidance For Review Of Denial Of ERISA Benefits Where The Administrator Operated Under A Conflict Of Interest Or The Process Was Irregular. The case stems from a wife's claim for life insurance benefits after her husband died of cancer. The administrator of the life insurance plan denied benefits because the husband had not submitted a "waiver of premium application" while he was receiving disability benefits. Even after the employer provided a late copy of the waiver, the benefits were still denied. In addition, the insurance plan claimed that the husband was not "totally disabled" prior to his death, and, therefore, was required but failed to pay his life insurance plan premiums during the period when he was on disability leave. The plaintiff sued under ERISA claiming that she was wrongly denied benefits. Applying an abuse of discretion standard of review, a California district court entered judgment in favor of the insurance plan. Last year, the Ninth Circuit affirmed the district court's use of the abuse of discretion standard of review but subsequently it granted the plaintiff's petition for rehearing "to reconsider the approach it has taken in the past to ERISA cases where a plan grants discretion to its administrator, but the administrator operates under a conflict of interest" or the process is irregular. Ruling *en banc*, the Ninth Circuit overruled the burden-shifting approach set by *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995), which required plan participants to provide probative evidence of conflicts of interest by plan administrators. The Ninth Circuit stated that the *Atwood* decision unreasonably required plan participants to produce material, probative evidence (i.e., "smoking gun" evidence) that a plan administrator operated under a conflict of interest. In addition, the Ninth Circuit rejected the "sliding scale" metaphor used by other courts that consider conflicts of interest as a factor under the abuse of discretion standard of review. According to the court, by removing the burden-shifting requirements of *Atwood*, "plaintiffs will have the benefit of an abuse of discretion review that always considers the inherent conflict when a plan administrator is also the

fiduciary, even in the absence of 'smoking gun' evidence of conflict." *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (*en banc*).

Long-term Disability Plan That Provided Benefits Equal To 60% Of A Plan Participant's Salary May Be Exempt From ERISA As A "Payroll Practice." The Ninth Circuit held that a long-term disability benefit plan that provided benefits equal to 60% of a plan participant's salary may be exempt from ERISA as a "payroll practice." In so ruling, the court gave "great deference" to the DOL's opinion letters regarding payroll practice regulations. Payroll practices are exempt from ERISA coverage because they are "more closely associated with normal wages or salary." Acknowledging that employers have relied upon this interpretation for over 25 years, the court refused to upset the established definition. *Bassiri v. Xerox Corp.*, 2006 U.S. App. LEXIS 23187 (9th Cir. Sept. 12, 2006).

Severe Heart Condition Rendered Employee Unable To Return To Work And Entitled Him To Long Term Disability Benefits. A sales manager claimed he was disabled due to the deteriorating condition of his heart and that he was entitled to long term disability benefits under an ERISA plan. The plan denied benefits, finding that the employee had recovered from his disability. A federal district court affirmed the denial of benefits. The Ninth Circuit reversed, finding that there was ample evidence of his disability. The employee had a lengthy history of severe heart disease, including two heart attacks, bypass surgery and several angioplasties. The plan argued that during the 90-day elimination period following his last angioplasty, his condition had substantially improved; therefore, he could not demonstrate that he was continuously disabled during the 90-day elimination period. The appellate court reversed, holding that the trial court's finding that the employee had recovered from his disability was "clearly erroneous." During the 90-day elimination period the employee went to the emergency room, visited a pulmonary specialist, visited a sleep specialist for sleep apnea, and had an abnormal EKG. Thus, the court concluded that the employee was unable to return to work and was entitled to disability benefits. *Silver v. Executive Car Leasing Long Term Disability Plan*, 2006 U.S. App. LEXIS 25030 (9th Cir. Oct. 6, 2006).

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 Ninth Circuit filed an amended opinion in this case that still found that Xerox's method violates ERISA by impermissibly reducing the pension benefits by more than the accrued pension benefit attributable to the earlier distributions. *Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 447 F.3d 728 (9th Cir. 2006), amended, 2006 U.S. App. LEXIS 23289 (9th Cir. Sept. 13, 2006). The original case was reported in the Spring Newsletter.

