BARKER KOUMAS & OLMSTED
A PROFESSIONAL LAW CORPORATION

Legal Update

Firm Newsletter May 2007

8880 Rio San Diego Drive, Suite 900 • San Diego, California 92108 • (619) 682-4040 • www.barkerkoumas.com

INSIDE THIS ISSUE:

NO FREE LUNCH FROM CALIFORNIA SUPREMES

By Elizabeth Koumas

The old saying "there no such thing as a free lunch" rings true for California employers. In fact lunch has become *very* expensive for employers who violate the Labor Code.

If an employer fails to provide a 30 minute meal period to an employee entitled to such periods, the Labor Code section 226.7 penalty is one hour of pay per day per employee. The same penalty applies for any day where an employer fails to provide rest periods.

Over time and among a number of employees, that penalty can add up to serious indigestion. The only saving grace for employers—until now—has been that most appellate courts and the California Division of Labor Standards Enforcement have stated that the statute of limitations is one year. Even if an employer had violated the law for longer than one year, employees could only collect a year's worth of penalties.

For several years, plaintiff lawyers representing employees have argued that the one hour of pay is a "wage" and not a "penalty." Why? Because if it is a wage, the statute of limitations is three years instead of one year. A longer statute of limitations translates into more money for the lawyers and the employees.

The California Supreme Court has settled the debate. On April 16, 2007, the California Supreme Court

(Continued on page 2)

"Employers who have not gotten their meal and rest period practices in order are urged to do so immediately, as a preventative measure, or risk exposure to the gamut of avoidable damages."

(Continued from page 1)
issued its ruling in *Murphy v Kenneth Cole Productions, Inc*. Unfortunately, the Court ruled that the one hour of additional pay due to an employee for a missed meal or rest period is a *wage or premium pay* rather than a *penalty*.

In order to reach this conclusion, the court analyzed purpose of the remedy, the language of the statute, and the administrative and legislative history leading up to the Labor Code section.

The court noted that the premium pay amount was based on an employee's rate of compensation, just like the overtime premium. The higher the hourly rate, the higher the amount owed. By contrast penalties are usually given in an established fixed amount.

Additionally, the court noted the language of the statute suggests the premium pay should be wage. Since "statutes governing conditions of employment are to be construed broadly in favor of protecting employees," the court noted the ability to take a meal break constitutes "wages" since that term has been expansively defined to include any benefit which is part of the employee's compensation.

Further, an early draft of the statutory language included a civil penalty, but this was omitted from the final version of the law. The Court assumed that the changed language evinced the legislature's intent to make it a wage. "Like overtime pay provisions, payments for missed meal and rest periods were intended to be enacted as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards."

Our state Supreme Court's unanimous decision has opened a Pandora's box of far reaching ramifications for employers, more than most realize.

The first significance is that wage claims carry a three-year statute of limitations, rather than the one-year statute of limitations associated with penalties. Therefore, an employee who misses meal periods and/or rest breaks may look back a longer period of time over which to recover damages.

Second, because California employers are required to pay employees their final *wages* when the employment relationship ends, a former employee who has missed meal or rest periods might also seek to recover *waiting time penalties* under Labor Code section 203, which provides:

If an employer willfully fails to pay, without abatement or reduction…any wages or an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefore is commenced, but the wages shall not continue for more than 30 days.

Third, because the additional pay due from a missed break has been classified as

(Continued on page 3)

MEAL AND REST PERIOD PRACTICAL TIPS:

- All employers must familiarize themselves with the general rule that "no employer shall employ any person for a work period of more than five hours without providing a meal period of not less than 30 minutes."
- Employers who have not gotten their meal and rest period practices in order are urged to do so immediately, as a preventative measure, or risk exposure to the gamut of avoidable damages described above.
- When an employee misses a meal break, pay the one hour penalty immediately (and an additional one hour wage if either or both breaks are missed).

