KOUMAS LAW GROUP

Legal Update

Spring 2012

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INSIDE THIS ISSUE:

CALIFORNIA SUPREME COURT FINALLY RULES ON EMPLOYER MEAL PERIOD AND REST BREAK OBLIGATIONS

Long overdue since late 2008, one of the most highly anticipated employment cases in the last decade has been decided by the Supreme Court. The high court's decision provides well needed clarification regarding California's meal and rest period rules, as well as standards for class action certification.

Meal period and rest break questions arose in *Brinker Restaurant Corporation v. Superior Court*, S166350, one of a number of meal and rest break class actions pending in the state. After the *Brinker* trial court certified classes of employees alleging the Brinker Restaurant Corporation had failed to provide meal and rest periods in the number and at the times required by state law, the Court of Appeal reversed and ordered each subclass vacated. The California Supreme Court accepted review and agreed to resolve lingering uncertainty over the nature of rest and meal period obligations and the suitability of such claims for class treatment.

With respect to meal periods, in a unanimous opinion authored by Associate Justice Kathryn M. Werdegar, the court in Brinker Restaurant Corp. v Superior Court, (2012) 53 Cal.4th 1004, explained that neither state statutes nor the orders of the Industrial Welfare Commission (IWC) compel an employer to *ensure* employees cease all work during meal periods. Resolving uncertainty over the scope of an employer's obligations to afford hourly employees meal and rest periods, the California Supreme Court concluded on April 12, 2012, that

> ***an employer's obligation is to relieve its employees of all duty during meal periods, leaving the employees thereafter***

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at liberty to use the period for whatever purpose they desire, but that an employer need not ensure no work is done.

The Supreme Court rejected the "ensure standard", urged by employees which would have meant employers had to "ensure that 30-minute meal periods actually be taken and begin before the end of the 5th hour of work." In essence, such a standard held employers *strictly liable* for meal period violations if one was missed, late, or too short, regardless of the reason. Based on this theory, an employer would be liable for an extra hour of premium pay even where the employee voluntarily returned to work in less than 30 minutes, refused to take a scheduled break, or failed to take the break at the time set by the employer. The decision to reject this policing standard is beneficial to employers.

Under state law an employer must provide its employees with a reasonable opportunity for an uninterrupted 30-minute duty-free period during which the employee is at liberty to come and go as he or she pleases. Absent a statutorily permissible waiver, a meal break must be afforded after no more than five hours of work, and a second meal period provided after no more than 10 hours of work.

On the question of rest periods, the court explained that under the IWC's orders, employees are entitled to 10 minutes of rest for every four hours of work or *major fraction thereof*. Rest periods should not be timed to fall specifically before or after any meal period, but must fall in the middle of a work period "insofar as practicable." An employer must "authorize and permit" employees to take the rest breaks, but need not ensure that they are taken. The Court focused and discussed the obligation in terms of the amount of time rather than the number of breaks. Thus, a net 10 minute rest break is required for shifts of three and one-half hours to six hour, and 20 minutes for shifts of more than six hours up to 10 hours in length, 30 minutes rest for shifts of more than 10 hours up to 14 hours, and so on. The foregoing are just some of the key points to takeaway from this landmark decision.

Practical "Proactive" Tips For Compliance

- Conduct self audits (written policies, practices, forms and agreements)
- Facilitate meal periods
- Use weekly acknowledgement forms
- Maintain accurate time records
- Use waivers and On-Duty Meal Period agreements
- Pay extra hour of pay where not legally provided
- Schedule meal periods and mid-shift rest breaks
- Prohibit off-the-clock work
- Coach and discipline for non-compliance

ARBITRATION AGREEMENT UPDATE: CLASS ACTION WAIVER ENFORCABILITY

Many employers may require employees to sign agreements to arbitrate employment related claims, rather than in court. Over the past several years, we have seen numerous court cases finding arbitration agreements contain invalid clauses. Therefore, employers need to pay more attention to proper drafting and implementation of an arbitration agreement. One of our prior newsletters informed you that arbitration agreements that prohibit class action lawsuits were being found unenforceable on the basis of unconscionability under California law. The 2009 legal update discussed two state Appellate Court decisions, striking down unenforceable class action waivers. In *Sanchez v. Western Pizza*, an employer's arbitration agreement was thrown out because the Court of Appeals said the class action waiver was against public policy. In *Franco v. Athens Disposal Company, Inc.*, a truck driver had signed an arbitration agreement which stated that he agreed not to participate in any class action or act as a "private attorney general" to represent anyone other than himself. The Appellate Court declared the arbitration agreement's class action waiver invalid and found the employee could not be prohibited from acting as a private attorney general under California's Private Attorneys General Act (PAGA).

