CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

January/February 2005

Supreme Court

Police Officer's Selling Of Sexually Explicit Video On eBay Not Protected Conduct or Speech. The U.S. Supreme Court determined there is no First Amendment right for a San Diego police officer to sell sexually explicit tapes of himself on eBay. In addition to the tapes, the officer also was selling SDPD uniforms. When the officer's supervisor discovered the activity, the officer was terminated. He sued claiming the termination violated his First Amendment rights. After the trial court found for the City, the Ninth Circuit reversed stating the conduct fell within the protected category of "citizen commentary on matters of public concern." The Ninth Circuit stated the conduct occurred while the officer was off-duty, away from his employer's premises, and was unrelated to his employment. The U.S. Supreme Court reversed stating the officer deliberately linked his videos (and other wares) to his employment in a manner that was injurious to his employer. The Court also concluded the speech was not about a matter of public concern. Instead, the officer was exploiting his employer's image for personal gain. *City of San Diego v. Roe*, 125 S. Ct. 521 (U.S. 2004).

Court To Decide Appropriate Statute Of Limitations For A Retaliation Claim Under The False Claims Act. The United States Supreme Court will decide whether a retaliation claim under the False Claims Act (whistleblower) is subject to the Act's general six-year statute of limitations or whether the shorter state-law wrongful discharge limitations period applies. *Graham County Soil & Water Conservation Dist. v. United States, ex rel. Karen T. Wilson*, 160 L. Ed. 2d 609, 2005 U.S. LEXIS 616 (U.S. Jan. 7, 2005).

Court Declines To Hear Berkeley Living Wage Law Appeal. The Court declined to consider whether a Berkeley living wage law violated a local restaurant's constitutional right to nonimpairment of contracts, equal protection, and due process. The Court let stand a Ninth Circuit decision that the application of the wage law was constitutional. *RUI One Corp. v. Berkeley*, 2005 U.S. LEXIS 290 (U.S. Jan. 10, 2005).

Federal Courts

COBRA

Retroactive COBRA Premiums For Seven-Month Period That Employee Was Not Enrolled Was Properly Required By Claims Administrator. Plaintiff was laid off from Sun Microsystems in November 2001. At that time, Sun's claims administrator sent plaintiff's notice of COBRA rights to the wrong address. When plaintiff learned of his COBRA rights in May 2002, he contacted the claims administrator. The administrator sent plaintiff an invoice for $2,200 for retroactive coverage from November 2001 through June 2002. Plaintiff paid the amount under protest because he believed he should not have had to pay for premiums for a period in which he did not have any benefits. When plaintiff failed to pay the plan premium in July 2002, the administrator terminated his COBRA coverage. Plaintiff sued alleging violation of his right to receive a COBRA notice and for terminating his coverage. The court found that although Sun violated COBRA by not giving plaintiff timely and proper notice of his right to continued health coverage (and issued a fine), the administrator properly required plaintiff to pay retroactive premiums for the time he was not covered by COBRA. The court commented that COBRA coverage began upon his termination and he was not permitted to commence COBRA seven months after the qualifying event. *Chaganti v. Sun Microsystems*, 2004 U.S. Dist. LEXIS 24243 (N.D. Cal. Nov. 23, 2004) (unpublished).

Title VII

Requiring Bartender To Wear Make-Up Not Sexual Harassment. Plaintiff was a bartender at Harrah's Casino in Reno, Nevada for nearly 20 years when Harrah's instituted a policy requiring her to wear make-up to work. Hoping to create a "brand standard of excel-

lence," in 2000 Harrah's imposed specific "appearance standards" for both men and women. Employees received training on achieving their "personal best." Plaintiff refused to comply with the make-up appearance standard and was told she had 30 days to find a new position that did not require make-up. Plaintiff did not apply for a new position and was terminated. She sued claiming sex discrimination. The trial court held Harrah's "personal best" program did not violate Title VII because it imposed equal burdens on both sexes and did not discriminate against plaintiff on the basis of "immutable characteristics" associated with her sex.