Labor Law Update

NLRB Issues New Guidelines For Determining Supervisory Status. The National Labor Relations Board (Board) published three decisions that set forth new guidelines for determining the supervisory status of employees under the National Labor Relations Act (Act). The Board set forth the new guidelines in *Oakwood Healthcare, Inc.* and then applied them in the other two cases, *Golden Crest Healthcare Ctr.* and *Croft Metals, Inc.* Pursuant to NLRA § 2(11) a supervisor must have one of twelve specified authorities (e.g. to hire, fire, promote), which he or she implements with independent judgment, in the interest of the employer. At issue in *Oakwood Healthcare* was a unit of 181 registered nurses at a hospital. The board found that only the 12 RNs who serve as charge nurses on a permanent basis, and not those who are charge nurses on a rotating basis, were supervisors, because the rotating charge nurses did not exercise supervisory authority for a substantial part of their work time. According to the Board, "assigning" is the "act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee." However, "choosing the order in which the employee will perform discrete tasks

within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to assign." Therefore, to "assign" refers to "the designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task." In the health care setting, an assignment would include directing a nurse or aide to care for a particular patient but it would not include directing that same nurse to give the patient a sedative. In addition, the Board interpreted "responsibly to direct" as determining what job shall be undertaken next and by whom, provided that the direction is both "responsible" and "carried out with independent judgment." Furthermore, for direction to be responsible "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." As for "independent judgment," following *Kentucky River Community Care Inc.*, the Board found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." To be independent, "the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Oakwood Healthcare Inc.*, 348 N.L.R.B. No. 37 (2006).

[Note: According to an NLRB spokeswoman, the board plans to remand approximately 47 pending representation cases to regional directors for reconsideration in light of the lead decision in *Oakwood Healthcare.*]

Applying These Guidelines, The Board Concluded That Nursing Home Charge Nurses Were Not Supervisors. The Board applied these guidelines in the two other cases issued the same day. In one case, the Board held that all charge nurses working at a nursing home were not supervisors because they lacked the requisite authority to assign and responsibly direct other employees. *Beverly Enterprises-Minn. Inc., d/b/a Golden Crest Healthcare Ctr.*, 348 N.L.R.B. No. 39 (2006).

Applying These Guidelines, The Board Concluded That Lead Persons At A Manufacturing Plant Were Not Supervisors. In the other case, the Board held that the lead persons at a manufacturing plant were not supervisors because they did not "assign" work or exercise "independent judgment," though they did "responsibly direct" their line or crew members. The Board noted that the lead persons worked alongside the regular line or crew members and performed the same tasks on their line. The Board also found that the lead persons' actions were predominantly governed by the employer's policies so that the lead persons exercised little or no discretion and that any judgment they did exercise was routine. *Croft Metals Inc.*, 348 N.L.R.B. No. 38 (2006).

Ninth Circuit *En Banc* Determines That Neutrality Statute Not Preempted By NLRA – A Different Ruling From The First Two Times It Addressed This Case. California Assembly Bill No. 1889 (AB 1889) forbids employers who received state grants or funds in excess of $10,000 from using such funding to "assist, promote, or deter union organizing." Business organizations sued for injunctive and declaratory relief on several grounds, including National Labor Relations Act (NLRA) preemption. The district court found that the statute was preempted. Ruling for a third time, this time *en banc*, the Ninth Circuit reversed the district court's decision that the NLRA preempts the California statute and the court vacated the injunctive order. As a preliminary matter, the Ninth Circuit determined that California acted as a regulator, not a proprietor or market participant in enacting the statute. Turning to the question of preemption, the court decided that neither the *Machinists* nor the *Garmon* preemptions required a finding that the statute was preempted by federal law. The Ninth Circuit observed that California did not condition the *receipt* of state funds on employer neutrality; rather, the statute merely forbids the employer from spending state grant and program funds on its union-related advocacy. Had the California statute required neutrality as a condition of receiving state funds, the employer's use of its own funds would thereby have been curtailed and the analysis would be quite different. The court further found that the statute did not violate the First Amendment since employers are not denied the right to engage in union-related activities; they are merely prohibited from using

public funds for it. In contrast, the dissent characterized AB 1889 as imposing "gag rules" on the use of state money granted to an employer" and co-opting "the payment for goods and services and profit realized under a contract (undoubtedly not state funds)." *Chamber of Commerce v. Lockyer*, 2006 U.S. App. LEXIS 24025 (9th Cir. Sept. 21, 2006). (A Management Alert was distributed on this case.)