Two plus years' later, and the legal landscape in the federal Appellate Courts, however, has changed. In April 2011, in *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __ [131 S. Ct. 1740] (*Concepcion*), the United States Supreme Court reiterated that the principal purpose of the Federal Arbitration Act (FAA) is to ensure that arbitration agreements are enforced according to their terms, and held that the FAA preempts state law on the issue, permitting contracting parties ***in consumer agreements*** to agree to an arbitration clause that contains a class action waiver. The Supreme Court declared that the FAA prohibits states from striking down class action waivers. Recently, in March, 2012, the Ninth Circuit reinforced this holding in *Coneff v AT &T Corp.* Likewise, in *Kilgore v Keybank, National Association*, the Ninth Circuit Court of Appeals reinforced that blanket prohibitions on the arbitration of particular claims are preempted by the FAA, *even if a state may profess to have a sound public policy on which to base such a ban.* The Court further noted the particular provision provided clear information about rights plaintiffs would be giving up if they signed the agreement, including a clause that said arbitration fees may be higher than those charged by a court. There was also an opt out provision that allowed plaintiffs to reject arbitration within a specified time of signing the agreement.

In *Jasso v Money Mart Express, Inc.* (4/13/12), a Northern District federal court reinforced the broad language of the recent decision of *Concepcion*, and **upheld enforcement of a class action waiver in an employment contract**. This decision is one of may recent decisions that has found the Supreme Court's reasoning in *Concepcion*— a consumer class action— is to be broadly applied to employment disputes as well. The case law interpreting the enforceability of arbitration agreements is complex and frequently changing. Therefore, employers should consult with experienced employment law counsel before implementing new agreements or modifying existing ones./

100 PERCENT DISABLED: DO YOU HAVE AN OBLIGATION TO ACCOMMODATE?

California's disability laws are intended to provide persons with disabilities the opportunity for employment. Protection under California's Fair Employment and Housing Act (FEHA) is far broader than provided by the federal Americans with Disabilities Act (ADA). To qualify as a disability under FEHA, an impairment need only "limit", not "substantially limit", a major life activity. "Working" is a major life activity under FEHA, and the inability to do a particular job (as opposed to a broad class of jobs) is sufficient to qualify as a limit on the major life activity of "working;" FEHA makes the employer, not the employee, prove whether the employee has the ability to perform essential job functions. FEHA applies to employers with more than 5 employees (as opposed to 15 for the ADA). Also, FEHA makes failure to engage in the "interactive process" an unlawful employment practice.

When it comes to employees and applicants with disabilities, FEHA generally requires two things of employers:

1. Employers must provide reasonable accommodation for those employee and applicants who, because of their disability, are unable to perform the essential function of their job;
2. Employers must engage in a timely, good faith interactive process with employees or applicants in need of reasonable accommodation.

An employer's obligation arises when it receives notice that an employee suffers from a disability that impairs job performance. Notice may come from any source including the employee, application for employment, a family member, a co-worker, or the existence of an obvious disability. FEHA *prohibits inquiry about a disability* unless the employer has objective facts indicating that a medical condition is impairing job performance.

Essential Job Functions

After receiving notice, the employer should carefully evaluate the job's essential functions. Both FEHA and ADA define "essential functions" in the same way. When determining whether a job function is essential, the following should be taken into consideration:

1. The position exists to perform that function;
2. There are a limited number of employees available to whom the job function can be distributed
3. The function is highly specialized.

In the case of an employee returning to work after a leave, fitness for duty certifications (release to return to work) may be required under certain circumstances:

1. There is a need to determine whether an employee is still able to perform the essential functions of the job;
2. It is necessary as part of the reasonable accommodation process;
3. It is required by applicable federal, state or local law, and is job-related and consistent with busi-

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ness necessity.

In all circumstances, the fitness for duty certification (provided by a physician) must be defensible as consistent with business necessity. All documentation relating to an employees disability must be kept separately and confidentially, as any other medical records, except when a supervisor or manager needs to be informed of restrictions for accommodation purposes or for safety reasons, such as when emergency treatment might be required.

