KOUMAS LAW GROUP

Employment Law Update

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110 West "C" Street, Suite 1810, San Diego, CA 92101/ (619) 398-8301/ www.koumaslaw.com

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PROP 8 UPHELD BY CALIFORNIA SUPREME COURT

On Tuesday, May 26, 2009, the California Supreme Court upheld Proposition 8- the November amendment to the state constitution that makes it illegal for same-sex couples to be married in the state of California. The court did, however, rule that the 18,000+ same-sex marriages *already performed* in California will remain legally valid. While the decision will undoubtedly lead to continued controversy and efforts, based on personal views, the court decision may cause employers some confusion about how to administer personnel policies, including benefits.

Same-sex couples married in other states who are employed in California are not recognized as married here, pursuant to the Defense of Marriage Act (DOMA), passed in 1996. DOMA holds that states are not required to recognize the same-sex marriages of people married in other states. Notably, President Obama has purportedly vowed to repeal DOMA, so a change to the federal rules regarding same-sex marriages may also be on the horizon.

Regardless of marital status, California provides protection to domestic partnerships entered into in the state, pursuant to the criteria set forth in California Family Code §297(a). As a reminder, pursuant to California Family Code §297.5, California employers are required to provide the same benefits to registered domestic partners as those afforded to married couples. Thus, wherever the term "spouse" is used in an employer's policies or benefits, it should be supplemented with "registered domestic part-

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ner." Also, the law protecting employees from discrimination based on sexual orientation remains intact. Thus, all employees should be informed that harassing or frequent statements in favor of the decision on Prop 8 could give rise to discrimination lawsuits, and employers should be quick to stop any such conduct in the workplace. Employers should remind all supervisors that the recent Supreme Court decision does not change a company's anti-discrimination policies in any way, shape or form.

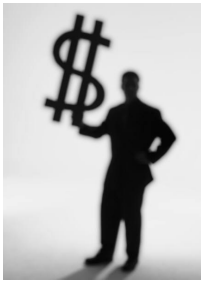
SUPREME COURT TO INTERPRET DEFINITION OF "OUTSIDE SALESPERSON" IN IWC WAGE ORDERS 1-2001 AND 4-2001

As a result of the case *D'Este v. Bayor Corp. (9th Cir. 07-56577 5/5/09)* pending in the Court of Appeals for the Ninth Circuit, the following questions have been certified for review by the state Supreme Court:

1. The Industrial Welfare Commission's Wage Orders 1-2001 and 4-2001 define "outside salesperson" to mean "any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." 8 Cal. Code Regs., tit. 8, §§ 11010, subd. 2(J); 11040, subd. 2(M). Does a pharmaceutical sales representative (PSR) qualify as an "outside salesperson" under this definition, if the PSR spends more than half the working time away from the employer's place of business and personally interacts with doctors and hospitals on behalf of drug companies *for the purpose of increasing individual doctors' prescriptions of specific drugs*?

2. In the alternative, Wage Order 4-2001 defines a person employed in an administrative capacity as a person whose duties and responsibilities involve (among other things) "[t]he performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers" and "[w]ho customarily and regularly exercises discretion and independent judgment." Cal. Code Regs., tit. 8 § 11040, subd. 1(A)(2)(a)(I), 1(A)(2)(b). Is a PSR, as described above, involved in duties and responsibilities that meet these requirements?

If you are a business which utilizes PSRs who are currently classified as "exempt" under the outside salesperson or administrative exemption of either Wage Order 1 or 4, you will be anxious to receive this decision, since it will determine whether you have misclassified such employees and will be subject to exposure for wage and hour violations, including but not limited to unpaid overtime, meal and rest periods.



REMINDER: FEDERAL MINIMUM WAGE INCREASE THIS MONTH

This month, the federal minimum hourly wage that must be paid to California employees will increase from the $ 6.55 per hour rate, which became effective July 24, 2008, to $ 7.25 per hour starting July 24, 2009. Since the current California minimum hourly wage is greater ($8.00/hr.), California employers need not worry. But be mindful if you have operations in *other* states that which have a lower state minimum wage, which may be impacted by the impending increase.

EMPLOYMENT ARBITRATION AGREEMENTS– CAN THEY TRUMP AN ADMINISTRATIVE WAGE CLAIM?

On May 29, 2009, a California Appellate Court decided the question whether a valid employment agreement, which is governed by the Federal Arbitration Act ("FAA"), could be enforced to dismiss a former employee's administrative wage claim for unpaid vacation, filed before the labor Commissioner. The court responded with an affirmative "yes."

