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What You Need to Know About Immigration Compliance

Last month, in response to the failed efforts of Congress to pass comprehensive immigration legislation reforms, the Bush Administration issued regulations to improve enforcement of existing immigration laws. Nearly all employers will be affected by the changes made under these regulations and should be aware of the policies in the event they are contacted by the Social Security Administration (SSA). The following explains the regulations that impact employers and provides compliance tips for your company:

Crackdown on Employment of Illegal Aliens Through "No Match" Letters

The new immigration enforcement policies increase the penalties of noncompliance with "no match" letters received from the SSA. A "no match" letter advises an employer that the name or social security number provided on an employee's W-2 tax forms does not match SSA records. The regulations require employers to resolve the mismatch within 90 days, or face fines and penalties for hiring individuals unauthorized to work in the

SAVE THE DATE! November 7, 2007

Hill, Farrer & Burrill, LLP and Mellon First Business Bank will be sponsoring a luncheon on the topic of "What You Need to Know About Immigration Regulation Compliance and Your Company" and other recent developments in Labor & Employment Law on November 7, 2007. The luncheon will be held at City Club on Bunker Hill, 333 S. Grand Avenue, 54th floor, in downtown Los Angeles, from noon to 1:30 p.m. A detailed discussion of the new "no match letter" immigration regulations will be held, and the opportunity will be provided to answer questions you may have regarding the new rules. We

will also be providing an update on recent Supreme Court cases, including the status of the *Gattuso v. Harte-Hanks* case (discussed in this Newsletter) which will provide important guidance on how employers may reimburse employees for business-related expenses.

We hope to see you there. If you are interested in attending the luncheon, please contact LaVenía Forte, assistant to James Bowles, at (213) 620-0460.

This occasional newsletter is published by Hill, Farrer & Burrill LLP as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advice of the Firm regarding any specific matter.

United States. As expected, there were immediate attempts to block or at least delay implementation of the regulations, and on August 31, 2007, a federal judge in California issued a temporary restraining order enjoining the Social Security Administration from sending its first round of no-match letters to employers. The court expressed serious concern with whether the new rule went beyond the statutory authority of either the Department of Homeland Security or the SSA. On October 1, 2007, the court will decide whether to issue a preliminary injunction to stop implementation of the rule.

While the current legal challenges have thwarted a September start date for the new regulations, employers should prepare to comply with "no match" letters and seek legal counsel if they are approached by the SSA. If the regulation succeeds legal challenge, it is expected that civil fines will be raised approximately 25 percent in coming months for employers who knowingly hire illegal immigrants, and criminal arrests are also expected to increase.

If your company receives a "no match" letter, it should:

First, review company records within 30 days of receipt to ensure the mismatch was not due to an administrative or clerical error. If the discrepancy is resolved by such an error, the company should contact the SSA and verify that the employee's name and social security number now match the SSA's records.

Next, if the mismatch is not resolved through a review of company records, ask the employee to verify the accuracy of the employer's records. If the employee states

that the company records are incorrect, the company should correct its records and verify the match with the SSA's records. If the employee states that the company's records are correct, the company should ask the employee to contact the SAA to resolve the issue and provide a deadline for doing so prior to the termination of the 90 day period.

If the mismatch remains unresolved at the conclusion of 90 days from receipt of the "no match" letter, the company must verify the immigration status and identity of the employee by completing a new I-9 form for the employee. The employee must complete section one and the employer must complete section two of the form within 93 days of receiving the "no match" letter. The company cannot accept any document containing a disputed social security number or any receipt for the replacement of said document to establish employment authorization status or identity. The employee must present a document containing a photograph to establish identity or identity and work authorization. The prior I-9 forms should be retained.

If the company cannot verify the immigration status of the employee, it risks civil and potential criminal liability for hiring an undocumented alien worker, and should proceed with termination.

Reduction in Number of Documents that Confirm Eligibility for Employment

The Administration is expected to publish a regulation that will reduce the documents an employer must accept to confirm an individual's identity and work eligibility. Currently, nearly 30 different types of

documents may be used for these purposes. The impending regulation will reduce the number of acceptable documents to improve the verification capacity of employers and reduce the risk of unlawful employment of illegal workers.

Mandatory Participation of Federal Contractors and Vendors in E-Verify

New regulations will also require federal government contractors and vendors to participate in E-verify, an internet program that allows employers to quickly determine an individual's employment eligibility. Other employers are not required, but encouraged, to participate in this program. The program will be expanded to include cross-checks of visa and passport information, and the SSA will be asking states to volunteer their DMV photos to prevent illegal immigrants from using fake driver's licenses to obtain employment. A potential benefit to participating is that the Department of Homeland Security and the SSA will likely focus their search for violations on non-participants.