The Interactive Process and Reasonable Accommodation

The interactive process is a dialogue between the employer and a disabled individual to determine whether there is a reasonable accommodation that would enable the employee or applicant to perform the essential functions of the job. State law incorporates guidelines developed by the Equal Employment Opportunity Commission (EEOC) in defining an "interactive process" between the employer and the employee or applicant with a known disability. *Critical to this process are the following basic guidelines*:

- Consult with the individual to ascertain the precise job-related limitations;
- Explore how the limitations might be overcome with a reasonable accommodation;

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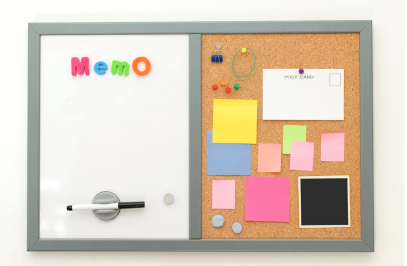
NLRB POSTING OBLIGATION FURTHER DELAYED BY COURT OF APPEAL



On April 17, 2012, the DC Circuit Court of Appeals issued an order further delaying the effective date the posting requirement. In 2011, the National relations Labor Board (NLRB) issued a controversial ruling requiring most private employers to post an "Employee Rights Notice" that discusses rights under the National Labor Relations Act. Under this rule, every private employer whose workplace falls under the NLRA must post the new 11-by-17-inch notice in the same location that other workplace notices are typically posted. It's important to remember that NLRA rights apply to union *and* nonunion workplaces, so even nonunionized workplaces must comply with the notice requirement. The NLRA does, however, exclude agricultural, railroad, and airline employers.

However, a number of lawsuits filed to challenge the NLRB's authority to issue the rules, and earlier in 2012, a federal district court for the District of Columbia determined that while the NLRB had the authority to issue the posting requirement, it did not have the authority to assess a penalty against employers due to failure to post the notice. A federal district court for South Carolina disagreed., It found the NLRB did not possess the power to require the notice.

Due to the ongoing controversy over whether the NLRB has the authority to impose the posting requirement, the DC Circuit Court of Appeals has set a hearing for September 2012, to address the issue, thus delaying the effective date for the posting until at least that time. It may even be delayed further./

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- Identify and document the consideration of a number of potential accommodations; and
- Assess the effectiveness of any accommodation that is mutually agreeable to determine essential functions of the job are being performed.

Examples of reasonable accommodations include facility or work area modifications; the purchase of equipment, devices or tools; job restructuring; modified or part-time work schedules; leaves of absence; telecommuting; reassignment of *non-essential* functions; the hiring of readers, transcriptionists and interpreters; and reassignment to other positions. Work area modifications might include elevators, quiet or private work areas, or workstation configuration changes. Typical equipment requests include ergonomic chairs, modified keyboards, and tools or machines to help with lifting.

An employee must cooperate in the interactive process and cooperation may include responding to the employer's request for medical information and/or documentation. Although the preferences of the individual in the selection of the accommodation should be considered, the accommodation implemented should be one that is most appropriate for both the employee and the employer.

After exploring accommodation alternatives, the employer should implement a reasonable accommodation that does not impose an undue hardship and evaluate whether the implemented accommodation enables the employee to perform the job. If the accommodation proves ineffective, the employer should consider and implement an alternate reasonable accommodation, if one exists. This process of implementing and evaluating accommodations should continue until either a reasonable accommodation proves effective or all reasonable alternatives have been exhausted. Finally, if no reasonable accommodation exists for the employee's position, the employer **must** offer reassignment to any other open position that the employee can perform.

Undue Hardship

As mentioned above, FEHA permits an employer to refuse to accommodate a request for reasonable accommodation when it would present an undue hardship to the operation of the employer's business. *If an employer denies accommodation due to an "undue hardship", it **must be able show** that the accommodation requires significant difficulty or expense, when considered in the light of the following factors:*

- The nature and cost of the accommodation needed;
- The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of person employed at the facility, and the effect on expenses and resources or the impact of these accommodations upon the operation of the facility;
- The overall financial resources of the employer, the overall size of the business with respect to the number of employees, and the number, type, and locations of its facilities;
- The type of operation, including the composition, structure, and functions of the workforce of the employer;
- The geographic separateness, administrative or fiscal relationship of the facility or facilities.

