CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

March 2005

Supreme Court

High Court To Review Waiting and Walking Time Cases. The Supreme Court has agreed to consider whether meat-processing plants must pay their slaughterhouse workers for the time it takes to wait for required protective clothing and safety equipment, and to walk to and from their workstations for changing clothes. The court granted *certiorari* in two consolidated cases: *IBP, Inc. v. Alvarez*, where the Ninth Circuit found that all of the time was compensable, and *Tum v. Barber Foods, Inc.*, where the First Circuit found that the employees should not be compensated under a Portal-to-Portal Act exclusion.

State Courts

Arbitration

The Number Of Arbitrators Selected To Decide A Case Is A Substantial Contractual Right That May Not Be Altered By A Court. In 1997, plaintiff, a general counsel and officer for defendant's business entities, entered into an "Engagement for Services" Agreement with defendant. Thereafter, the parties entered into a "Telecom Agreement" (a stock incentive agreement). In December 1999, defendant attempted to renegotiate the Employment Agreement and Telecom Agreement, but plaintiff rejected her proposals. The plaintiff's employment was terminated on January 29, 2000 and he sued. The defendant sought to invoke the mandatory arbitration provisions contained in each agreement. A problem arose because the arbitration provisions were different; the Employment Agreement provided for a sole arbitrator, whereas the Telecom Agreement provided for a three-arbitrator panel. The parties agreed the issues were interrelated, however, they did not agree on which Agreement should control. The trial court consolidated the proceedings and determined a single arbitrator should resolve the dispute. The sole arbitrator found for the plaintiff and awarded him over $11 million. The trial court granted a petition to confirm the award and denied the defendant's petition to vacate.

The appellate court reversed the confirmation of the arbitration award regarding the stock incentive agreement and held the trial court had deprived the defendant of a substantial contractual right by ordering a single arbitrator for the consolidated proceedings. Because there is limited judicial review with arbitration, the number of arbitrators hearing a case is an important matter that the court cannot alter. The court also held the arbitration agreement was not unconscionable where it required the employee to share the cost of arbitration because the agreement was not "generic," the plaintiff earned a substantial salary, the plaintiff, an attorney, negotiated or had the opportunity to negotiate the terms of the agreement, and the case did not involve claims under the Fair Employment and Housing Act. *Parker v. McCaw*, 125 Cal. App. 4th 1494 (Cal. App. 2d Dist. 2005).

Consumer Reports/Employee Investigation

Employer Investigating a Suspicion of Wrongdoing Must Provide Background Check Records to Employee Within "Reasonable Time." After a law firm conducted a computerized legal search revealing a paralegal had several felony convictions, the paralegal resigned at the firm's request. The paralegal sent a letter to the firm seeking a copy of the public records that caused his dismissal pursuant to the Investigative Consumer Reporting Agencies Act (Civ. Code § 1786 *et seq*). The ICRAA requires an employer that conducts its own background check to provide a copy of the information discovered to an employee within seven days after receipt of the information. The firm sent the paralegal the information, on April 21, 2003, eight business days after his resignation. The paralegal sued and the court required the plaintiff post security as a "vexatious litigant." When the plaintiff failed to post security, the court dismissed the lawsuit.

The Court of Appeals affirmed the dismissal, finding the court's order that the paralegal post security was proper. The court also determined that under the ICRAA, an

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employer investigating suspected misconduct by an employee must "furnish to the employee copies of any public records uncovered by a background check within a reasonable time after the investigation concludes, rather than within a fixed period." The ICRAA suspends the seven-day requirement when the employer is investigating suspicion of wrongdoing or misconduct by an employee. The eight business days it took the firm to provide the information to the plaintiff was deemed reasonable. *Moran v. Murtaugh, Miller, Meyer & Nelson, LLP*, 126 Cal. App. 4th 323 (Cal. App. 4th Dist. 2005).

Trade Secrets & Confidential Information

Modified Preliminary Injunction Enjoining Improper Solicitation of Employees and Customers Using Trade Secret Information is Upheld Even Though Improper Non-Compete Agreement Existed in Violation of Business and Professions Code Section 16607.