The Ninth Circuit affirmed. In determining whether a sex-differentiated appearance standard constitutes sex discrimination in violation of Title VII, the court applies an "unequal burdens" test. Under this test, an employer may adopt different appearance standards for each sex so long as they do not impose a greater burden on one sex over the other. The Ninth Circuit rejected plaintiff's argument that the expense of make-up and the time consumed applying it placed an unequal burden on women because plaintiff failed to present evidence to support her theory. *Jespersen v. Harrah's Operating Co., ECR Inc.*, 2004 U.S. App. LEXIS (9th Cir. Dec. 28, 2004).

Plaintiff's Sexual Harassment Claim Based on Pregnancy To Proceed To Trial. Seven months after starting her job, plaintiff told her employer she was pregnant. She was terminated one month later. Plaintiff sued alleging she was subjected to unlawful treatment based on her pregnancy. The court granted the employer's motion to dismiss plaintiff's pregnancy harassment and failure to accommodate claims but denied the motion to dismiss her sexual harassment and intentional infliction of emotional distress claims. The court reasoned the pregnancy harassment claim was duplicative of her sexual harassment claim based on pregnancy. Further, the court dismissed her failure to accommodate claim based on alleged denial of sick leave for morning sickness because plaintiff failed to obtain an accommodation recommendation from a health care provider as required by the FEHA. *Mayfield v. Trevors Store, Inc.*, 2004 U.S. Dist. LEXIS 24576 (N.D. Cal. Dec. 6, 2004).

Arbitration

Circuit City's Dispute Resolution Agreement Again Found Unenforceable. In three cases decided under California law (*Mantor*, *Ingle*, and *Adams*), the Ninth Circuit found Circuit City's Dispute Resolution Rule and Procedures (DRRP) was substantively unconscionable and unenforceable. In this case, the Ninth Circuit reached the same conclusion applying Washington state law.

Plaintiff worked for Circuit City from 1997 until November 1998, when he was terminated. He filed a complaint alleging employment discrimination. Circuit City moved to compel arbitration, the trial court denied the motion, and Circuit City appealed.

On appeal, the Ninth Circuit affirmed. First, the court ruled that Circuit City's DRRP adopted in 2003, after plaintiff was terminated, was inapplicable. The court noted Circuit City's policy allowing it to unilaterally amend its alternative dispute resolution practices previously had been found unconscionable under California law. The court also found it to be unconscionable under Washington law. The court then considered the enforceability of the 1998 DRRP in effect at the time of plaintiff's termination. The court concluded California and Washington apply virtually the same definition of substantive unconscionability. Applying this standard, the court held the 1998 DRRP, which required employees to forgo essential substantive and procedural rights, was excessively one-sided and unconscionable. The court further held the unconscionable provisions of the 1998 DRRP pervaded the entire arbitration agreement, and thus was not severable. *Al-Safin v. Circuit City Stores, Inc.*, 2005 U.S. App. LEXIS 747 (Jan. 14, 2004).

Wage & Hour

Veterinarians Exempt From Overtime Pay. Two veterinarians who worked at an emergency animal clinic sued alleging violations of the FLSA because they were not paid overtime. The trial court entered judgment for the employer finding the vets were exempt from overtime pay. The court concluded the "physicians and other practitioners" exclusion under § 541.314(b)(1) applied to the vets. The Ninth Circuit affirmed. *Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124 (9th Cir. 2004).

National Labor Relations Board (NLRB)

Employee Handbook Provision Barring Staff From "Property" Except As A Guest Or Within 30 Minutes Of Shift Found To Violate Federal Labor Law. The NLRB ruled an employee handbook provision barring staff of a Las Vegas hotel/casino restaurant from the "property" except as guests or within 30 minutes of the start or end of their shifts violated federal labor law, affirming a 2001 Board decision. The Court of Appeals for the District of Columbia remanded the case in 2003 because it was unsure whether the Board had found correctly that the handbook provision applied to the entire hotel, casino, and parking lot. The Board affirmed its earlier ruling that the provision covered parts of the hotel and casino complex which were not leased by the employer. The employer operated three restaurants, a food court, and an employee dining room inside the New York-New York hotel and casino. The Board concluded the terms "property" and "premises" used in the handbook were unacceptably

ambiguous and could reasonably be interpreted as referring to the whole property and not just the employer's restaurants. Therefore, the application of the handbook provision would impermissibly chill employees' rights to engage in protected activities per Section 7 of the NLRA. *Ark Las Vegas Restaurant Corp.*, 343 N.L.R.B. No. 126 (Dec. 16, 2004).