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One of your employees is injured on the job and receives a 100 percent total permanent disability rating in a workers' compensation proceeding. If he asks to return to work, can you turn him away without running afoul of California's Fair Employment and Housing Act (FEHA)?

What if you have a policy or practice of allowing disabled employees to work light-duty assignments? The California Court of Appeal answered these critical questions in a recent case.

Summary

Rory Cuiellette, a Los Angeles Police Department (LAPD) officer, was injured on the job and received a 100 percent disability rating in connection with his workers' comp claim. Following disability leave, he asked to return to work in the fugitive warrants unit, and provided a medical note authorizing him to perform "permanent light duty— administrative work only." The city allowed Cuiellette to return to work at a desk job in the fugitive warrants unit, which was an administrative assignment. However, Cambridge Associates, the city's workers' comp claims administrator, believed the city couldn't reemploy someone who received a 100 percent disability rating for workers' comp purposes. The city deferred to Cambridge's advice. A week later, Cuiellette's supervisor notified him that the city wouldn't allow him to continue to work because he was "100 percent disabled." He ultimately filed suit against the city for disability discrimination.

Case History

The case came before the California Court of Appeal—three times. In the first appeal, the court held that the 100 percent total permanent disability rating received in the work comp proceeding wasn't a legitimate nondiscriminatory reason for the adverse action. The city appealed again following a large jury verdict in Cuiellette's favor. In the third appeal, the city argued that the trial court's findings that it was liable for disability discrimination and failure to accommodate weren't supported by substantial evidence because Cuiellette wasn't able to perform the essential duties of a police officer with or without reasonable accommodation, even if he was able to perform the essential duties of the administrative court desk position.

The essential functions of a police officer include many strenuous tasks, such as making arrests, taking suspects into custody, operating vehicles in emergency situations, and undergoing training exercises that simulate those duties. The trial court found there was persuasive evidence that the city maintained "permanent 'light duty' vacancies in the fugitive warrants units for the specific purpose of accommodating disabled officers who couldn't perform the strenuous tasks of a peace officer position. In accordance with that policy, the city placed Cuiellette in an admin position in the fugitive warrants unit. He was able to perform the essential functions of that position from May 27 to June 3, 2003. Thus, the trial court found that the city failed to accommodate Cuiellette and discriminated against him on the basis of his disability. The court stated, "In addition to considering Cambridge's advice regarding workers' compensation issues, the City should have independently evaluated [his] situation with reference to FEHA." If the city was concerned about Cuiellette's physical limitations, "*it had an affirmative duty to engage in an interactive process and to make an effort to accommodate [him], rather than simply take him off the job.*"

Mid-Year Employment Law Check Up

If your organization has not conducted an annual audit of its employment practices and procedures, now is the perfect time for a mid-year check up. To ensure that your company is not acting unlawfully and placing itself in financial harms way, since even one wage and hour violation can be costly to any sized company, and significantly jeopardize the continuing stability of smaller businesses, answer the following questions to determine whether a legal audit is in order:

- We have a legally reviewed handbook updated with new State and Federal laws. Yes No
- We have the 2012 Federal and State posters displayed in our workplace. Yes No
- We have valid I-9s for every one of our employees. Yes No
- We are aware of the new hiring requirements stated in AB 469. Yes No
- We have written job descriptions for every position. Yes No
- We know how to handle a State Unemployment dispute and appeal. Yes No
- We know during the hiring process what questions are illegal to ask. Yes No
- We understand how to explore accommodations and handle an ADA claim. Yes No
- We have a formal anti-harassment policy and annually conduct employee training. Yes No
- We understand the new 2012 obligations for commissioned employees. Yes No
- We understand the new employee classification law SB 459. Yes No
- I am aware of meal and break time requirements and have currently valid policies. Yes No

If you responded "No" to any of the above questions, your organization could be facing exposure to legal claims by employees and/or governmental agencies that could be easily avoided. **Contact Elizabeth Koumas at (619) 682.4811 or ejk@koumaslaw.com to assist with the compliance needed.**/

FUTURE PRESENTATIONS

Employment Law Update: From A to Z

Date December, 2012 **Time:** 8:30a.m. to 4:30p.m.

Location: TBD

Sponsored By: Lorman Educational Services

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