A District Court Does Not Have The Authority To Enjoin An Unfair Labor Practice Proceeding Pending Before The NLRB. Rejecting an employer's attempt to take a constitutional claim to district court while the unfair labor practice charge was still pending before the NLRB, the Ninth Circuit ruled that the NLRB is the "exclusive mechanism" for federal court review of decisions made in unfair labor practice hearings. In so ruling, the Ninth Circuit joined the Third, Fourth, Fifth and Seventh Circuits who have already held that employers must exhaust their constitutional claims with the NLRB before seeking remedies in federal court. The NLRB charged U-Haul with committing unfair labor practices for allegedly trying to thwart unionization efforts at two Nevada-based truck repair facilities. After the complaint was filed, but before the hearing, the NLRB discovered that U-Haul's parent companies exercised full control over U-Haul's labor relations activities. An administrative law judge heard the case over a three-week period. When questions arose as to the parent company's right to recall witnesses, the parent company sought an injunction in federal court to stop the NLRB proceedings. Dismissing the case, the Ninth Circuit stressed that under NLRA § 10 and *Myers v. Bethlehem Shipbuilding*, 303 U.S. 41 (1938), district courts do not have the authority to enjoin an NLRB unfair labor practice hearing even where the company under investigation claims that the hearing violates the U.S. Constitution. Furthermore, courts of appeal have exclusive jurisdiction to review final NLRB decisions. Here, no final decision had been issued. The Ninth Circuit affirmed the district court's dismissal of the employer's request for injunctive relief. *Amerco v. NLRB*, 458 F.3d 883 (9th Cir. 2006).

District Court Refuses To Enjoin Enforcement of A City Ordinance Requiring Minimum Pay and Employment Standards More Generous Than State Law. Two hotels petitioned for an injunction to block a new local ordinance affecting wages and benefits paid to hotel workers. The ordinance also required better recordkeeping. The court denied the injunction petition, but held that the hotels did have standing to challenge portions of the ordinance. *Woodfin Suite Hotels LLC v. Emeryville*, 2006 U.S. Dist. LEXIS 64827 (N.D. Cal. Aug. 23, 2006).

Employee Out On Sick Or Disability Leave Is Eligible To Vote Unless It Is Shown That Employee Has Resigned Or Been Discharged. The Board ruled that an employee who is out on sick or disability leave is eligible to vote in a representation election unless the employee has resigned or been discharged. The Board refused to apply a standard that considered the reasonable expectancy of return. Instead, the Board applied the well-established standard that "presumes an employee on sick or disability leave to be eligible to vote absent an affirmative showing that the employee has resigned or been discharged." *Home Care Network Inc.*, 347 N.L.R.B. No. 80 (2006).

Employment Contracts and Business Torts

California Supreme Court Enforces Proposition 64's Limitations On Who Can Sue Under California's Unfair Competition Statute. California's Unfair Competition Law (UCL), which plaintiffs' lawyers use to bring overtime and discrimination claims, was narrowed significantly by the California Supreme Court. The plaintiff, a non-profit corporation, sued on behalf of the general public for alleged violations of disability law related to pathways and fixtures in a department store that allegedly did not permit adequate access for persons using mobility aids (e.g., wheelchairs, scooters, crutches and walkers). The plaintiff did not claim to have suffered any harm as a result of the department store's conduct. The store prevailed in the trial court and while the plaintiff's appeal was pending, Prop 64 took effect. The store moved to dismiss the appeal, arguing that the plaintiff no longer had standing to continue the litigation. The lower court denied that motion and the Supreme Court agreed to hear the case. The Supreme Court held that Prop 64's limitation that UCL claims be brought only by people who have

suffered actual injury (in the form of lost money or property) as a result of unfair competition applied to cases pending at the time Prop 64 took effect even if the case was on appeal. *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223 (Cal. 2006).