NLRB Rules That Dissemination Of Plant Threat Closure For Union Vote Will Not Be Presumed But Must Be Shown. A divided Board reversed a four-year-old precedent and ruled it will not be presumed that an employer's threat to close its facility if employees voted for a union was disseminated throughout the bargaining unit. Thus, a party who wishes to rely on dissemination of the threat throughout a plant has the burden of showing it. Note: this decision will be applied prospectively only so the Spring Industries rule – that all plant closure threats are presumed disseminated throughout the plant absent evidence to the contrary – will apply in all pending cases involving plant-closure threats. *Crown Bolt Inc.*, 343 N.L.R.B. No. 86 (Nov. 29, 2004).

No NLRA Violation For Firing Workers Who Failed To Disclose Criminal Records On Employment Applications. Overnite Transportation is a commercial freight carrier with 530 employees at its Memphis facility. On December 24, 1998, the employer discovered that the fence had been cut and that approximately $250,000 worth of merchandise had been taken. An investigation was immediately launched. A second incident occurred the following week. Company investigators believed that the thieves were either company employees or outsiders who were assisted by company employees. As part of the investigation, the investigators decided to perform background checks on all employees and supervisors/managers whose job applications predated 1997 (when the employer began conducting prehire background checks on all job applicants). The investigators were looking for any employee who had a criminal background that was not disclosed on the employee's employment application. The investigators had used this technique before in theft investigations at five other facilities. The investigators discovered seven employees and one supervisor had failed to disclose criminal records on their job applications. The crimes included manslaughter, rape, drug possession, unlawful possession of a weapon and unemployment fraud. All eight employees were terminated. An administrative law judge ruled that the terminations violated the NLRA, finding the employer's true motive for the terminations was the employees' union activities (most, but not all, were active in the union). The National Labor Relations Board reversed, finding that the employees had been terminated for falsifying their job applications. The Board further found the employer's decision to terminate the employees was consistent with its past practice at the Memphis facility and other facilities. The Board also concluded that the investigation was legitimately motivated by the thefts. *Overnite Transp. Co.*, 343 NLRB No. 134 (Dec. 16, 2004).

Non-Union Employee Not Entitled To Presence Of Co-Worker At Investigatory Interview. After receiving an employee complaint about workplace conduct (using foul language), a non-union Wal-Mart employee was asked by his manager to accompany him to the training room to speak with two other managers. The employee asked for his own witness at the meeting, but his request was denied. The employee denied using foul language and stood up to leave the room. The employee was sent home. The next day, the manager initiated another meeting. The employee again sought an independent witness, which the employer refused. The employee refused to provide a written statement and was terminated for creating a hostile work environment and using foul language. An administrative law judge found that Wal-Mart violated the employee's rights under the NLRA for continuing the investigatory interview after the employee asked for his own witness, and for discharging him for exercising his right to a witness. However, after the judge issued his decision, the NLRB issued *IBM Corp.*, 341 N.L.R.B. No. 148 (2004), in which it held an employee who is not represented by a union does not have a statutory right to have a co-worker present during an investigatory interview. After *IBM Corp.*, the Board stated it was "clear" that Wal-Mart was not obligated to grant the employee's request for a witness at the interview, and it could lawfully require the employee to continue the investigatory interview without the presence of his requested witness. *Wal-Mart Stores, Inc.*, 343 N.L.R.B. No. 127 (December 16, 2004).

