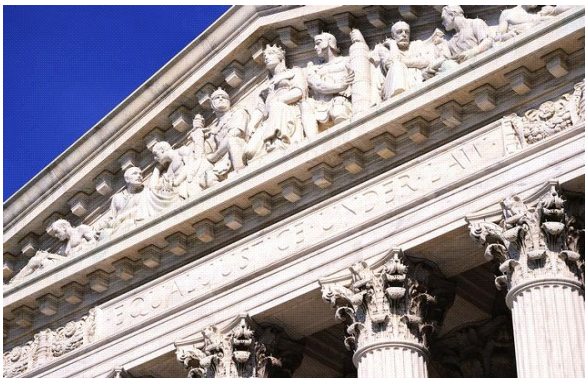
KOUMAS LAW GROUP

Employment Law Update

February 2009

110 West "C" Street, Suite 1810, San Diego, CA 92101/ (619) 682-4811/ www.koumaslaw.com



INSIDE THIS ISSUE:

Yet Another New I-9 Form Required by Employers	**1**
Equal Pay Laws On The Horizon	**2**
Meal and Rest Periods…And The Story Goes On	**2**
Pending California Supreme Court Employment Cases	**3**
Use of Releases In These Tough Economic Times. Are You Protected?	**4**

YET ANOTHER NEW I-9 FORM REQUIRED BY EMPLOYERS

The U.S. Department of Homeland Security (DHS) has published revised I-9 regulations and, once again, a new Form I-9 on December 17, 2008 in the Federal Register. In this firm's August 2008 Legal Update, we advised employers about a new I-9 Form which had been issued, without any substantive changes to it. However, the DHS has now substantively revised the form. **Employers must use the new form beginning on February 2, 2009.**

The revisions to the Employment Eligibility Verification form narrow the list of acceptable identity documents and further specifies that expired documents are no longer considered acceptable forms of identification. All employers must complete an I-9 form for each newly hired employee to verify the individual's identity and authorization to work in the United States.

> The new Form I-9 should only be used for new hires on or after February 2, 2009.

In issuing the new form, the agency commented that an expansive list of acceptable documents makes it difficult to verify valid and acceptable forms and single out fraudulent documents, thus compromising the effectiveness and security of the employment verification process. The following is a summary of the recent substantive changes to the new 2009 form:

- Expired documents are not permitted (e.g., an expired passport is no longer acceptable)
- Documents I-688, I-688A, or I-688B may not be used
- Foreign passports with machine-readable visas may be used

DHS has also announced that an updated version of the I-9 Handbook for Employers is coming. A copy of the new I-9 form is available on the firm's website at www.koumaslaw.com.

SUBSCRIBE NOW!

If you know anyone who would like to receive our complimentary newsletter by e-mail, they should subscribe through the firm's website, at www.koumaslaw.com, or contact Elizabeth Koumas at ejk@koumaslaw.com

EQUAL PAY LAWS ON THE HORIZON

The House of Representatives passed two pay discrimination bills— The Lilly Ledbetter Fair Pay Act (H.R. 11) and the Paycheck Fairness Act (H.R. 12). Senator Clinton (Democrat) was expected to introduce companion legislation in the Senate by the end of January. Although similar legislation passed the House of Representatives in 2008, the Republican Senate vote defeated that bill. Nevertheless, former President Bush had vowed to veto the legislation even if it had successfully made its way through the Senate. In light of our new President, it was unlikely a similar result will occur this time.

The **Ledbetter Fair Pay Act,** which arises after the 2007 decision by our Supreme Court (*Ledbetter v Goodyear Tire & Rubber Co., Inc.)*, gives employees more time to file pay discrimination actions . The time for filing a Title VII charge of employment discrimination with Equal Employment Opportunity Commission (EEOC) begins when discrete discriminatory act occurs, e.g. termination, failure to promote, denial of transfer, or refusal to hire. The **Paycheck Fairness Act** amends the Equal Pay Act of 1963. The amendment provides clarification that a plaintiff who alleges gender-based pay discrimination can seek both compensatory damages, as well as punitive damages. Additionally, the amendment places the burden on employers to prove that pay disparities are not gender-based, and further prohibits retaliation against employees who assert pay discrimination complaints.

On January 29, 2009, Congress passed the Ledbetter Bill. S.181 amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and modifies the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes. The bill would make it unlawful each time an employer writes a paycheck that gives some workers less than others, because of race, sex, disability, religion or national origin. The bill is expected to receive approval from President Obama. Once signed into law, it will apply to bias claims that are filed on or after May 28, 2007.

MEAL AND REST PERIODS… AND THE STORY GOES ON

In this firm's August 2008 Legal Update, we reported on the *Brinker Restaurant Corp. v. Superior Court* decision, which held that employers are only required to *provide* employees with meal and rest breaks, not *ensure* that employees actually take them. In reliance upon that ruling, the Department of Labor Standards and Enforcement modified its enforcement position concerning meal and rest breaks, to follow *Brinker.* Shortly thereafter, the Court of Appeal issued its ruling in *Brinkley v. Public Storage, Inc.*, which (like *Brinker)* held that employers are required merely to provide employees with meal and rest periods, not ensure that employees actually take them.

