CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

June 2005

Federal Court

Arbitration

Circuit City's Bid For Arbitration Fails Again. In an earlier decision, the Ninth Circuit found Circuit City's arbitration agreement unconscionable under California law and the U.S. Supreme Court declined to review the decision. See *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), *cert. denied* 540 U.S. 1160 (2004). Circuit City again sought to compel arbitration in the *Ingle* case, claiming that the court's decision in *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (*en banc*), implicitly undermined the earlier *Ingle* decision. In rejecting this argument, the Ninth Circuit concluded that *Luce* did not limit, overrule or even address *Ingle*. The court observed that *Ingle* addresses whether an arbitration clause is unconscionable under state contract law while *Luce* addresses the arbitrability of discrimination claims under a federal statute. Not only did the court find that there was no merit to Circuit City's argument, but it also awarded double costs and attorneys fees because the appeal was frivolous. It did not, however, find that the appeal was brought in bad faith, thus refusing to award additional sanctions. *Ingle v. Circuit City*, 2005 U.S. App. LEXIS 8875 (9th Cir. May 18, 2005).

First Amendment

Preliminary Injunction Entered Against Day Laborer Solicitation Statute. The Ninth Circuit affirmed the district court's grant of a preliminary injunction prohibiting the City of Redondo Beach from enforcing a municipal code section that makes solicitation of work on city streets unlawful. *Comite de Jornaleros de Redondo Beach v. Redondo Beach*, 2005 U.S. App. LEXIS 8525 (9th Cir. May 11, 2005) (unpublished). The plaintiffs contend that the ordinance violates the First and Fourteenth Amendments of the United States Constitution.

Note: On May 13, 2005, a district court issued an order converting a preliminary injunction to a permanent one enjoining the City of Glendale from enforcing a similar ordinance. The court rejected the city's claims that the ordinance was designed to reduce traffic congestion, ensure the safety of drivers and pedestrians, and improve and preserve the quality of life of residents and business owners. The plaintiffs claim that the ordinance is discriminatorily directed at day laborers. *Comite de Jornaleros de Glendale v. City of Glendale*, C.D. Cal., CV 04-3521-SJO, filed 5/13/05.

National Labor Relations Act (NLRA)

Labor Neutrality Law To Be Reconsidered. In April 2004, the Ninth Circuit determined that the NLRA preempts the California union "neutrality" law that prevents employers who receive state grants or funds in excess of $10,000 from using such funding to advocate for or against union organizing. *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004). The court did not rule on the provision of the statute that applies to state contractors because the Chamber was not a state contractor and thus lacked legal standing to challenge that provision. *Id.* Now, over a year later, the court has granted rehearing based on petitions filed by Attorney General Lockyer and various labor organizations. *Chamber of Commerce v. Lockyer*, 2005 U.S. App. LEXIS 8460 (9th Cir. May 13, 2005).

Note: On May 17, 2005, a New York federal judge ruled that a similar union neutrality law enacted by the state of New York was preempted by the NLRA. The judge relied heavily on the Ninth Circuit's Chamber of *Commerce v. Lockyer* 2004 decision. *Healthcare Association of New York State Inc. v. Patak*i, 1:03-CV-0413, (N.D. N.Y. May 17, 2005). See Daily Lab. Rpt. No. 96 (May 19, 2005), A-1.

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Title VII

Court Grants *En Banc* Review Of Harrah's "Make-Up" Rule. As recently reported, a bartender was fired for refusing to comply with a casino rule requiring her to wear make-up. In December 2004, a divided three-judge panel of the Ninth Circuit determined that requiring a female bartender to wear make-up did not impose an "unequal" burden on women and found that the bartender was unable to prove her sexual harassment claim. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004). The bartender disagreed with the panel's decision, and the court has now granted her petition for *en banc* review. *Jespersen v. Harrah's Operating Co.*, 2005 U.S. App. LEXIS 8472 (9th Cir. May 13, 2005).

Wage & Hour

Finance And Insurance Managers Of Automobile Dealers Exempt From Overtime Pay. In three consolidated cases, the Ninth Circuit considered whether 29 U.S.C.§ 207(i) ("Section 207(i)") applies to finance and insurance managers at three automobile dealerships. Section 207(i) exempts employers from paying overtime to "any employee of a retail or service establishment" if the employee's regular pay is one and one-half times minimum wage and more than half the compensation comes from commissions on goods or services.

The employees in question performed the following duties: verified information about the terms of the transactions agreed upon by the customer and sales staff and inputed the information into the computer; completed the necessary bank and Department of Motor Vehicles forms; obtained the customers' signatures on the requisite paperwork; and sold alarm systems, extended warranties, insurance policies and paint and fabric protection plans. The managers were compensated almost exclusively through commissions on the products they sold; none of the commissions were based on the sale or lease of a vehicle itself. The district court in each case awarded overtime to the plaintiffs, finding that their commissions were not engaged in the dealerships' retail activity and hence not exempt because their commissions were not based on retail goods and services they sold.