State Courts

CalFRA

Employee Who Was Performing Same Functions At Second Hospital Job Was Not Entitled To Medical Leave Of Absence Under CalFRA. Plaintiff worked in the sterile processing department of Sutter Health Care. Six years later, she began working in the sterile processing department of Kaiser Hospital. At first she worked at Kaiser on the weekends, but eventually began working during the week. When Sutter changed plaintiff's shift times, she requested a medical leave. Sutter approved a paid time off but ordered plaintiff to return to work on August 23rd. When she failed to return to work, she was fired. Plaintiff sued under CalFRA, which requires employers to grant a medical leave of absence if an employee's serious health condition renders him/her unable to perform the functions of his/her position. The court found plaintiff was not entitled to a CalFRA medical leave since she was performing the same functions of her position at Kaiser.

On appeal, the court explained the purpose of CalFRA is to balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons. However, CalFRA is not intended, as plaintiff argued, to allow an employee to demand medical leave from one employer (because she feels the working environment is too stressful) when she is performing the same job functions for another employer. The statutory definition of a serious health condition that makes an employee "unable to perform the functions of the position of that employee" must be construed as meaning an inability to perform the essential job functions generally, not just for a specific employer. According to the court, "[a]ny other interpretation is inconsistent with the purposes of CalFRA and common sense." *Lonicki v. Sutter Health Central*, 22 Cal. Rptr. 3d 177 (Cal. App. 3rd Dist. 2004).

Constitutional Rights

Public Employee's Due Process Rights Not Violated Despite Lack Of Post-Dismissal Hearing. Plaintiff was employed as a public employee coach operator at Omnitrans, a local public transit agency. Following a verbal altercation with a security guard, he was dismissed for misconduct. Plaintiff's union declined to take the matter to arbitration. Plaintiff requested that Omnitrans proceed with the arbitration, but Omnitrans declined because it believed it was without the authority to engage in arbitration and to do so would violate the parties' memorandum of understanding (MOU). Plaintiff contended he was deprived of his constitutionally protected property interest in continued employment without due process of law because Omnitrans refused to afford him a post-termination hearing. Plaintiff also argued the MOU, which provided a multi-step grievance procedure in which only the union could request arbitration, is unenforceable as a violation of the employee's due process rights. The trial court dismissed plaintiff's petition.

The appellate court affirmed. The court stated a public employee who is subject to discharge only for cause has a constitutionally protected property interest in continued employment and cannot be dismissed without being afforded procedural due process. The MOU provided for an informal grievance procedure as well as a three-step formal grievance procedure. The grievance procedure provided adequate procedural due process for the employee. *Jones v. Omnitrans*, 22 Cal. Rptr. 3d 706 (Cal. App. 4th Dist. 2004).

Injunction Issued Against Anti-Day Laborer Ordinance. A trial judge granted an injunction against a local day laborer ordinance that prohibited sidewalk solicitation by day laborers seeking employment in Redondo Beach. The court's decision barred the city from "intimidating, threatening, or discouraging day laborers' solicitation of work while on public rights-of-way." *Comite de Jornaleros de Redondo Beach*, C.D. Cal. No. CV04-9396.

FEHA

Court Finds Complaint Timely Under Relation Back Doctrine. Alleging he had been unlawfully laid off from his job because he complained about racial harassment, plaintiff filed a complaint with the Department of Fair Employment and Housing in January 2001. He received his right-to-sue letter on December 27, 2001. On November 13, 2002, plaintiff filed a complaint alleging harassment, discrimination, and breach of contract against "Basalite Corporation." When the secretary of state indicated it had no record of Basalite's agent for service of process, plaintiff had the complaint served by hand at the address where he had formally worked. When Pacific Coast, which owns and operates a block manufacturing plant under the name Basalite, moved to quash service, plaintiff moved to file an amended complaint to substitute "Pacific Coast Building Products, Inc. [doing business as (dba)] Basalite" in place of Basalite Corp. The court permitted the amendment. Thereafter, Pacific Coast sought dismissal arguing the causes of action were untimely. The trial court agreed and dismissed the action.

Reversing the trial court in part, the appellate court reinstated the discrimination and harassment claims under the relation back doctrine. According to the court, the amended complaint did not add a new defendant but corrected the name of the defendant. Thus, the amended complaint related back to the date the original complaint was timely filed. However, the court determined the contract claims were not timely filed in the original complaint and were properly dismissed. *Hawkins v. Pacific Coast Bldg. Products, Inc.*, 22 Cal. Rptr. 3d 453 (Cal. App. 3rd Dist. 2004).