Prop 64 Did Not Automatically Bar Plaintiffs' Lawyers From Saving Their Cases By Amending The Complaints To Add New Plaintiffs. However, in a companion case to *CDR*, the court held that Prop 64 did not automatically bar plaintiffs' lawyers from saving their cases by amending the complaints to add new plaintiffs. Plaintiffs filed their UCL complaint on behalf of the general public but they had not transacted any business with defendant and had not otherwise lost any property or money as a result of dealing with the defendant. While the case was pending on appeal, Prop 64 took effect and the court revoked the standing of plaintiffs that had not alleged actual injury caused by defendant and dismissed the action. The Supreme Court granted plaintiffs' petition for review to consider whether a plaintiff may "amend" his or her complaint to substitute in or add a party that satisfies the standing requirements of [Prop 64] … and does such an amended complaint relate back to the initial complaint for statute of limitations purposes?" Oddly, having asked the parties to brief the right to amend issue, the Court declined to rule specifically on the issue. Instead, it held that Prop 64 does not affect the ordinary rules governing amendment of complaints and that these rules would apply to *Branick* but must be applied by the trial court. *Branick v. Downey Savings and Loan Assoc.*, 39 Cal. 4th 235 (Cal. 2006).

Court Rules That Most Noncompetition Agreements Are Invalid Under Business And Professions Code § 16600 And Against Public Policy Even If They Are Narrowly Tailored. When he was hired, the plaintiff signed a noncompetiton agreement that prohibited him from working for or soliciting certain categories of clients for limited periods after his termination. The employer, Arthur Andersen, later closed and sold its tax practice, where the plaintiff worked, to another firm. However, as a condition of employment, Andersen supposedly required that the plaintiff execute a release of his noncompetition agreement. When the plaintiff refused to sign the document, his offer of employment was withdrawn and he sued Andersen. According to the court, a noncompetition agreement between an employee and employer is invalid under § 16600 unless it falls within the statutory or "trade secret" exceptions to the statute. This is true even if the agreement is narrowly tailored and a substantial portion of the market has been left open to the employee. In so holding, the court declined to follow the Ninth Circuit's "narrow restraint" exception to § 16600. Moreover, the court found that an employer's use of an invalid noncompetition agreement as leverage against an employee could leave it open to a tort claim of intentional interference with prospective economic advantage. In addition, in a related matter, the court held that an employer who requires an employee to waive indemnity rights under the state Labor Code as a condition of employment violates public policy and commits an "an independently wrongful act" for purposes of a claim of intentional interference with prospective economic advantage. *Edwards II v. Arthur Andersen LLP*, 142 Cal. App. 4th 603 (Cal. App. 2d), *modified* 2006 Cal. App. LEXIS 1488 (Cal. App. 2d Dist. Sept. 26, 2006).

The California Supreme Court Rules That The Right To Terminate Employment "At Any Time" Was A Clear Expression That The Company Intended The Employee To Work "At-Will." At issue in this case is whether the plaintiff was hired to work at-will. The plaintiff alleged that through various oral representations, conduct, and documents the employer led him to believe that he would not be discharged from his employment except for cause. When he was terminated, he sued. The trial court granted the employer summary judgment; however, the appellate court reversed. The California Supreme Court, agreeing with the trial court, found that summary judgment was properly granted to the employer. According to the court, California's courts of appeal do not agree whether a termination provision allowing termination "at any time" or upon specified notice creates an implied-in-fact agreement that termination will occur only for cause. The court rejected the plaintiff's argument that allowing for termination "at any time" is *per se* ambiguous because it does not state whether cause is required. However, it generally entails termination with or without cause." Moreover, the offer letter at issue here was found not to be ambiguous but provided that the plaintiff was hired to work

at-will. *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384 (2006) (Stacy D. Shartin and Dennis DePalma of Seyfarth Shaw filed an *amicus* brief for the California Employment Law Council in support of the defendants).

