BARKER KOUMAS & OLMSTED
A PROFESSIONAL LAW CORPORATION

# Legal Update

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## INSIDE THIS ISSUE:



# NO-MATCH: NO JOB
## DHS ISSUES NEW EMPLOYER RULES

By Elizabeth J. Koumas

For years, the Social Security Administration ("SSA") has been sending "No-Match Letters" to employers who employed individuals whose social security numbers ("SSN") did not match their personal information. The SSA, however, provided unclear guidance for responding to the letters.

With immigration at the forefront of the national policy debate, it has been noted that many undocumented workers use false SSNs, which in turn has led to the conclusion that many no-match letters pertain to these workers. The Department of Homeland Security (DHS), the agency responsible for enforcement of our immigration laws, has issued a new rule describing the steps an employer must take when it receives a "no-match" letter from DHS or the Social Security Administration (SSA).

In conjunction with the new rules, the DHS also announced that it would increase civil penalties and expand criminal investigations of those employers who knowingly hire unauthorized workers. The rule takes effect on Sept. 14, 2007.

The new regulation clarifies that an employer may be held liable for knowingly employing an undocumented worker if the employer fails to take "reasonable steps" to resolve a discrepancy within 90

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*"In conjunction with the new rules, the DHS also announced that it would increase civil penalties and expand criminal investigations of those employers who knowingly hire unauthorized workers. "*

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days of receiving a no-match letter. The rule also describes the steps that the government will consider to be reasonable.

As stated in the regulations, the steps that a reasonable employer may take include the following:

## Responding to No-Match Letters

**1. Promptly Re-Check Records.**

The regulations state that a reasonable employer checks its records promptly after receiving a no-match letter to determine whether the discrepancy results from a typographical, transcription, or similar clerical error in the employer's records, or in its communication to the SSA or DHS.

If there is such an error, the employer corrects its records, informs the relevant agencies; verifies that the name and number, as corrected, match agency records--in other words, verifies with the relevant agency that the information in the employer's files matches the agency's records.

Making a record of the corrected verification is crucial. The record should include the manner, date, and time of the verification. ICE would consider a reasonable employer to have acted promptly if the employer took such steps within thirty days of receipt of the no-match letter.

**2. Instruct Employee To Correct The Problem**

If checking for typographical errors does not resolve the discrepancy, a reasonable employer would promptly request that the employee confirm that the employer's records are correct.


If the records are not correct, the employer would take the actions needed to correct them, inform the relevant agencies (in accordance with the letter's instructions, if any), and verify the corrected records with the relevant agency.

If, on the other hand, the records are correct according to the employee, the reasonable employer would ask the employee to pursue the matter personally with the relevant agency.

Appropriate steps for the employee may include visiting a local SSA office, bringing original documents or certified copies required by SSA, which might include documents that prove age, identity, citizenship or alien status, and other relevant documents, such as proof of a name change, or by mailing these documents or certified copies to the SSA office, if permitted by SSA.

Prompt action is necessary. Immigration and Customs Enforcement ("ICE") would consider a reasonable employer to have acted promptly if the employer took such steps within thirty days of receipt of the no-match letter.

The regulation provides that a discrepancy will be considered resolved only if the employer verifies with SSA or DHS, as the case may be, that the employee's name matches in SSA's records the number assigned to that name, or, with respect to DHS letters, verifies the authorization with DHS that DHS records indicate that the immigration status docu-

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ment or employment authorization document was assigned to the employee.

In the case of a number from SSA, the valid number may be the number that was the subject of the no-match letter or a different number, for example a new number resulting from the employee's contacting SSA to resolve the discrepancy.

Employers may verify a SSN with SSA by telephoning toll-free 1-800-772-6270, weekdays from 7 a.m. to 7 p.m. EST. See http://www.ssa.gov/employer/ssnvadditional.htm.

**3. Termination Absent Correction**

The regulation also describes a verification procedure that the employer may follow if the discrepancy is not resolved within ninety days of receipt of the no-match letter.

This procedure would verify (or fail to verify) the employee's identity and work authorization cannot be verified using a reasonable verification procedure, such as that described in this regulation, then the employer must choose between:

(1) Taking action to terminate the employee, or

(2) Facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien and therefore, by continuing to employ the alien, violated INA section 274A (a)(2), 8 U.S.C. 1324a (a)(2). (*Hint: Don't choose this option!*)

## Re-Verification Rules

The procedure to verify the employee's identity and work authorization described in the rule involves the employer's and employee's completing a new Form I-9, Employment Eligibility Verification Form, using the same procedures as if the employee were newly hired, as described in 8 CFR 274a.2, with certain restrictions.