Reversing the trial court, the Ninth Circuit concluded that the employees are exempt from overtime. As a preliminary matter, the court (as did the district court) found that the auto dealerships were "retail or service establishments" as defined by the FLSA. The issue of contention was whether Section 207(i) was limited to employees earning commissions on *retail* goods or services or whether it applied more broadly to *all* employees earning commissions on goods and services. Deciding it is the latter, the court focused on the fact that the "duties performed by the finance officers were an integral, and integrated, part" of the dealerships' retail business of selling or leasing cars. Therefore, the court distinguished the case from other decisions involving employers that maintained departments that were engaged in truly separate business endeavors distinct from the employers' retail businesses (*e.g.* manufacturing rollers for cotton mills and retail lumber sales). *Gieg v. DRR, Inc.*, 2005 U.S. App. LEXIS 8874 (9th Cir. May 18, 2005).

California Courts

Employment Torts

Injured Employee's Claim For Breach Of Regulatory Duties Survives Summary Judgment. The plaintiff, an employee for nonparty Chico Drain Oil, was severely injured by an explosion while cleaning fuel tanks on land owned by Jesse M. Lange Distributor, Inc. ("Lange"), a company that stores and sells gasoline to commercial and agricultural customers. Lange hired Paul Oil Company to clean and remove the fuel tanks (in exchange for which Paul Oil would get the tanks); Paul Oil hired Northern Lights Mechanical to transport the tanks; and Northern Lights contracted with Chico Drain Oil to assist with the cleaning of the tanks before they were transported. Although the plaintiff worked for Chico Drain Oil, he sued, among others, Lange. The trial court entered summary judgment for Lange under *Privette v. Superior Court*, 5 Cal. 4th 689 (1993), and its progeny, which bar injured employees of independent contractors from suing non-negligent property owners who hire contractors to perform hazardous work.

Reversing summary judgment, the Court of Appeal found that it was possible that Lange could be liable for breaching its regulatory duty to provide fire extinguishers pursuant to the California Fire Code. According to the plaintiff, he was not arguing vicarious liability under the peculiar risk doctrine as set forth in *Privette*; instead, he argued that Lange was directly negligent and contributed to his injury by breaching its nondelegable duty of providing fire extinguishers within 75 feet of places where fire is likely to occur. The court found that Lange erred in simply relying on *Privette* to resolve all potential theories of liability because *Privette* did not address plaintiff's theory of liability — breach of regulatory duties. In fact, at least one California decision held that an owner may be liable if its breach of a regulatory duties affirmatively contributes to injury of a contractor's employee; thus, summary judgment was improper. *Barclay v. Jesse M. Lange Distributor, Inc.*, 129 Cal. App. 4th 281 (2005).

Class Actions

Opt-In Notice Not Required By Due Process. The defendant, a consulting company that does business in California, sent unsolicited advertisements to a tele-

phone facsimile in violation of the Telephone Consumer Protection Act (TCPA). A preliminary question arose concerning the content and manner of serving notice to the potential class members. The trial court determined that class members had to "opt-in" to participate. The plaintiff objected, arguing that this "eviscerate[d] the class action device." The appellate court agreed with the plaintiff, finding that an "opt-in" notice was not required by due process, and that the trial court's imposition of this requirement conflicts with the California Rules of Court governing class action management. *Hypertouch, Inc. v. Superior Court of San Mateo*, 128 Cal. App. 4th 1527 (2005).

Legislative Updates

Federal Developments

President Bush Signs The Bankruptcy Abuse Prevention And Consumer Protection Act. On April 20, 2005, the President signed the Bankruptcy Abuse Prevention and Consumer Protection Act ("the Act"), which, among other things, amends the Bankruptcy Code in several respects. With respect to employment, the Act:

- Creates an exemption from the automatic stay provisions so that a debtor's employer may withhold and collect from a debtor's wages the amounts to be used for payments relating to a loan from an ERISA qualified retirement plan or from a qualified thrift savings plan.

- Allows employment agreements to give rise to fraudulent transfer claims. Under the Act, payments made to an insider under an employment contract, outside of the debtor's ordinary course of business, may be recovered as a fraudulent conveyance where the debtor received less than reasonably equivalent value in exchange for the payment. The new law makes such payments recoverable, and allows for the avoidance of the employment agreement itself, even if the debtor was doing well financially at the time the employment agreement was executed or the payment made. This change is effective immediately.

- Provides that changes to retiree health and welfare benefit plans within the six months prior to bankruptcy may be reversed by the court unless the balance of the equities favors the modification. This change is effective immediately as to cases commenced on or after April 21, 2005.

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