Workers' Compensation

The Presumption Established By Labor Code § 4664(B) Regarding Apportionment Of Permanent Disability Is Conclusive, Not Rebuttable. Labor Code § 4664(b), which is one of the workers' compensation statutes enacted in 2004 to govern apportionment of permanent disability, states that "[i]f the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof." The question for the court was whether the presumption established by Labor Code § 4664(b) is conclusive or rebuttable. The plaintiff injured his spine while working as a traffic officer. The parties stipulated that the injury caused permanent disability of 29%, and the plaintiff was awarded permanent disability benefits. Six years later, the plaintiff sustained another work-related back injury. The parties stipulated that his level of permanent disability was now 27%. In his report, the medical examiner concluded that there should be no apportionment of his permanent disability to the 1996 injury "based on [the plaintiff's] remarks that he completely recovered from this prior low back industrial injury with no ongoing physical limitations." The defendants argued that notwithstanding the plaintiff's claim of rehabilitation from the prior injury, the permanent disability resulting from that injury had to be treated as still existing because of the conclusive presumption of § 4664(b). The workers' compensation judge (WCJ) found that the plaintiff was not entitled to any permanent disability benefits for the 2002 injury, but upon reconsideration the Board rescinded the WCJ's decision and returned the case for further consideration. Annulling the Board's decision, the appellate court concluded that the Legislature intended the § 4664(b) presumption to be conclusive, not rebuttable, notwithstanding the second sentence of the statute. Therefore, the Board correctly determined that the plaintiff was not entitled to prove he was medically rehabilitated from his prior permanent disability when he sustained a subsequent industrial injury. However, the Board incorrectly ruled that the plaintiff has the burden of *disproving* overlap between his current permanent disability and his previous disability to establish his claim to permanent disability benefits for his 2002 injury. Instead, according to the court, the adjusting agency for the plaintiff's employer has the burden of proving overlap between the current disability and the previous disability to establish its right to apportionment of the plaintiff's permanent disability. *Kopping v. WCAB*, 142 Cal. App. 4th 1099 (Cal. App. 3d Dist. 2006).

Off-Duty Corrections Officer Who Stopped To Aid Injured At An Accident Scene And Was Injured Himself Was Not Entitled To Workers' Compensation. The claimant filed for workers' compensation benefits for injuries he sustained when he stopped to help at an accident scene he came upon on his way to work as a correctional officer for the Department of Corrections and Rehabilitation, California Medical Facility (DOC). While helping an injured person, the claimant was near a parked truck that was hit by an oncoming car. The impact drove the truck into the claimant, causing his injuries. The workers' compensation judge (WCJ) and the WCAB found that the claimant was not acting as a peace officer at the time he stopped at the accident and that his job duties did not require him to stop and render aid and, therefore, he was not acting within the course and scope of his employment when he was injured. Though the appellate court "appreciated" the claimant's efforts to aid those injured in the accident, the court found no reason to disturb the findings and conclusions of the WCAB. As a general rule, coming and going to work is not rendering any service to the employer, and therefore, injuries sustained during this time do not qualify for workers' compensation benefits. It made no difference to the court that the claimant was not in his vehicle at the time of his injury. According to the court, stopping to help at the accident scene did not place him "on duty in service to his employer." *Pettigrew v. WCAB*, 2006 Cal. App. LEXIS 1486 (Cal. App. 3d Dist. Sept. 26, 2006).

