KOUMAS LAW GROUP

Employment Law Update

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INSIDE THIS ISSUE:

NEW DONOR LEAVE OBLIGATIONS FOR PRIVATE EMPLOYERS

Last month's legal update provided some general information about the new private employer leave rights created by the Governor's passage of Senate Bill 1304. Here are more details of the new leave law. California's private employers with *at least 15 employees* must now provide limited paid leave to certain employees who act as medical "donors." Under the Michelle Maykin Memorial Donation Protection Act, employees who have exhausted all available sick leave may take a paid leave of absence, not exceeding 30 days, for the purpose of organ donation, and not exceeding five days for bone marrow donation. Pursuant to the language of the statute, this leave does not run concurrently with employee leave rights under the Family and Medical Leave Act ("FMLA") or the California Family Rights Act, although it is unclear whether FMLA leave will apply. Public employees are already entitled to similar paid organ and bone marrow donor leave.

Under the new law, private employers must reinstate employees returning from organ or bone marrow donation leave to the same or an equivalent position held by the employee when the leave commenced. Additionally, the new law protects employees from retaliation based on an applicable leave. Finally, the new law creates a mechanism by which aggrieved employees can seek enforcement of the provisions of this new law.

PRACTICE TIP: Private employers should consider revising their employee handbooks and leave policies to include these new leave rights for organ and bone marrow donation

CALIFORNIA SUPREME COURT UPDATE

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:

- ***Brinker Restaurant Corp. v Superior Court (Hohnbaum)***, 80 Cal. Rptr. 3d 781 (2008), *review granted*, 85 Cal. Rptr. 3d 688 (2008). Petition for review after grant of petition for peremptory writ of mandate. This case presents issues concerning the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest periods to hourly workers. Status: Fully briefed by the parties.

- *Brinkley v Public Storage, Inc.*, 167 Cal. App. 4th 1278 (2008), *review granted*, 87 Cal. Rptr. 3d 674 (2009). Petition for review after affirmance of judgment. Briefing deferred pending decision in ***Brinker Restaurant Corp. v Superior Court , supra.*** Status: Holding for lead case.

Why do the pending decisions in these two cases matter?

In 2008, a California appeals court issued an important decision in *Brinker Restaurant Corp. v. Superior Court*, interpreting the state's meal and rest period requirements and giving employers and employees flexibility in scheduling breaks. The court's reasoning interpreted California law to only require that employers make meal and rest periods available, rather than having an affirmative obligation to ensure that such breaks were taken by all employees and within the time limits imposed for such breaks. Shortly thereafter, the California appeals court 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.

However, because the petitions for review of these cases by the California Supreme Court were granted, the appellate courts' decisions were essentially removed from the books, making them no longer law, and employers are waiting anxiously for the Supreme Court to render its decision on meal and rest breaks.

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 that *timely* breaks are taken in accordance with statutory requirements.

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Take Away Tips

1. Have a meal and rest break policy containing "must" and "shall" to emphasize that you authorize employees to take meal and rest periods.

2. Review internal procedures to determine whether there are impediments to employees taking their required breaks by the starting time imposed by the statute.

3. Require employees to record on time cards the stop and start times of their meal breaks, and review time cards to ensure compliance.

4. Have employees acknowledge on time cards that they actually took their meal periods of at least 30 minutes, and were provided time to take rest periods. Where such break was not properly taken, be prepared to pay the one extra hour of pay to the employee under the penalty statute and discipline where not taken properly due to the employee's own inaction.

For assistance with drafting such policies, you can contact Elizabeth Koumas, at (619) 398-8301, or ejk@koumaslaw.com.

- *Pineda v Bank of America, N.A.*, 170 Cal.App. 4th 388 (2009), *review granted*, 93 Cal. Rptr. 3d 536 (2009). Petition for review after affirmance of order granting motion for judgment on the pleadings. (1) When a worker files an action to recover penalties for late payment of final wages under California Labor Code § 203, but does not concurrently seek to recover any other unpaid wages, which statute of limitations applies: the one-year statute for penalties under California Code of Civil Procedure §340(a), or the three-year statue of limitations for unpaid wages under California Labor Code § 202? (2) Can penalties under California Labor Code § 203 be recovered as restitution in an Unfair Competition Law action (California Business & Professions Code § 17203)? Status: Fully briefed by the parties.

Why does the decision in this case matter?

The statute of limitations dictates how far back a plaintiff may go when seeking to recover damages in a lawsuit. The longer the statute of limitations, the further back a former or current employee can reach for monetary recovery and/or wait to sue. Currently, the law applies the three-year statute of limitations where a worker initiates a claim for unpaid wages *concurrently* with waiting time penalties for failure to receive final wages. So, if a worker commences an action within three years of his/her last day of work seeking both unpaid wages and the penalties, he or she can go back three years from the date of the suit and, if the worker prevails, collect unpaid wages *along with* the penalty. However, where that same employee is paid, albeit late, all wages that were due on the final date of work, and afterwards that employee files suit seeking to recover the *penalties only* for that same violation (failure to timely pay final wages), the current law applies a one year statute of limitations from his/her last day of work in which to file that suit seeking to recover those same penalties.