UNLICENSED CONTRACTORS CREATE WORKERS COMP HAVOC

By Tiffany Keith

California's Workers' compensation law makes a bad idea—hiring unlicensed contractors—into an expensive mess.

A recent California appeals court case provides an illustration. In *Heiman v. Workers' Compensation Appeals Board*, homeowners, through their home owners association, hired a property management company, Pegasus, to maintain the property.

Upon Pegasus' recommendation, the homeowners association decided to install new rain gutters. After receiving several bids, Pegasus hired Mark Hruby, an unlicensed contractor. Hruby, in turn hired Freddy Aguilera. On Aguilera's first day on the job, a rain gutter contacted a high voltage electrical wire and Aguilera was severely shocked and fell to the ground. Aguilera was later determined to be 90% disabled.

After his injury, Aguilera made a Workers' Compensation claim, at which time he learned that Hruby did not carry the mandatory workers' compensation insurance. He therefore filed suit, naming the homeowners, the homeowners association, Pegasus, and Hruby as defendants.

In California, one who hires a worker to perform work for which a license is required is deemed an employer if that worker does not have the required license. Thus, in this case, the property management company who hired Hruby, an unlicensed contractor, was deemed Aguilera's employer. It was responsible for his injuries.

Interestingly, Pegasus argued that it qualified for a homeowners exception to the rule. Homeowners who hire contractors for less than 52 hours or who earn less than $100 to perform work on the homeowner's home are exempt from the workers' compensation requirement.

The court rejected this argument. Pegasus was an agent of the homeowners association, not the homeowners. The HOA did not qualify for the homeowners exception, and therefore neither did the property manager.

Always be sure to check the license status of all hired contractors, and also obtain verification of workers' compensation insurance.

"Always be sure** to check the license status of all hired contractors, and also obtain verification of **workers'** compensation **insurance."

(Continued from page 2)

a *wage*, a prevailing employee will also be entitled to recover his or her attorneys' fees incurred in association with making such a claim.

Fourth, employees can now seek to recover section 226.7 premium pay for a period of four years prior to the filing of a complaint, by asserting a Business and Professions Code section 17200 claim. As a result, there is likely to be an increase in class action lawsuits.

One item which remains unresolved at this point in time is whether this decision will have retroactive effect on the cast number of pending meal or rest period cases.

Although labor law attorneys believe the Supreme Court has interpreted the statute incorrectly, there is no further avenue of redress in the court system for employers, and the law will remain that missed meal or rest periods constitute lost wages unless, and until, the state legislature amends the section 226.7, expressly stating the one hour of additional pay is a penalty rather than a wage, eliminating any doubt at the court level.

For more information about this new law, or implementation of and/or enforcement of meal and rest periods policies, contact Elizabeth J. Koumas at either (619)682-4811 or ejk@barkerkoumas.com.

EMPLOYEE RECEIVING DISABILITY PAY DURING FMLA LEAVE NOT REQUIRED TO SUBSTITUTE PTO FOR UNPAID FMLA LEAVE

By Christopher Olmsted

"Only where the leave is 'otherwise unpaid' does the employer have a right to require employees to use company-provided paid time off during an FMLA/CFRA leave of absence."

When an employee takes a protected leave of absence under the federal FMLA or the California CFRA, questions frequently arise regarding the use of employer provided paid time off—typically in the form of vacation or sick pay.

An employer is not required to pay an employee while the employee is on FMLA leave, though an "employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under the FMLA.

However, only where the leave is "otherwise unpaid" does the employer have a right to require employees to use company-provided paid time off during an FMLA/CFRA leave of absence.

A recent Seventh Circuit case illustrates the rule. In *Repa v. Roadway Express*, Alice Repa took a six-week FMLA leave for an injury not related to work. As a Teamster working for a unionized trucking company, she applied for and received $300 per week from her union's disability insurance plan.