In the case ***Sonic-Calabasas A, Inc. v. Moreno***, former employee Moreno filed his wage claim with the Labor Commissioner, pursuant to the California Labor Code § 98 Berman process. Former employer Sonic-Calabasas A, Inc. filed a petition with the Superior Court to dismiss the Berman proceeding and compel arbitration pursuant to the arbitration agreement between the parties. Moreno conceded the agreement was valid. Although the Superior Court denied the petition as *premature*, the Appellate Court reversed the order denying the motion to compel arbitration.

Sonic argued the Labor Commissioner's jurisdiction over the wage claim was divested by the FAA, citing the recent decision in *Preston v. Ferrer* (2008) ___ U.S. ___ [128 S.Ct. 978], in which the Labor Commissioner's jurisdiction was held to be divested by the FAA with respect to a contract dispute arising under the Talent Agencies Act (§ 1700 et seq.) In the alternative, Sonic contended that if the minimum requirements for arbitration established by *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 apply to the wage claim, a Berman hearing was not a prerequisite to arbitration either under *Armendariz* or *Gentry v Superior Court* (2007) 42 Cal.4th 443. The court concluded Moreno waived his right to a Berman hearing and the waiver was not barred by *Armendariz* or *Gentry*.

Take Away Tips

Litigation can be expensive. First, if you are an employer that utilizes an employment arbitration agreement, have it reviewed to ensure it meets the legal requirements of *Armendariz* for enforcement purposes. Second, once any legal claim is asserted by an employee either in court or in an administrative forum (*i.e,* Labor Commissioner, DFEH, EEOC), remember to immediately review personnel files to see if an arbitration agreement exists which requires the asserted claim to be arbitrated. Untimely assertion of a demand or petition to compel arbitration could waive an employer's right to proceed with an employment claim by way of arbitration instead of court or an administrative forum. If you would like to have your arbitration agreement reviewed, please contact Elizabeth Koumas at ejk@koumaslaw.com or (619) 398-8301.

DFEH ISSUES 2008 ANNUAL REPORT

The Department of Fair Employment & Housing ("DFEH") recently submitted its 2008 annual report to the Governor and the Legislature. Last year, the agency established four goals, which included (1) improving the delivery of public service, (2) vigorously enforcing the law, (3) expanding educational outreach, and (4) providing civil rights leadership. As part of carrying out these goals, the DFEH established an automated appointment and a right-to-sue system for persons who are already represented by counsel and/or wish to proceed directly to civil court. The system explains the administrative consequences of electing private action to complainants. As part of a pilot program, a telephonic rather than in-person intake system has been developed. The agency received approxi-

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mately 3000 *more* complaints in 2008 than the prior year, and the agency's prosecution of complaints filed rose almost 30% in the second half of 2008 compared to same timeframe in 2007. The average pre-accusation case settled for over $8,000 and the average post-accusation case settled for nearly $40,000. To for more information about settlements see the press releases of DFEH settlements and judgments at http://www.dfeh.ca.gov/DFEH/Announcements/pressReleases.aspx.

To accomplish its enforcement goal, the agency established a special unit to investigate systematic discrimination. In hopes of reducing the number of potential violations, and in turn claims, Director Phyllis Cheng made 44 keynote and panel presentations; and the DFEH staff made another 40 presentations to: civil and human rights organizations; employee and employer groups; tenant and landlord representatives; plaintiffs' and defense bars; the private and public sectors; and all stakeholders in our diverse state. Under grants it received from the Equal Employment Opportunity Commission, and State Bar Labor & Employment Section, the DFEH produced a website and videos to educate workers about their rights and obligations in the workplace. Director Cheng also formed the first entity at the State Bar devoted to fair housing and public accommodations, and is expected to train attorneys on this important issue.

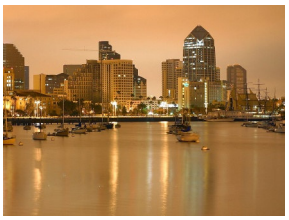
This year the DFEH will celebrate the 50th anniversary of the Fair Employment and Housing Act! For more details in the 2008 annual report, please visit the link to the report on the firm's website.

LEGISLATION AND CASE LAW ON THE HORIZON

The Family and Medical Leave Restoration Act (HR 2161), just introduced in the U.S. House of Representatives, would repeal the changes to FMLA that took effect this past January.

A case currently before the U.S. Supreme Court will address the issue of whether employers can scrap the results of a **job qualification test** if it's later discovered that the test is racially biased.

Two bills introduced into the U.S. House of Representatives in late April would create **new OSHA reporting obligations** for certain employers and stiffer penalties for violations.



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