The regulation identifies these restrictions:

(1) 93 Day Deadline:

Under the regulation, both Section 1 (``Employee Information) would need to be completed within ninety-three days of receipt of the no-match letter. Therefore, if an employer and employee tried to resolve the discrepancy described in the no-match letter for the full ninety days provided for in the regulation, they have an additional three days to complete a new Form I-9. Under current regulations, three days are provided for the completion of the form after a new hire. 8 CFR 274a.2(b)(1)(ii).

(2) Avoid False SSN Documents:

No document containing the SSN or alien number that is the subject of the no-match letter, and no receipt for an application for a replacement of such a document, may be used to establish employment authorization or identity or both.

(3) Photographic Identification:

No document without a photograph may be used to establish identity (or both identity and employment authorization). (This is consistent with the documentary requirements of the United States Citizenship and Immigration Services' Electronic Employment Verification System (EEVS) (formerly called the ``Basic Pilot Program"). See http://uscis.gov/graphics/services/SAVE.htm.)

***"Employers should apply these procedures uniformly to all of their employees having unresolved no-match indicators. If they do not do so, they may violate applicable anti-discrimination laws."***

**PRACTICAL TIP: By taking the steps set forth in the regulations in a timely fashion, an employer would avoid the risk that the no-match letter would be used as any part of an allegation that the employer had constructive knowledge that the employee was not authorized to work in the United States. Employers should apply these procedures uniformly to all of their employees having unresolved no-match indicators. If they do not do so, they may violate applicable anti-discrimination laws.**

## IMMIGRATION: I-9 FORM CHANGES ON THE WAY

By Elizabeth J. Koumas

The DHS recently announced that it is drafting a rule that will reduce the number of documents that can be used establish identity and work eligibility in the I-9 process.

Currently, the I-9 Form lists 29 categories of documents that can be used to establish identity and work eligibility.

According to DHS, "Employers have little capacity to verify the authenticity of these documents, and the sheer quantity of accepted documents is an invitation to fraud. This regulation will reduce unlawful employment by weeding out insecure documents now used often for identity fraud."

Keep your eyes open for more information on the final rule in a future BKO Legal Update.

## RECORDKEEPING: IN THE HOME STRETCH FOR THE NEW EEO-1 FORM DEADLINE

By Elizabeth J. Koumas

***"Less than a month away - are you ready to file the new EEO-1 form?"***

Less than a month away - are you ready to file the *new* EEO-1 form?

Employers with federal government contracts of $50,000 or more, and 50 or more employees, and those who do not have federal contracts but have100 or more employees must file an EEO-1 Report.

In 2006, the U.S. Equal Employment Opportunity Commission (EEOC) made the first major revision to this form in 40 years, and approved a new version of the EEO-1 employer report.

As set forth in our April, 2007, newsletter, changes to the form affect how covered employers classify managers and supervisors and categorize the race and ethnicity of employees.

The next EEO-1 report is due no later than Sept. 30, 2007.

Despite the deadline looming, affected employers still have unanswered questions, such as:

(1) What has changed about the ways employers can collect race-related data from workers?

(2) Are employers ready to comply with the EEO-1 confidentiality requirements?

(3) How does the new form affect affirmative action obligations?

(4) What steps does the law require an employer to take to insure the accuracy of your report?

(5) And maybe most importantly, what are the consequences if an employer is not finished yet with surveying its workers and completing the new form that's due at the end of September?

For more details, please see the April newsletter, available on line at: http://www.barkerkoumas.com/news/index.php

For more information about No Match letters, I-9 Forms, EEO-1 reporting requirements, or other labor law compliance issues, please contact Elizabeth J. Koumas at (619)682-4811 or ejk@barkerkoumas.com.

## APPELLATE COURT PAGA DECISION FACILITATES EMPLOYEE LAWSUITS

By Christopher W. Olmsted

In Spanish, the word "paga" is a command to "pay." Under California law, PAGA can also mean "pay," when referring to the Labor Code Private Attorneys General Act ("PAGA")—that is, employers who violate certain aspects of the California Labor Code may face the prospect of paying hefty penalties to their employees and employees' attorneys.

Enacted in 2004, PAGA created the right for employees to sue their employers for practically any Labor Code violation. The law allows one affected employee to bring a claim on behalf of all other affected workers. In a PAGA claim, the employee may seek to recover civil penalties typically ranging from $100-200 per employee, per violation, per pay period. The penalties add up quickly over time.

In the past few years, plaintiffs' lawyers have filed a number of PAGA claims, and California courts have been tasked with interpreting the law. One question that the statute does not address is whether PAGA claims must follow the procedural rules for class action lawsuit. Class actions must follow a class certification procedure, which offers important protections for employers and can, at times, act as a barrier to inappropriate class actions.

In *Arias v. Superior Court*, a California Court of Appeal recently decided the issue in favor of employees. Specifically, the Court ruled that representative claims for penalties under the Labor Code Private Attorneys General Act ("PAGA") do not need to follow class certification procedures.