Roadway granted Repa's request and notified her that she was required to "substitute any accrued paid leave for any unpaid FMLA leave." Upon Repa's return from leave, Roadway paid her for five sick days and two weeks of vacation. Repa received this pay in addition to the $300 per week she received through the union disability plan.

Repa was apparently unhappy with being forced to use up her sick and vacation benefits. She filed suit in federal court alleging that Roadway had violated the FMLA by requiring her to use her sick and vacation leave days when she was receiving disability benefits during her FMLA leave. Citing federal regulations, Repa argued that because she was receiving temporary disability benefits through the union fund, the FMLA "provision for substitution of paid leave was inapplicable," and therefore Roadway should restore her vacation and sick time.

The district court ruled in favor of Repa, and the 7th Circuit Court of Appeal affirmed this decision.

In reaching this result, the court applied what appears to be a regulation applicable to pregnancy leaves and extended its application to all types of FMLA leave. Specifically 29 C.F.R. § 825.207(d)(1) provides:

"Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable."

The court also noted that the same rule applies in the context of workers' compensation cases:

"The regulation also provides: "As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable." 29 C.F.R. § 825.207(d)(2).

The court reasoned that if employers cannot force employees to use sick or vacation pay where the employee receives pregnancy disability payments and workers' compensation disability payments, then the same rule applies where the employee receives union temporary disability bene-

(Continued on page 5)

DLSE LIBERALIZES INTERPRETATION OF "LEARNED" PROFESSIONAL EXEMPTION

The California Division of Labor Standards Enforcement (DLSE) has liberalized its Enforcement Policies and Interpretations Manual with respect to the "learned or artistic" exemption.

In order to qualify for the exemption from overtime and other wage and hour rules, the DLSE has *previously* taken the position that "learned" professionals must have "completed a prolonged course of intellectual instruction in a recognized field of learning resulting in the attainment of an advanced degree or certificate (above a BA or BS degree)."

The manual has been modified to delete the last phrase requiring a degree *above* a BA or BS. Apparently advanced learning above the high school level *may* qualify the employee for the learned professional exemption.

This modification brings the DLSE's interpretation of the exemption in line with federal regulations.

Note that the DLSE's interpretation of state law, although relevant, is not binding on a court. Courts have on occasion disregarded DLSE opinions.

Despite the liberalization of the rule, employers should exercise caution and seek appropriate advice before classifying employees as exempt under this (or any) classification. Misclassifications can create costly labor claims.

Additional DLSE Manual Revisions. The DLSE has published additional revisions to its policy manual, including: ***alternative workweek schedules***, ***statute of limitations for unpaid vacation claims***, and ***meal time training or client meetings***. If you would like to review these sections of the updated manual, visit the DLSE's website (www.dir.ca.gov/DLSE/) or email Chris Olmsted at cwo@barkerkoumas.com.

"Vacation and sick policies must be drafted with employee leave of absence rights in mind."

(Continued from page 4)

fits.

It remains to be seen how California federal and state courts will interpret this federal regulation. The impact could be far-reaching given that California offers a generous paid family leave benefit through the EDD. The California EDD provides Paid Family Leave benefits for qualified employees. Adoption of the *Repa* court's interpretation of the federal regulations would mean that employees receiving PFL could not be required to use company provided PTO. Note, however, that PFL permits employers to require qualified employees to use up to two weeks of any earned but unused vacation leave or paid time off (PTO) prior to the initial receipt of benefits. A carefully worded policy could safely follow this special rule.

Take Away Tips:

- Vacation and sick policies must be drafted with employee leave of absence rights in mind
- FMLA/CFRA employers should review vacation and sick policies with counsel to ensure compliance with federal law.
- Review federal regulations and seek advice prior to forcing employees to use vacation/sick benefits when they are already receiving disability benefits, workers' compensation benefits, PFL, or other form of paid leave.

Vacation and Sick Pay Policies Must Not Single Out **Workers' Compensation Claimants**

By Christopher Olmsted

"Employers ought to review their benefit policies to ensure that industrially injured workers are entitled to the same benefits as other workers."