Court Sets Forth Formula For Apportioning Disability Between The Current and Prior Injuries. This case addresses the apportionment provision in the newly amended Workers' Compensation Act. A firefighter suffered an industrial injury to his back, spine and right knee in 2000. He again injured his back and spine in 2002, which resulted in 74% permanent disability. However, over the previous 30 years of his career as a firefighter, the claimant had sustained several work-related injuries to the same body parts for which he was awarded compensation based on a 44.5% permanent disability rating. Therefore, in calculating the award, the WCJ had to apportion the disability between his prior injuries and the injuries that underlie his current claim, and in so doing applied new Labor Code §§ 4663 and 4664. Reluctantly, based on the current law at the time the award was made, the WCJ subtracted 44.5 from 74 and awarded the claimant benefits based on a 29.5% permanent disability rating. Two sections of the new law address the apportionment of employer responsibility for such injuries. § 4663(a) states that "[a]pportionment of permanent disability shall be based on causation," and § 4664(a) provides, "The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." Therefore, any permanent disability award must consider causation, and an employer is responsible only for the percentage of disability caused by a work-related injury. The appellate court ruled that the appropriate formula for determining apportionment is "the percentage of overall current disability [ ] converted to its monetary equivalent," from which the dollar value of the percentage of prior disability is subtracted. According to the court, this formula best effectuates the directive of § 4664(a) in apportioning responsibility between a current and prior injury. Therefore, the WCAB's decision was annulled and the matter was returned for the amount of permanent disability to be recalculated. *Brodie v. WCAB*, 142 Cal. App. 4th 685 (Cal. App. 1st Dist. 2006).

Courier Drivers Were Employees, Not Independent Contractors; Therefore, Employer Had To Purchase Insurance For Their Benefit. The issue before the court was whether the drivers for a courier business were employees or independent contractors. The Department of Industrial Relations (Department) determined that they were employees and required their employer to purchase workers' compensation insurance for their benefit. The employer petitioned a trial court to overturn an administrative stop work order and penalty issued and upheld by the Department based on the Department's conclusion that the delivery drivers were properly employees, not independent contractors, and that the employer had to purchase compensation insurance for their benefit. The ultimate finding by the hearing officer was that the drivers, "as an unskilled but integral part of its business," functioned as employees rather than independent contractors. The trial court refused to overturn the stop order. Affirming the trial court's decision, the appellate court ruled that the employer had not demonstrated that the Department abused its discretion in so finding that the drivers are employees. *JKH Enters., Inc. v. Dep't of Indus. Rel.*, 142 Cal. App. 4th 1046 (6th Dist. 2006).

False Claim Act Update

Neither The California Nor The Federal False Claims Acts Require A Pre-Disclosure Notice To The Government For A Party To Be An Original Source. Interpreting the statutory provisions relating to the "public disclosure" bar and the "original source" exception to that bar under the Federal False Claims Act (FCA) and the California False Claims Act (CFCA), the Ninth Circuit held that neither the federal nor the state statute statutes required that "an individual report relevant information to the government prior to the 'public disclosure' at issue to qualify as an 'original source.'" The company manufactures control systems and monitors the air environment in large buildings. It sells its systems to end-users and through a network of independent distributors. One of its distributors sued alleging that Johnson Controls Inc. (JCI) engaged in a bid-rigging scheme; however, that complaint was subsequently voluntarily dismissed in favor of arbitration. Thereafter, the distributors gave notice (which went unanswered) and then filed a qui tam action as relators. Both the federal and state governments declined to intervene. Prior to the end of discovery, JCI filed for summary judgment alleging that the court lacked jurisdiction because the complaint was "based upon public disclosure"

but the relators were not an "original source." The district court granted JCI summary judgment, finding that to be an "original source" the prospective relator had to provide the government with the information prior to the public disclosure. Here, JCI argued that the relators could not be an original source because the government notification occurred after the public disclosure. The Ninth Circuit determined that there is no such pre-disclosure notice requirement in order for a party to be considered an original source under the FCA or the CFCA. *United States v. Johnson Controls, Inc.*, 457 F.3d 1009 (9th Cir. 2006).