In a carefully worded decision delicately balancing California's public policy against illegal non-compete agreements with trade secret protection, the Fourth Appellate District upheld a modified preliminary injunction enjoining a former nurse staffing recruiter from engaging in solicitation of plaintiff's healthcare employees, or agents, nurses, or remote recruiters under contract with plaintiff regarding the nurse staffing business. Defendant argued the injunction was improper because plaintiff required defendant to sign three-year non-compete agreements in violation of Business and Professions Code section 16607. Under Section 16607, a customer list, including the names, addresses and identities of all employer customers who have listed job orders with an employment agency within a period of 180 days prior to the separation of an employee from the agency and including the names, addresses and identity of all applicant customers of the employment agency, shall constitute a trade secret and confidential information of, and shall belong to, the employment agency. No liability shall attach to, and no claim shall arise from, the use of a customer list of an employment agency by a former employee who enters into business as an employment agency more than one year immediately following termination of his employment.

In upholding the injunction, the Court focused on the fact that defendant was terminated for stealing ReadyLink's records containing proprietary and confidential information, and signed a declaration acknowledging his misappropriation in an improper attempt to form his own company in competition with ReadyLink. Further, the Court stated the injunction is premised not only on misappropriation of ReadyLink's confidential customer information, but on other trade secrets as well (deemed trade secrets from the Appellate Record only, not on the merits). There is no time limitation on the duration of injunction relief as to the other trade secret information. The Court stated if a former employee uses a former employer's trade secrets or otherwise commits unfair competition, California courts recognize a judicially created exception to Section 16600 and will enforce a restrictive covenant in such a case. **Note**: The *ReadyLink* decision includes a useful discussion concerning trade secret protection for confidential customer lists. *Readylink Healthcare v. Cotton*, 2005 Cal. App. LEXIS 224 (Cal. App. 4th Dist. Feb. 14, 2005).

Practice Tip: Business and Professions Code Section 16600 prohibits contracts restraining employees from engaging in a lawful profession. Misappropriation of trade secrets constitutes an exception to Section 16600. Numerous courts have held that non-compete agreements unrelated to trade secrets (with the exception of Business and Professions Code Section 16601 agreements) are void as against public policy, thus subjecting companies to substantial liability and punitive damages. Prior to requiring employees to sign a confidentiality agreement on restrictive covenant, consult with your employment counsel.

Wage & Hour Laws

An Employer's Chargeback Policy For Unearned Advanced Commission Did Not Violate California Law. The Los Angeles Times paid its telesales employees an hourly wage and an advanced commission upon the sale of each newspaper subscription. A training manual distributed to the telesales employees explained that if the customer did not keep the subscription for 28 days, the sale was not considered a "commissionable sale," and the employee would be "charged back" the advanced commission. The employees acknowledged the receipt of these manuals in writing. The telesales employees sued, arguing that the chargeback policy violated the Labor Code prohibition against deductions for business losses. The trial court found for the employer, ruling that the 28-day requirement was a condition precedent to the employee's entitlement to the commission, and that it was lawful for the employer to charge back any unearned advances. The appellate court agreed, explaining "[c]ompensating employees in part with advances on commissions is a longstanding practice. No prior case has held the practice to violate the Labor Code, and we are pointed to no statute that expressly bars such a practice." The court rejected the employees' argument that the chargeback policy was an illegal "kickback," secret deduction, or loan, because the employer was reconciling an advance, not taking back "wages." *Steinhebel v. Los Angeles Times Communs.*, 2005 Cal. App. LEXIS 191 (Cal. App. 2d Dist. Feb. 7, 2005).

Workers' Compensation

The California Supreme Court Declares The 90-Day Investigation Period Runs From The Time The Employee Files A Claim, Not When The Employer Learns Of The Injury. A sheet metal specialist claimed he suffered work-related injuries to his body and psyche due to his employment. The employee's medical records noted that his doctor prescribed medications for "work stress" on July 20, 1998. On October 16, 1998, the employee's wife left a message with the employer's disability coordinator that her husband had a nervous breakdown and was hospitalized. The hospitalization records mentioned stress, personal history, and "work problems." On January 11, 1999, in response to the employee's January 10, 1999 submission of a request for leave form for a work-related injury, the employer sent the employee a claim form and pamphlet explaining workers' compensation. On January 15, 1999, the employee submitted a completed claim form. The employer denied the claim on March 31, 1999. The matter was submitted to a workers' compensation judge ("WCJ") for a determination of whether the injury should be presumed compensable because the employer failed to deny liability within 90 days and it was "reasonably certain" an industrial injury had occurred. The WCJ found the injury should be presumed compensable and the 90-day period under Labor Code section 5402 expired January 15, 1999. The Workers' Compensation Appeals Board ("WCAB") agreed.