Although California state law (as in other states) does not mandate that employers provide sick and vacation benefits, once those benefits are provided, the state regulates their use.

A recent appellate court case titled *Anderson v. City of Santa Barbara* serves as a reminder to employers not to discriminate against employees seeking to use their benefits in the context of a workers' compensation claim.

While Mr. Andersen was employed as a finance supervisor for the City of Santa Barbara, he developed pain in his elbows, wrists and hands. He filed a claim for workers' compensation. Andersen later returned to modified work, but needed to obtain medical care for these injuries.

Pursuant to ordinance and policy, the City required him to use his earned vacation time rather than sick leave to attend the medical appointments he needed to care for these industrial injuries. Workers with non-industrial injuries could use their sick leave for such matters.

In applying for workers' compensation benefits, Mr. Andersen alleged that the City discriminated against him, within the meaning of Labor Code section 132a, by forcing him to use vacation time rather than sick leave, as non-industrially injured employees were allowed to do.

Section 132a prohibits, among other practices, discrimination against any employee because he or she has filed a claim for compensation.

The Court of Appeal determined that the City's practice illegally discriminated against industrially injured workers. "The City could choose not to provide sick leave to any of its employees. But, if the City provides sick leave to its employees, it cannot refuse to permit its use for industrially-related medical appointments when non-industrially injured workers are not so restricted. Here, the City permits non-industrially injured persons to use sick leave for medical appointments but requires industrially injured persons to use earned vacation time."

Finding in favor of Mr. Anderson, the court concluded: "The City may not discriminate against active, industrially-injured workers in the use of sick leave for medical appointments, as compared to non-industrially injured workers. Such a policy contravenes Labor Code section 132a."

In light of this court ruling, employers ought to review their vacation, sick, or PTO policies to ensure that industrially injured workers are entitled to the same benefits as other workers.

New Vacation Policy Checklist

When is the last time that you reviewed your employee vacation benefit policy for compliance with the Labor Code and other employment laws? To get started, ask for our complimentary Vacation Policy Checklist. Email Chris Olmsted at cwo@barkerkoumas.com.

A LESSON FROM THE PAST: TERRI SCHIVAO AND YOUR ADVANCE HEALTH CARE DIRECTIVE

By Tiffany Keith

A little over two years ago Terri Schiavo died. This sad event took place two weeks after her feeding tube had been removed, and after she spent 15 years in a persistent vegetative state.

The national media frenzy, the protests, the state and federal court decisions, and an act of Congress would have been unnecessary had Ms. Schiavo been advised to take the few minutes necessary to complete some basic paperwork. Her true wishes—whether to pass peacefully away or to be kept alive indefinitely--could have been honored.

The saga should have prompted people all across the nation to prepare advance health care directives and Health Insurance Portability and Accountability Act (HIPAA) authorizations. That has not happened. A recent study by the Pew Research Center found that, although 70% of Americans had given thought to end-of-life treatment, only 29% have a living will/health care directive.

An advance health care directive is a legal document that lets your physician, family and friends know your health care preferences, including the types of special treatment you want or don't want at the end of life, your desire for diagnostic testing, surgical procedures, cardiopulmonary resuscitation and organ donation. It can serve as a way for you to maintain control over your health decisions even if you are incapacitated.

Doctors are under a duty to prolong life at most costs. A person in Terri Schiavo's position will most likely be kept alive by artificial nutrition and/or respiratory devices. Armed with an advance health care directive, the doctor no longer has to rely on family members regarding what the patient would have wanted, rather, the patient gives her instructions via the directive.

By creating an advance health care directive you take the burden of making difficult end-of-life decisions off of your family and loved ones. There is no ambiguity as to what you would have wanted because you would have already specified your wishes.