In Arias, the plaintiff employee sued his former employer alleging that he was not compensated for overtime, that he received no meal periods or rest breaks, and that the housing provided to employees was uninhabitable. Among other allegations, he asserted a claim under the PAGA. He sought damages for himself and on behalf of other current and former employees.

The trial court dismissed the case, but the court of appeal reinstated it. The court found that the statute contained no requirement that PAGA claims follow class action procedures.

The court ruled in favor of the employer on another issue. The employee had also filed a claim under California's Unfair Competition Law ("UCL"). As to UCL, the court followed earlier precedent by ruling that such claims *do* have to follow class certification rules.

The court's ruling makes it easier for employees to sue, and could increase the number of wage and hour lawsuits filed. More employers will face not only claims for unpaid wages, but also PAGA penalties.

Employers who have not already begun to do so have more incentive than ever to regularly audit their wage and hour practices to ensure compliance with California law.

***"The court's ruling makes it easier for employees to sue, and could increase the number of wage and hour lawsuits filed."***

## DLSE FILES SPATE OF LAWSUITS AGAINST SAN DIEGO COMPANIES

In the course of our regular monitoring of new lawsuits filed in San Diego courthouses, we have noted a recent spate of suits filed by the Division of Labor Standards Enforcement ("DLSE").

The DLSE filed approximately two dozen lawsuits against San Diego companies in late August.

Most of the suits allege a failure to maintain workers' compensation insurance for some or all employees.

The civil penalties for failure to insure can be significant, and they are often followed up with criminal sanctions initiated by the district attorney.

The DLSE conducts surprise inspections of businesses. Be sure to maintain *continuous* workers' comp coverage for *all* of your workers.

# CAL SUPREME COURT SETS HIGH STANDARD FOR ENFORCEMENT OF CLASS ACTION WAIVERS

By Christopher Olmsted

***"The Supreme Court ruled that class action waivers might be permissible in some circumstances, but class action waivers do not have a bright future in California."***

As seemingly endless cascades of wage and hour class actions hit California employers, the California Supreme Court has issued a new decision strongly in favor of employees. The case is titled *Gentry v. Superior Court*.

The issue relates to arbitration of employee disputes on the one hand, and class action claims on the other. For obvious reasons, some employers prefer arbitration agreements to jury trials. However, formulating enforceable terms of an employer-employee arbitration agreement—that is, an agreement that the courts will agree to uphold—has been very difficult. Employers have to heed a bevy of precedential cases, primary among them the California Supreme Court's year 2000 decision *Armendariz v. Foundation Health-Psychcare Services, Inc.*

Many arbitration agreements include wage and hour claims within their scope, including class action claims. Theoretically, assuming that the agreement is not otherwise unenforceable, wage and hour class action claims can be determined by an arbitrator just like any other employment law claim.

Of course, employers would prefer to have no class action claims at all, either in court or in arbitration. With that end in mind, as described in the *Gentry* case, Circuit City Stores included an arbitration agreement clause that had employees waive their right to class action claims. Although employees retained the right to bring *individual* wage and hour arbitration claims, they could not bring such claims in the form of a collective class action.

Circuit City customer service managers filed a class action claim alleging that they were misclassified as exempt employees, and claiming entitlement to overtime compensation. The employees challenged Circuit City's arbitration agreement, claiming as unenforceable the provision requiring claims be brought individually rather than as a class.

The Supreme Court ruled that class action waivers *might* be permissible in some circumstances. However, the court set a very high standard that, as a practical matter, employers will not be able to meet. In short, class action waivers do not have a bright future in California.

The Court began its analysis by noting that as a matter of public policy, the Labor Code Section 1194 statutory right to receive overtime pay is an important and unwaivable right for employees. Therefore, an arbitration agreement affecting the right to recover such pay ought to be viewed with suspicion.

The court observed that class action waivers have the practical effect of "exculpatory clauses" (they help let the employer off the

# SUPREME COURT: CALIFORNIA EMPLOYERS WIN WITH NEW DISABILITY LAW RULING

By Elizabeth J. Koumas

The California Supreme Court has issued an important new decision with good news for employers. In the case, *Green v. State of California*, the high court ruled that in a disability discrimination case filed under California's Fair Employment and Housing Act (FEHA), the employee bears the burden of proving that he or she is capable of performing the essential duties of the job.

Although this is the standard that already applies under the federal Americans with Disabilities Act, the language of the FEHA created some doubt as to the correct standard under state law. The employee in this case unsuccessfully argued that the employer had the burden of proving that the employee was not capable of performing his duties.

## SUPREME COURT UPHOLDS GROUP PROFIT SHARING INCENTIVE PLAN

By Christopher Olmsted

In *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, the California Supreme Court recently validated an employee profit sharing plan that deducted workers' compensation costs and other expenses from company profits.