OSHA

OSHA's Whistleblower Retaliation Protection Covers Employee Fired Because Her Employer Feared She Would Make A Safety Complaint. A beauty salon worker filed a safety complaint with Cal-OSHA. Following an investigation, Cal-OSHA inspectors cited the salon for several minor workplace safety violations. The salon owner fired the employee and a stylist who was friends with the employee. The state labor commissioner ordered the salon to rehire the stylist with back pay, and then sued to enforce the order when the owner refused to rehire the stylist. After determining the stylist was an employee of the salon and not an independent contractor, the court held the whistleblower retaliation statute did not cover the stylist because she was not the one who made the complaint.

Reversing the trial court in part, the appellate court determined Section 6310 should be construed liberally to cover an employee who is "preemptively terminated" for fear that she might file a complaint. The appellate court affirmed that based on the stylist's work schedule, payment, use of supplies and workstation, and scheduling of appointments through the salon's front desk, she was an employee and not an independent contractor.

Lujan v. Minagar, 21 Cal. Rptr. 3d 861 (Cal. App. 2d Dist. 2004).

Promissory Estoppel

Lost Future Wages From A Former At-Will Employer Are Recoverable On A Promissory Estoppel Theory So Long As They Are Not Speculative And Supported By Substantial Evidence. Plaintiff, a general manager of a piano store, wished to change jobs and contacted Greene Music. Greene offered plaintiff a sales management position and he resigned from his former job. When Greene withdrew its employment offer, plaintiff sued under several theories, including promissory estoppel. Following a bench trial where Greene was found liable, the court awarded damages including lost wages based on what plaintiff would have earned from his former employer until his retirement. Greene appealed arguing such future damages were impermissible reliance damages and were speculative as a matter of law.

The Court of Appeals held generally, "a plaintiff's lost future wages from the former at-will employer are recoverable on a promissory estoppel theory as long as they are not speculative or remote, and are supported by substantial evidence." However, the court concluded that based on the evidence plaintiff presented, such damages were not recoverable because they were too speculative. Plaintiff's former employment was at-will and he failed to present any evidence that his employment would have continued until his retirement. *Toscano v. Greene Music*, 124 Cal. App. 4th 685 (Cal. App. 4th Dist. 2004).

Workers' Compensation

Workers' Compensation Sole Remedy For Construction Worker Injured On-The-Job And He Could Recover From General Contractor. Plaintiff was a construction worker with Kincaid Construction Co. when a gust of wind knocked over a wall injuring his back. Kincaid was the roofing subcontractor for the project and Greg Agee Construction (Agee Construction) was the general contractor. Kincaid's foreman conceded the wall had not been properly braced. At the time of the incident, Kincaid was not carrying workers' compensation insurance. Plaintiff sued Agee, Kincaid, and Kincaid's principal for negligence, "special risk," and premises liability. In addition to the lawsuit, plaintiff filed a workers' compensation claim with the California Uninsured Employers' Fund. Defendants moved for summary judgment, arguing that workers' compensation was plaintiff's sole remedy. The court agreed and found that Agee had not "affirmatively contributed" to plaintiff's injuries. The court also stated its decision on liability was not changed by the fact that Kincaid was uninsured at the time of the incident.

On appeal, the sole question was "whether peculiar risk liability may be imposed on Agee notwithstanding *Privette*, because his employer Kincaid was without workers' compensation coverage at the time he sustained his injuries." In *Privette* and *Toland*, the California Supreme Court held an employee of an independent contractor may not sue the hirer of the contractor under either of the alternative versions of the *peculiar risk* doctrine. In a subsequent case, *Hooker*, the court concluded the hirer of an independent contractor can be held liable to an employee of the contractor if the hirer retains control of the safety issues and the exercise of retained control *affirmatively contributed* to the employee's injuries. The appellate court held Agee was not subject to peculiar risk liability. The court believed the California Supreme Court in Privette intended that its ruling would bar peculiar risk liability in situations where an injured employee's employer is uninsured and the employee may receive benefits through the Fund. *Bell v. Greg Agee Construction, Inc.*, 125 Cal. App. 4th 453 (Cal. App. 4th Dist. 2004).