Hand in hand with advance health care directives are HIPAA authorizations. Current law limits the ability of health care institutions and doctors to disclose "protected medical information" family and friends. HIPAA authorizations allow you to designate in advance persons eligible to review such information. You are also able to indicate the parameters related to when those persons should have access. Armed with an accurate HIPAA authorization, those you have designated can have access to your medical information in an emergency- the doctor will be able to discuss your condition with those persons to make sure they understand exactly what is going on. They are simple documents to create, but must be completed with the utmost care and forethought. Minor errors or ambiguities can render the document ineffective.

Think of this advance planning as an act of compassion for your loved ones—they will appreciate making tough decisions according to your wishes.

"Think of this advance planning as an act of compassion for your loved ones."

Need Help?
For more information about Advance Healthcare Directives or HIPAA authorizations, contact Tiffany Keith at (619) 682-4040 or by email at tak@barkerkoumas.com

Barker Koumas & Olmsted
8880 Rio San Diego Drive, Suite 900
San Diego, CA 92108
(619)682-4040
www.barkerkoumas.com

FEHC MAKES FINAL REVISIONS TO SEXUAL HARASSMENT REGS

After making a few additional revisions, the California Fair Employment and Housing Commission has approved final Sexual Harassment Training and Education regulations that have been under review for over a year.

The regulations are expected to be added to the California administrative code within the next 60 days.

The last round of revisions added some clarity with respect to who may train. Trainers include experienced employment law attorneys, certain HR professionals, and certain college professors.

For more information about how to comply with the new regulations, ask for our complimentary summary of the new regulations. Email Chris Olmsted at cwo@barkerkoumas.com

Both Elizabeth Koumas and Christopher Olmsted offer legally compliant training sessions. Barker Koumas & Olmsted offers the training for a flat, attractively priced fee. Contact either attorney for more information.

UPCOMING EMPLOYMENT LAW SEMINARS

California Employment Law From "A to Z" June 21, 2007

Human Resources Records and Documents
- Mandated Workplace Postings
- Key Handbook Components
- Recordkeeping

Hiring Policies and Practices
- Proper Use of Applications, Interviews and References
- Background Checks and Credit Reporting
- New Hire Reporting Requirements
- Eligibility for Employment
- Overview of ADA/FEHA Disability laws and Rights of Disabled Applicants

Employee Relations
- Overview of FMLA and CFRA
- Harassment and Sexual Harassment Training
- Performance Improvement Plan
- Discipline Policies and Essential Documents
- Terminations

Compensation and Benefits
- Essential Wage and Hour Practices
- COBRA and HIPAA

Presented through Lorman Educational Services. Brochures available now!

California Wage & Hour Law

Wage and Hour (Part 1) – July 12, 2007 @ 8:00 – 9:30 am
- State Wage Orders
- Notice Posting Requirements
- Computing Hours Worked
- Meal and Rest Periods
- Travel Time / Expenses
- Record Keeping

Wage and Hour (Part 2) – July 26, 2007 @ 12:00 – 1:30 pm
- Employee versus Independent Contractor
- Exempt versus Non-Exempt
- Deductions from Wages
- Overtime
- Enforcement and Penalties

Held at our offices.
$30 Registration Fee.

Conducting Employee Investigations

Thursday, May 17, 2007
- What circumstances can lead to an investigation?
- When is it a legal requirement?
- When is it just good business sense?
- How soon should you begin the investigation?
- Who should conduct the investigation?
- Internal investigator or third party investigator?
- What does an investigation look like?
- Who do you talk to?
- What do you ask?
- What are some potential risks?

This program is presented by Elizabeth Koumas, Chris Olmsted, and HR consultant Elizabeth Roche. East County Personnel Association monthly lunch meeting. *Guests are welcome!*
The Brigantine Restaurant, La Mesa 11:30am - 1:00pm. Non-members $35
Reservations: Plazapersonnel@aol.com

Register Now! Call or email Christy Corpuz at (619) 682-4040 or cgc@barkerkoumas.com