CALIFORNIA LEGISLATIVE UPDATE

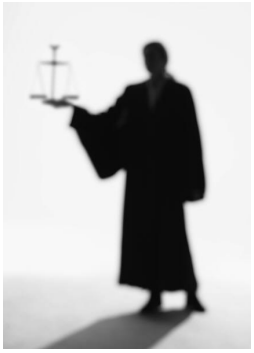
Last month, the firm's newsletter reported some of the important new employment legislation Governor Schwarzenegger signed into law as his term nears it end. Additional new employment laws, also passed last month, that employers should be aware of include the following:

Background Checks- Senate Bill 909

Effective January 1, 2012, this law requires additional disclosures by an employer to an applicant or employee when conducting background checks through a third party "investigative consumer reporting agency." Designed as another measure to combat identify theft, the law requires that employers disclose the website address for the agency's privacy practices, and weather the applicant's or employee's personal information will be sent out of the Unites States.

PRACTICE TIP: Employers should update their background check consent forms to reflect these new requirements, prior to the law's January 1, 2012 effective date, to comply with this new law.

Labor Commissioner Appeals – Assembly Bill 2772



Some employees initiate legal claims against their employers for Labor Code violations, including unpaid wages, before the Division of Labor Standards Enforcement ("DLSE"). An employer (and an employee) has a right to appeal an adverse order or decision by the DLSE to the local superior court, who then hears and decides the matter anew. To do this, however, the new law clarifies that employers must first *post a bond* in the superior court, in the amount of the judgment rendered by the DLSE. This new law overturns the Court of Appeal decision in *Progressive Concrete, Inc. v. Parker (2006),* in which the court held that the posting of a bond was *not* a mandatory condition precedent for appeal.

LIABILITY FOR FAILURE TO TAKE STEPS TO PREVENT HARASSMENT EVEN ABSENT A FINDING OF HARASSMENT

In Dept. Fair Empl. & Hous. v. Lyddan Law Group (Williams) (Oct. 21, 2010) No. 10-04-P, FEHC Precedential Decs. 2010 [2010 WL ___ (Cal.F.E.H.C)], Williams filed an administrative charge against Lyddan Law Group and its owner, Jeffrey Lyddan, alleging that one year prior Lydden had created a hostile workplace and discriminated against her based on race, religion and sex through race-related comments and derogatory emails. She further alleged Lydden retaliated against her after she protested against the conduct.

The Department of Fair Employment & Housing (DFEH), an administrative agency empowered to issue accusations under Government Code §12930(h), issued an accusation against Lydden Law Group and Lydden. In addition to charging the respondents with sexual and racial harassment, creating a hostile workplace, failing to provide a workplace free from harassment, and retaliation, the DFEH also charged a violation of Government Code § 12940(k), for failure to take all reasonable steps to prevent discrimination and harassment from occurring. The administrative judge held that the DFEH did not prove that the respondents were liable for sexual or racial harassment under the Fair Employment and Housing Act (FEHA). Gov.'t Code §12940 (j). It also failed to prove the respondents were liable for retaliation or failure to maintain a discrimination-free workplace. Gov.'t Code §12940 (a) and (f). However, the judge found that in exercising its police powers, the DFEH did prove that Lyddan Group was liable for failing to take all reasonable steps to prevent harassment and discrimination in the workplace.

Lydden Group did not have an employee handbook or written policy against harassment. It also lacked any human resource department, and did not conduct any training for its employees or supervisors in harassment or discrimination prevention. The evidence revealed that Lyddan had undergone such training about three years prior with a former employer. In reviewing the administrative decision, the Fair Employment and Housing Commission (FEHC) affirmed the administrative judge's ruling that the employer was liable for failing to take all reasonable steps to prevent harassment and discrimination in the workplace, under section (k). The FHEC further clarified that its ruling does *not* create a private right of action for an independent violation of Government Code § 12940(k); rather the prosecution of an independent (k) violation is exclusively within the province of the DFEH.

PRACTICE TIP: Sexual Harassment workshops are not only educational, but also evidence your company's pledge to prevent sexual harassment and respond to complaints. It is also important to having a written, communicated and enforced written Harassment/Discrimination Prevention Policy. For assistance with a written policy and/or training, please contact Elizabeth Koumas, at ejk@koumaslaw.com.

FUTURE SEMINARS

Unemployment Insurance 101: Assessing and Responding to Claims for U.I Benefits

Date: January 12, 2011 **Time:** 8:30am-4:30pm
Location: Holiday Inn, Mission Valley Stadium
3805 Murphy Canyon Road **Sponsor:** Lorman Education
Cost: $329 (20% discount for KLG clients)
Continuing education credits available
Brochure available on firm website

Time Off: State and Federal Laws on Employee Leaves

Date: March 23, 2011 **Time:** 8:30am-4:30pm
Location: TBD
Sponsor: Lorman Education Services
Cost: TBD
Continuing education credits available, AIPB, HRCI, HRPD, CPE

For more information about the seminar topics or agendas, please contact Elizabeth Koumas

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