$100,000 Penalty Imposed On Company For Failing To Obtain Workers' Compensation Insurance From An Authorized Insurer Was Proper. Starving Students, Inc. is a moving company with 300 employees. It hired an employee leasing company, Human Dynamics Corporation (HDC), to handle its workers' compensation insurance and administer other employee matters. HDC obtained workers' compensation insurance for Starving Students through Insurance Company of America (ICA). ICA, however, was not an authorized California insurer, as was easily verified on the Department of Insurance's website. On March 12, 2003, a deputy labor commissioner visited Starving Students' office, verified ICA was not an authorized insurer, and issued a "Stop Order - Penalty Assessment" of $100,000. A week later, the company secured a valid policy and asked that the penalty be set aside. The trial court refused, finding that the penalty was mandatory and constitutional.

The Court of Appeal agreed. California Labor Code section 3700 requires employers to carry workers' compensation insurance from an insurer duly authorized to write compensation insurance in California. Under Labor Code section 3710.1, at the time a stop order is issued, the director shall issue and serve a penalty assessment order for $1,000 per each employee up to $100,000. Although the Starving Students employed 300 employees, the penalty was capped at $100,000. According to the court, the only possible basis for relief is found in Labor Code section 3727.1, which provides that an employer who has secured proper insurance may have the penalty set aside. However, where, as here, the record reveals that the employer was in violation of section 3700, the director has no statutory authority to relieve the employer of the assessed penalty. Moreover, the court ruled that the penalty was not unconstitutionally excessive. *Starving Students, Inc. v. Dept. of Industrial Relations*, 2005 Cal. App. LEXIS 82 (Jan. 24, 2005).

Administrative Appeal

Written Reprimand Must Be Reversed. An officer with the Orange County Sheriff's Department reported for duty at the Inmate Reception Center in Santa Ana. An hour later she was questioned because her supervisor smelled alcohol on her breath. The officer said she had consumed two beers at lunch about 10 hours earlier. She also said she was sick and taking Nyquil. Although she agreed to take a breathalyzer, none was administered. The officer was reassigned (she had been scheduled to work the Visiting Desk) to a less public location. Following an internal investigation in which the Department conceded she was not impaired because of any alcohol consumption, the officer received a written letter of reprimand for reporting for work with the smell of alcohol on her breath. She was found to have violated the "Use of Alcohol" rule prohibiting officers from reporting for duty, or being on duty, while under the influence of drugs or alcohol. The officer appealed arguing, among other things, her conduct had not violated the rule. When her appeal was denied, she further appealed to the department of human resources. While that appeal was pending, she filed an appeal in court. The trial judge dismissed the appeal finding it was not "ripe" because the administrative proceedings had not been completed.

The California Court of Appeals disagreed and granted the officer's request to have the written reprimand reversed. The court noted the reprimand failed to state the officer was "unable to effectively carry out [her] duties and responsibilities because of [alcoholic beverage] use." The reprimand's conclusions that the officer could not do her assigned duties because of the smell of alcohol on her breath, and the reference to "alienating" co-workers and the public due to the smell on her breath, were unsupported by any evidence. In addition, the record did not show that the officer was ever given an opportunity to rebut the presumption the odor created. *Hinrichs v. County of Orange*, 2005 Cal App. LEXIS 2308 (4th Dist. Dec. 20, 2004).

Anti-SLAPP Statute

Plaintiff, the former Chair of the Department of Orthopedic surgery at Palomar Medical Center, alleged one of his patients was not transferred to another hospital for necessary medical care due to financial considerations. Plaintiff "protested" to Palomar's CEO and the hospital's peer review body claiming interference with his medical decision. Plaintiff alleged the executive committee subsequently took a number of retaliatory steps against him. In response, plaintiff filed a complaint raising a number of different claims. Palomar moved to strike the complaint under the anti-SLAPP law, arguing plaintiff's causes of action arose from Palomar's exercise of free speech on matters of public interest and/or in connection with an official proceeding. Plaintiff argued the anti-SLAPP law was inapplicable because the allegations did not concern statements made in connection with an "official proceeding" or conduct in connection with a "public issue." The trial court held the statute applied but plaintiff satisfied his burden of establishing he would prevail on the merits. Thus, Palomar's motion to strike was denied.