In the October 2008 issue of our Legal Update, we informed you that the Supreme Court granted

(Continued on page 3)

(Continued from page 2)

review of the *Brinker* decision. As a result, that case holding could not longer be relied upon. Immediately after review was granted, the DLSE issued a memo retracting reliance upon its prior enforcement position, but still directed its staff to adhere to the *Brinker* decision.

Now, the California Supreme Court has also agreed to review the *Brinkley* decision, which means that employers cannot rely on either *Brinker* or *Brinkley* for guidance on how to handle meal and rest periods until the Supreme Court has issued its rulings in these cases. The court was scheduled to begin review in late January.

TIP: Given the unsettled legal status concerning the enforcement relating to meal and rest periods, employers are strongly encouraged to strictly follow meal and rest period rules, by ensuring employees record starting and ending times for meal periods and implementing and enforcing a clear meal and rest period policy which requires breaks are taken accordingly.

PENDING CALIFORNIA SUPREME COURT EMPLOYMENT RELATED CASES

Every year, our California Supreme Court is faced with many requests to review controversial decisions issued by our Appellate Courts. This year is no exception. The following are just a select few of the current employment law related issues which are now awaiting our state Supreme Court to weigh in with its position on these important labor questions:

- ***Harris v Superior Court, Supreme Court Case No. S156555***
  Do claims adjusters employed by insurance companies fall within the administrative exemption (Cal. Code Regs. Tit. 8, §11040) to the requirements that employees are entitled to overtime compensation?

- ***Martinez v Combs,*** Supreme Court Case No. S121552
  Can the officers and directors of a corporate employer personally be held civilly liable for causing the corporation to violate the statutory duty to pay minimum and overtime wages, either on the ground such officers and directors fall within the definition of "employer" in the Industrial Welfare Commission Wage Order 9 or on another basis?

- ***Roby v McKesson HBOC,*** Supreme Court Case No. S149752
  In an action for employment discrimination and harassment by hostile work environment, does *Reno v Baird* (1998) 18 Cal.4th 640 require that the claim for harassment be established entirely by reference to a supervisor's acts that have no connection with matters of business and personnel management, or may such management-related acts be considered as part of the totality of the circumstances allegedly creating a hostile work environment? (*There is another issues pending review regarding the constitutionality of a punitive damages award.)*

- ***Brinker Restaurant Corp. v Superior Court,*** Supreme Court Case No. S166350
  This case presents issues concerning proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly employees.
  - *Brinkley v Public Storage, Inc.*, Supreme Court Case No. S168806
    Same issue as *Brinker*. The court deferred briefing pending decision in *Brinker*.

USE OF RELEASES IN THESE TOUGH ECONOMIC TIMES. ARE YOU PROTECTED?

General releases often accompany severance packages, settlement agreements, or final paychecks. Agreements that contain boilerplate provisions can give rise to legal implications not intended by an employer who utilizes these agreements without consulting employment counsel first. The key provisions which require review and consideration before providing a release to an employee for any reason include the following:

"Any and All Claims" Clauses

The typically reason for using a release is so that an employer can obtain peace of mind when an employee leaves, such that there are no potential pending claims which can be asserted against the employer subsequent to the separation. However, in California, employees cannot release nonwaivable rights, such as unpaid wages and benefits and unemployment claims. Even if a release expressly states that "all claims" are released, such is not the case since an agreement seeking to waive the nonwaiveable statutory rights is void and unenforceable. Therefore, employers should be sure to include in an agreement a disclaimer of any intent to include nonwaivable claims in the release.

ADEA Claims Clauses

Waiver of federal age discrimination claims, under the Older Workers Benefits Protection Act, requires certain procedural-based provision be included to create a valid and enforceable release. When a release is going to be given to an employee who is 40 years of age or older, language clearly demonstrating the release is "knowing and voluntary", affords the employee a 21-day right to review the document, a 7-day right to rescind the employee's signature, before the agreements takes effect are necessary for compliance. Such clauses are not needed for younger employees.

No Re-hire Clauses

Where an employee is terminated involuntarily, many employers usually want to ensure that employee will not seek reemployment in the future with the company, at the same workplace or any satellite location. However, where a termination is due to a lay-off, an employer may want to revise such a clause to exclude laid off employees since such clauses may create issues if an employer wishes to rehire valuable employees after tough economic times pass.

Non-Compete and Non-Solicitation Clauses

In California, such clauses have now been clearly held to be unenforceable, regardless of an attempt to qualify them with limited time frames or narrows geographical parameters. Including such provisions in an agreement may cause prospective employers to shy away from hiring an individual who has signed such an agreement. An employee who is denied a prospective job due to signing an agreement with an unenforceable provision may come after his or her former employer to assert a claim for that lost economic benefit.

TIP: Employee separation is painful enough that employers do not need to compound the effects by utilizing an unenforceable release agreement. Disgruntled or desperate employees faced with cumbersome legal-ease may choose to sue if they are confused about their rights. For more information about drafting valid and enforceable releases, please contact Elizabeth Koumas at (619) 398-8301, or ejk@kounmaslaw.com.