No Provisions For Gaining Legal Status

Because the President lacks the authority to grant legal status to the millions of undocumented workers by regulation, the new measures only address workplace enforcement and do not provide a means by which undocumented workers can gain legal status.

For more information, U.S. Immigrations and Customs Enforcement has a continually updating FAQ page on its website, located at: <http://faq.ice.gov>. The attorneys at Hill, Farrer & Burrill, LLP also invite you to contact

them with any questions you may have.

Employers Win 2 of 3 Recent California Supreme Court Arguments; Class Arbitration Waivers Hang in the Balance

As counsel for many California employers, we have been anxiously awaiting the decisions in three important cases undertaken for review by the California Supreme Court this term. These cases tested the baseline for bringing a disability discrimination claim under California law, the legality of employee bonus schemes based on net profits, and the viability of class arbitration waivers in employment agreements. In the first two of the three cases, unexpectedly employer-friendly decisions were reached by a 4-3 court majority. A swing vote by Chief Justice Ronald George in the third case, however, leaves class arbitration waivers in jeopardy of being deemed unconscionable.

- **Disability Discrimination Plaintiffs Must Prove Capability of Performing Essential Job Functions (*Green v. State of California*)**

In *Green v. State of California*, the court held that an employee raising a claim of disability discrimination under the California Fair Employment and Housing Act (FEHA) bears the burden of proving that he or she is capable of performing the essential job functions of the position held or desired in order to establish a prima facie case of discrimination. The court rejected the argument that inability to perform, with or without accommodation, is merely an affirmative defense

that may be raised by an employer for which the employer would bear the burden of proof.

This decision brings FEHA into line with the Americans with Disabilities Act, under which employees have always borne the burden of establishing that they were "qualified" as part of their underlying case. Writing for the majority, Justice Chin stated that in cases of disability discrimination a plaintiff has not shown the employer did anything wrong until establishing that he or she was capable of performing the job with reasonable accommodation.

- **Profit-Based Incentive Plans Found Lawful Under CA Law (*Prachasaisoradej v. Ralphs Grocery Company*)**

In *Prachasaisoradej v. Ralphs Grocery Company*, the court upheld an employee bonus plan under California law that took into account employer expenses. The ruling overturns two appellate court decisions finding that the plan, which provided employee bonuses based on a comparison of overall store profitability to a profitability target set by the employer, violated labor laws by taking into account store expenses such as cash shortages, merchandise loss and the cost of workers' compensation. The lower courts deemed this practice an unlawful recovery of business expenses out of employee wages under California law.

Rejecting such a finding, the court noted that while compensation plans that deduct a portion of an employer's expenses from employee commissions based on an employee's particular efforts are unlawful (because they reduce the offered or promised compensation), the

Ralphs plan did not involve a deduction from offered or promised wages. Rather, during any period in which Ralphs operated at a profit, it provided *supplemental* compensation as an incentive to continue store profitability and as a reward for collective performance by the employees. The employee was already paid for all wages "promised," and all additional money provided through such a plan would otherwise be profits that Ralphs was entitled to retain for itself.

- **Class Arbitration Waivers Not Presumptively Invalid, But Subject to Close Scrutiny (*Gentry v. Superior Court*)**

When the court granted review of *Gentry v. Superior Court (Circuit City Stores)*, it was feared that the court would strike the final blow to class arbitration waivers. After issuing positive rulings in *Green* and *Ralphs*, hope was restored that the court would also favorably rule in *Gentry*. Ultimately, the ruling comes down somewhere in between: while it significantly reduces the availability of class action waivers in arbitration agreements, it does not deem such waivers unconscionable.

The court stated that the lower courts were best left to determine whether a particular class action waiver was valid, and listed a variety of factors that should be considered in the case where a group of employees allege their employer has systematically denied proper overtime pay. These factors include: "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime

pay through individual arbitration.”

After assessing these factors, if the trial court concludes that a class arbitration is likely to be more effective in asserting the rights of the employees, and determines that disallowing a class action will likely cause less comprehensive enforcement of overtime laws for the allegedly affected employees, it must invalidate the class arbitration waiver to ensure the vindication of unwaivable rights.

All three of these cases change the landscape of employment law in California and clarify what rights employers have vis-à-vis their employees. We welcome any questions you may have about these rulings and their effects on your company.