Ralphs Grocery implemented a written incentive compensation plan whereby certain employees of each store were eligible to receive, over and above their regular wages, supplementary sums based upon how the store's profitability. Profits were determined by subtracting store operating expenses from store revenues.

Employees of Ralphs sued, claiming the Plan's formula for calculating the benefits violated California law.

The Labor Code prohibits employers from deducting business expenses from wages, including among other things cash and merchandise losses, and the cost of workers' compensation.

The California Supreme Court ruled in favor of Ralphs. In determining profits, it is acceptable to factor in normal concepts of profitability, ordinary business expenses, such as storewide workers' compensation costs, and storewide cash and merchandise losses. After fully absorbing the expenses at issue, Ralphs simply determined what remained as profits to share with its eligible employees in addition to their normal wages.

Deducting expenses from an individual employee's bonus would not have been permitted.

An undecided issue was whether the bonus plan payments counted towards the "regular rate" for overtime calculation purposes.

***"Employers who have incorporated class action waivers into their arbitration agreements should consult with legal counsel regarding possible revisions."***

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hook) because they can make it very difficult for those injured by unlawful conduct to pursue a legal remedy. The court articulated the following concerns:

- Individual wage and hour awards are small, so employees and plaintiff lawyers have no incentive to pursue them, whereas the large sums recovered in class actions provide adequate incentive to pursue the claims.
- Individual employees are reluctant to bring claims out of fear of retaliation, but on a class wide basis, retaliation is not as likely.
- Individual employees may not bring claims because they are ignorant of their rights, but class action claims can be brought on behalf of ignorant employees.
- Individual claims result in "random and fragmentary enforcement" of the employer's legal obligation to pay overtime, whereas the risk of class claims creates an incentive for employers to comply with the law.

The court did not categorically rule that *all* class arbitration waivers in overtime cases are unenforceable. Nevertheless, it set a high standard that will defeat most waivers: "If the trial court concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.'"

In light of the *Gentry* decision, employers who have incorporated class action waivers into their arbitration agreements should consult with legal counsel regarding possible revisions.

# UPCOMING SEMINARS

## PROBLEMATIC EMPLOYEE BEHAVIORS: WHAT DO WE DO NOW?

*Date*: September 12, 2007
*Time*: 11:30 a.m.
*Location*: Carlsbad Hilton Garden Inn, 6450 Carlsbad Blvd. Carlsbad, CA 92009

From mildly annoying, to creating stress and disrupting productivity; from slightly disturbing, to threatening or overtly violent -- this range of aberrant employee behavior can be an incredible drain on an HR professionals' time and emotions.

Join NCPA at its September 12th luncheon for a fascinating discussion of HR best practices and legal compliance recommendations regarding documenting problems, minimizing risk and intervening in problematic workplace behaviors.

Chris Olmsted will be joining HR consultant Ed Sherman for this presentation.

For a pdf of the complete agenda, and for registration information, visit our home page at www.barkerkoumas.com, or contact Kristin Isbell at (619) 682-4040 or kai@barkerkoumas.com.

## LEAVES OF ABSENCE IN CALIFORNIA

This fall, Chris Olmsted and Elizabeth Koumas will present a day long training seminar on FMLA, CFRA, and other protected employee leaves.

**Date: October 25, 2007**

**Time: 8:30 a.m. to 4:30 p.m.**

**Location: Horton Grand Hotel, San Diego California**

Topics Include:

- Federal Family And Medical Leave Act (FMLA) And California Family Rights Act (CFRA)
- California Pregnancy-Related Disability Law Length Of Leave Entitlement
- Interaction Between Family Leave Laws And Disability Laws
- Workers' Compensation
- Strategies For Handling Employee Leaves
- Other Protected Leaves

The seminar will be presented through Lorman Educational Service. For a pdf of the complete agenda, and for registration information, visit our home page at www.barkerkoumas.com, or contact Kristin Isbell at (619) 682-4040 or kai@barkerkoumas.com.

## CEB SEMINAR: UTILIZING DISPOSITIVE MOTIONS

*Date*: October 6, 2007
*Time*: 9:00a.m.-12:00p.m. *Location*: San Diego County Bar Association

Join Elizabeth J. Koumas and other panel members as they discuss strategies and practical tips related to dispositive motions.

## EMPLOYMENT LAW REFERENCE MATERIALS AVAILABLE

If you have missed one of our seminars, we have complimentary written materials available for your review. Examples include:

- Wage and Hour Law for Construction Contractors: How to Avoid Getting Sued
- Employee Discipline and Termination
- Conducting Employee Investigations

Please contact Chris Olmsted or Elizabeth Koumas for complimentary copies.

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