The California Court of Appeals reversed, finding the WCAB's adoption of a "reasonable certainty" standard as the trigger for starting the 90-day period was contrary to the plain statutory language that the time runs from the filing of a claim form. The court further stated egregious conduct by the employer designed to frustrate the employee may estop the employer from denying the 90-day period had commenced, but the negligent failure to provide a claim form (as occurred here) could not start the running of the 90-day period.

The California Supreme Court agreed, holding the 90-day period had not expired before the employer challenged liability; thus, the employee's injury should not be presumed compensable. The Court highlighted a four-step process: (1) the employee notifies the employer of an injury, unless the employer already knows of the injury from other sources; (2) the employer provides a claim form and advises the worker of his or her rights; (3) the employee then, if he or she chooses, files a claim form; and (4) the employer has 90 days from the time the claim form is filed to investigate and evaluate the claim. In 1990, the legislature amended the statute, mandating that the 90-day period runs from "the date the claim form is filed." The Court explained an employer will be estopped from denying the running of the 90-day period before the filing of a claim form only if: (1) the employer, knowing that the injury occurred or that the employee was asserting that an injury occurred, refused to provide a claim form or misrepresented the availability or need for a claim form; (2) the employee believed no claim form was available or necessary; and (3) the employee suffered some loss because of the reliance. *Honeywell v. WCAB*, 2005 Cal. LEXIS 1604 (Cal. Feb 10, 2005).

Legislative Updates

Federal Developments

New USERRA Poster Requirements Go Into Effect March 10, 2005. Part of the Veterans Benefits Improvement Act of 2004, which President Bush signed into law in December 2004, is a requirement that employers post notice of basic Uniform Services Employment and Reemployment Rights Act ("USERRA") protections and requirements. The final draft of the new poster is now available at http://www.dol.gov/vets. The DOL plans to publish the poster along with posting instructions in the Federal Register. The Federal Register is also available on-line at http://www.gpoaccess.gov/fr/index.html.

President Signs Bill To Curb State Class-Action Suits. On February 18, 2005, President Bush signed into law a new bill to curb state class-action litigation. Under the Class Action Fairness Act, class-actions seeking $5 million or more with at least one diverse class member from one or more defendants must now be heard in federal court. Federal courts may decline jurisdiction in certain situations, including cases where one-third to two-thirds of the proposed class members and the primary defendants are citizens of the same state. If one-third or fewer of the proposed class members are citizens of the original forum state, federal courts must retain jurisdiction and hear the case. However, federal courts must decline jurisdiction if two-thirds of a proposed class are from the same state and at least one primary defendant is from that state. The law also limits attorney fees in cases where the plaintiffs receive discounts or coupons rather than monetary settlements. The law will not apply to suits already pending in court.

U.S. Senate Passes The Genetic Information Nondiscrimination Act (S. 306). The Senate unanimously approved a bill designed to prevent employers from using genetic information to discriminate against employees. The bill also prohibits insurance companies from using genetic makeup information to deny insurance coverage or to set or adjust premiums. Insurers with genetic information would be required to treat that information in accordance with existing privacy rules.

EEOC Recovers Record $420 Million In Fiscal 2004. The EEOC recently reported that it recovered a record $420 million in relief last year for thousands of people filing charges of employment discrimination. It also expanded its mediation program and its efforts to proactively prevent discrimination through outreach, education, and technical assistance. In 2004, the EEOC reported that it received a total of 79,432 new charges, filed 378 merit lawsuits, and resolved 85,259 charges. Race discrimination was the subject of the highest number of charge filings with 27,969, sex discrimination was next with 24,249 charges, retaliation was the third highest with 22,740 charges, followed by age discrimination with 17,837 charges, disability discrimination with 15,346 charges, national origin with 8,361 charges, religious discrimination with 2,466 charges, and finally, equal pay act claims totaled 1,011. The average charge processing time was 165 days. The 2004 EEOC statistics are available on-line at http://www.eeoc.gov/stats/enforcement.html

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

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

CHICAGO
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

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

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

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

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

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

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

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