FedEx Must Repay Expenses of Drivers; High Court to Clarify Duty to Indemnify Employee Expenses

On August 13, 2007, the California Court of Appeals in *Estrada v. Fed Ex* held that despite executing agreements identifying its drivers as independent contractors, the drivers used by FedEx were in fact its employees and maintained the right to reimbursement of work-related expenses. The appellate court utilized the common law test for employment, which rests on whether the principal has the right to control the manner and means by which the agent performs his work.

Because FedEx controlled the details of the drivers' performance, including their clothing and hair style, required them to use specific scanners and forms obtained from FedEx,

caused them to follow regular schedules and routes, employed supervisors with the authority to modify such routes, and provided a service for FedEx's customers rather than the drivers, the court deemed the drivers employees of FedEx. Under Labor Code Section 2802, an employer must indemnify his employee for all necessary expenses incurred by the employee directly resulting from the discharge of his duties. Because the drivers were employees, FedEx was required to reimburse their expenses.

A separate case dealing with Labor Code Section 2802, *Gattuso v. Harte Hanks Shoppers*, was heard by the California Supreme Court in September 2007. There, the issue was whether an employer may indemnify its employees' expenses by paying increased wages or commissions instead of reimbursing them for their actual expenses as they occur. As Section 2802 is alleged in many wage and hour cases, the court's instruction will provide guidance and enable the compliance by employers. The opinion is due out by December. We will keep you posted on the court's findings.

Ninth Circuit Enforces DOL Supervised Waivers

The Fair Labor Standards Act (FLSA) authorizes the U.S. Department of Labor to supervise the settlement of claims made under that statute. Under section 16(c) of the law, the Secretary of Labor is authorized to supervise the payment of unpaid minimum wages or unpaid overtime compensation only to any employee or employees, and the agreement of any employee to accept such payment constitutes a waiver

by such employee of any right he has to file a lawsuit. The statute was passed by Congress in 1949 in order to encourage settlement of FLSA claims by enabling employees to recover an agreed-upon amount in exchange for their waiver of the right to seek liquidated damages, attorneys fees and costs in a private civil action.

In the recent case of *Dent v. Cox Communications Las Vegas, Inc.*, the U.S. Ninth Circuit Court of Appeals ruled that such waivers were effective to preclude a lawsuit brought by an employee who entered into such a settlement, but only for the period covered by the settlement agreement. The employee in that case signed a WH-58 standard form "Receipt for Payment of Lost or Denied Wages, Employee Benefits, or Other Compensation," by which he acknowledged receipt of unpaid wages for the period between May 2002 and October 2003. The employee then filed a lawsuit under the FLSA in August 2004, claiming that he was entitled to recover unpaid overtime beginning in August 2001. The appellate court was faced with the issue of whether the settlement form the employee entered into was effective to bar the entirety of his claim.

The court ruled that the settlement was only effective to bar the employee's claim for the period listed in the settlement form, and not the period prior thereto. The court reasoned that Congress approved of DOL supervised agreements regarding wages owed for a specific time period, so long as all further claims based on that period would be waived. Because a valid waiver only required the employee to accept the amount tendered by the employer for the time

period covered in the settlement form, it did not extend to periods outside the form for which the employee claimed unpaid overtime in his private lawsuit.

The case provides an important reminder to employers who seek to settle FLSA claims. If such claims are settled by reaching a private agreement which is not supervised by the Department of Labor, it is possible for the an employee to sue later on under the FLSA and claim that he was not actually compensated for all overtime hours worked. Such claims are extremely rare, however, in view of the fact that overtime pay claims are usually contested and the employee's execution of a settlement agreement for a certain amount provides substantial evidence of the value of his claims. In resolving claims of this nature, it is also useful to recite in the agreement that after receipt of the settlement payment the "employee has been paid in full for all hours worked, including overtime, vacation, and any other compensation to which he is entitled" from the employer.

Construction Site Held "Separate Site of Employment" for WARN Purposes

The Ninth Circuit recently decided another recent case of import to employers, in which it analyzed the application of the Workers Adjustment and Retraining Notification (WARN) Act to employees of construction companies. In *Bader v. Northern Line Layers, Inc.*, the court addressed the question of whether construction workers' "site of employment" was the company headquarters or the workers' actual work site, for the

purpose of determining whether 50 or more laid-off employees worked at a "single site of employment." The court in that case held that the sites of employment of the construction workers were their individual job sites and that they were not entitled to 60 days' notice of a layoff because 50 or more employees were not employed at any such site.