Federal Administrative and Legislative Developments

Passage Of The Pension Protection Act. In August, Congress passed the Pension Protection Act of 2006, a comprehensive pension reform law. Strengthening the defined benefit pension plan funding rules was the significant moving force behind the Act. Some of the provisions in the Act include:

- An amendment to Internal Revenue Code § 409A to prohibit a public company from funding any deferred compensation arrangement for certain key executives and directs while its qualified pension plan is at risk, including making deposits into a rabbi trust or other arrangement that is subject to claims of creditors.
- A number of provisions deal with 401(k)s and other defined contribution plans, including new and revised notice and disclosure requirements for all plans, plan investment and fiduciary issues and restrictions on funding unqualified deferred compensation arrangements.
- A safe harbor for hybrid plans, such as cash balance plans. The Act provides that a hybrid plan does not violate age discrimination rules if a participant's accrued benefit would be equal to or greater than that of any similarly situated younger participant. For this purpose, a participant's accrued benefit may be expressed as the balance of a hypothetical account, and "similarly situated" means that the participants are identical in every respect (i.e., period of service, compensation, position, date of hire, work history), except age. Although this provision is effective as of June 30, 2005, the Act specifically provides that no inference should be drawn from the Act's new rules as to the status of hybrid plans before that date. In other words, an employer could not use the Act to shield itself from age discrimination claims concerning operation of its hybrid plan before June 30, 2005, but neither can employees argue that the enactment of the Act implies that hybrid plans were previously illegal. (Several Management Alerts and One Minute Memos addressed the new Act.)

SEC Issues Final Executive Compensation And Related Party Disclosure Guidance. On August 11, 2006, the SEC released the final rules relating to disclosure of executive and director compensation, related party transactions, director independence and other corporate governance matters, current reporting regarding compensation arrangements and beneficial ownership of officers and directors. (A Management Alert summarized the final rules.)

Labor Department Emphasizes Importance of Education, Independent Judgment And Management Responsibilities In Determining Whether Employees Are Exempt From Overtime Requirements. In a series of five opinion letters recently released by the Labor Department, the Department emphasized the significance of education, independent judgment and management responsibilities in determining whether employees are covered by the Fair Labor Standards Act's (FLSA) administrative and executive exemptions to the law's overtime requirements. The letters dealt specifically with mortgage loan officers, loss prevention managers, and service station managers and found that they can qualify for the 29 U.S.C. § 213(a)(1) executive and administrative exemptions because of their duties and responsibilities; however, certain corporate senior legal analysts and respiratory therapists may not qualify for the exemption because of the education requirements in the field. Daily Lab. Rpt. No. 193, Oct. 5, 2006, A-1.

Restaurants May Not Deduct Uniform And Cleaning Expenses From The Tips And Wages Of Tipped Employees, Even If The Employees Agree To The Deductions. In an opinion letter, the Department stated that requiring workers to wear clean uniforms while on duty is a convenience and benefit to the employer and the cost of the cleaning is a cost of doing business that may not be passed on to the employees if doing so would reduce their wages below minimum wage. The Department further explained that under the "tip credit," any tips above the credit – wages plus tips that equals the minimum wage – do not count as "wages" under the FLSA and cannot be taken by the employer since they are the property of the employee. This is true even if the employees agree to have tips deducted to pay for uniform cleanings. Daily Lab. Rpt. No. 131, July 10, 2006, AA-1.

Employees Who Earn More Than $23,660 In Combined U.S. And Foreign Currency Can Qualify For The FLSA White Collar Exemptions. In another opinion letter the Department discussed certain "inpatriates," who are foreign nationals temporarily residing in the U.S. and performing accounting and tax duties. The inpatriates are compensated in both U.S. and foreign currency. According to the Department, the salary for determining whether the worker meets the threshold requirement for overtime, is the combination of the U.S. currency and the foreign currency, which is converted to U.S. dollars by using the exchange rate at the time of payment. Daily Lab. Rpt. No. 129, July 6, 2006, E-1.

California Administrative and Legislative Developments

There was relatively little activity this election year in the California legislature. The most significant development was passage of AB 1835, which increased the minimum wage to $7.50 per hour, effective January 1, 2007 and to $8.00 per hour, effective on January 1, 2008. Another development was AB 2095, which clarified that the statute requiring sexual harassment prevention training is limited to supervisors located in California. In the area of safety, the legislature passed SB 1613, which requires the use of a hands-free headset when using a cell phone while driving. SB 1613 is effective July 1, 2008.

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