The Court of Appeal affirmed but on a different ground. The legislature did not intend that a proceeding before a nongovernmental body – such as the hospital peer review committee – be included in the definition of an "official proceeding." Furthermore, the anti-SLAPP law was not triggered because the matter did not concern the public interest. This was a private workplace dispute. The fact that it involved managed care was not sufficient to convert it to a matter of public interest as defined by the statute. *O'Meara v. Palomar-Pomerado Health Sys.*, 2005 Cal. App. LEXIS 74 (4th Dist. Jan. 21, 2005).

Wage & Hour

$135 Million Settlement Approved For Alleged Overtime Violations. Insurance adjusters for State Farm sued for alleged overtime violations. The 2,615 adjusters will receive on average $34,000. However, adjusters who were with the company since 1996 will receive an average of $64,000 after costs and fees. *Guttierez v. State Farm Mutual Auto Ins. Co.*, Cal. Super. Ct. No. BC.

Legislative Updates

Federal Developments

EEOC Collects Record $415 Million In Benefits Resolutions. Of the $415 million, $251.7 million ($112.4 million collected through the agency's mediation program) was obtained at the administrative level and $163.7 million through litigation. The average time for processing a charge was 165 days, and the inventory for pending matters was approximately 30,000. The EEOC resolved some 85,000 charges last year and found "merit" in about 16,700 of those charges (19.5%). Approximately 8,000 charges were resolved through the commission's alternative dispute resolution program.

Veteran's Benefits Improvement Act Signed. President Bush signed the Veteran's Benefits Improvement Act on December 10, 2004. The Act modifies and extends housing, education, and other benefits for the Nation's veterans by amending portions of Title 38 of the United States Code, including the Uniform Services Employment and Reemployment Rights Act (USERRA). USERRA, enacted in October 1994, provides reemployment protection and other benefits for veterans and employees who perform military service.

IRS Issued Guidance on Automatic Rollover Rule. On December 28, 2004, the IRS released guidance on

new automatic rollover rules for qualified retirement plans. The new rules – under Section 401(a)(31)(B) – were implemented under the Economic Growth and Tax Relief Reconciliation Act. The new rules will take effect March 28, 2005. Under the new rules, mandatory distributions of more than $1,000 from a qualified retirement plan must be paid in a direct rollover to an IRA unless an election is made to have the amount rolled over to another retirement plan or to receive the distribution directly. Under the rule, plan administrators must give written notification that the distribution may be paid in a direct rollover to an IRA.

FLSA Enforcement Extending to Call Centers, Other 'New Economy' Jobs

The Labor Department's Fair Labor Standards Act enforcement efforts, focusing on low-wage workers, are expanding significantly to include "new economy" workers in the computer and call-center industries, DOL's Associate Solicitor Steven Mandel says.

Speaking at a meeting of the American Bar Association's Federal Labor Standards Legislation Committee in Cancun, Mexico, Mandel says enforcement in fiscal year 2005 in the call-center and Internet sectors has already surpassed levels for all of the last fiscal year. The department has obtained settlements approaching $5 million for call-center employees owed additional compensation and an additional $4.5 million for workers in nontechnical Internet and computing fields.

Mandel, who oversees DOL's legal efforts relating to federal labor standards, says the settlements involve employees who are not compensated for "off-the-clock" time spent logging onto computers, reading updates, and preparing to make or take calls. In many such workplaces, employees are not paid until they take their first phone call, even if they are responsible for tasks before the first call is taken or after the last call is taken. C-1

State Developments

Nurses Association Sues Governor Over RN Staffing Ratios. The California Nurses Association sued Gov. Schwarzenegger over emergency regulations that would delay implementation of the mandatory nurse-to-patient staffing ratios.

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