The employer in that case provided specialty construction services, primarily for telecommunication companies, in various western states stretching from California to Montana as well as certain other states. The company employed 33 employees at its corporate office in Billings, Montana, at which the company's overall operations were administered. Most of the construction workers worked at remote sites and were residents of many different states, and some of them moved from job site to job site. The case was brought by 64 construction employees who had been laid off between January and March 2003 at various job sites. They sued based on their contention that the Company instituted a "mass layoff" by releasing 50 full-time employees within a 30 day period at a single site of employment, which comprised at least 33% of the total work force at this site.

Relying on the regulations to the federal WARN Act, the court ruled that remote construction project sites cannot be aggregated for the purpose of determining whether 50 or more employees were laid off within a 30 day period, because the sites were not in "reasonable geographical proximity" or "the same geographical area." The construction employees were also supervised by separate managers, and did not report to

anyone in the Billings Corporate office. Accordingly, even though accounting, billing, payroll and administrative functions were performed out of the corporate office, the laid off employees were not considered to have worked at that location, and could not claim that they were entitled to the 60 days' notice of mass layoff based on their contention that the Billings office was their "site of employment."

Employee Held to Have Promptly Reported Sexual Harassment

Under Title VII of the U.S. Civil Rights Act of 1964, employers may assert certain affirmative defense to a "hostile work environment" sexual harassment claim under certain circumstances, based on (1) evidence that it took reasonable steps to prevent harassment from occurring and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. In *Craig v. M & O Agencies, Inc.*, the Ninth Circuit ruled that an employer could not establish the second prong of this defense, when an employee waited only 19 days to report alleged harassment by her supervisor.

The case involved a claim by a branch manager against an interim president, who made repeated inappropriate comments to the employee about her legs and how she should wear shorter skirts. The president told the manager that he would like her to take off a blue dress she was wearing, invited her back to his house to drink wine in his hot tub, told her "it's not a matter of if but when" something would happen

between them, and later followed her into a women's restroom in which he grabbed her arms, gave her an open mouth kiss, and stuck his tongue in her mouth. After the manager reported the president's conduct, he began retaliating against her by ignoring her and failing to respond to her emails or other requests for information.

The branch manager later sued for sexual harassment under Title VII. The court ruled that the employer satisfied the first prong for affirmative defense – that it “exercised reasonable care to prevent and promptly correct any sexually harassing behavior” – because it had a mechanism in place for filing complaints about sexual harassment and addressed the situation promptly. In this regard, it told the president to stay away from the branch manager after it received the complaint, hired outside counsel to investigate and make recommendations, had the employee report to another individual other than the President, and conducted sexual harassment training.

However, the court held that the manager's minor delay in reporting the behavior did not meet the stringent standard required for the second prong of the test. The court stated that it did not think that in this situation a 19-day delay in reporting the alleged harassment was unreasonable, reasoning that an employee in the manager's position “may have hoped the situation would resolve itself without the need of filing a formal complaint.” The court also noted that the Manager “justifiably may have delayed reporting in hopes of avoiding what she perceived could be adverse – or at least unpleasant – employment consequences.” The court

accordingly allowed the employee's hostile work environment sexual harassment claim to proceed.

Software Engineer Held FLSA–Exempt

A software engineer working for a healthcare information firm was not entitled to overtime pay under the FLSA, even if her work was limited to identifying and resolving software defects, a federal district court in Missouri ruled on August 28, 2007.

In *Young v. Cerner Corp.*, a software engineer was hired at a salary of \$65,000 per year, which was one pay grade above the company's entry level for new engineers. Although her job description stated that she was responsible for writing computer code to use as specifications, the employee claimed that during her 13 months of employment she never wrote any code. Instead, she alleged that she tested systems and programs using a tool called Informatica, which allowed her to determine if a program was pulling correct data from a database. The employee claimed that she relied on the Informatica program and did not develop or execute her own test plans, but admitted that when she identified a resolution to a problem she tested it to confirm its effectiveness. She also admitted that on at least one occasion she wrote modifications to a stored computer procedure that was successful to other users.

The engineer resigned from her employment after being written up for failure to perform her job in a satisfactory manner. She then sued for unpaid overtime in federal court. The court found that she qualified for the computer professional

exemption, because her work included testing solutions to software problems and her modifications to the stored computer procedure was “not a simple copy and paste solution.” The court also found that the employee did “more than just follow instructions,” and that it was ultimately her job to apply analysis and judgment in resolving problems. The court concluded that “at the very least, [her job] required the design, analysis, creation, testing and modification of computer systems or programs based on and related to use of system design specifications,” and she therefore met the requirements of the exemption.

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP.

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