

Hill, Farrer & Burrill LLP
Attorneys at Law

Management News

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

Spring 2003
2003-1

Route To: _____

HAS YOUR COMPANY HAD AN "EMPLOYMENT POLICIES CHECKUP" LATELY?

Amid the continuing proliferation of employment-related litigation, including wrongful termination suits, discrimination and harassment cases, and overtime class actions, employers should make every attempt to keep their employment policies up to date with current law. Ongoing consideration should also be given to ensuring that employees are properly classified as exempt or non-exempt for overtime pay purposes, and to seeing to it that the company's compensation systems are in accord with the law.

Hill, Farrer & Burrill LLP has assisted companies in maintaining policies and procedures necessary to avoid costly litigation for many years, and routinely reviews employer policies and compensation programs to ensure their compliance with the law. An "employment policies checkup" typically includes:

1. ***Review of Employee Handbook Policies*** – Does the Handbook contain the necessary at-will language, which employees are required to sign? Does it have the requisite anti-harassment policy required by law, as well as a workable family and medical leave policy if the company employs the requisite number of people? Does it have a sick leave policy that complies with the many rules for calculating the number of "sick leave days" available, a substance abuse policy, and a vacation pay policy which does not require forfeiture of earned vacation after a set amount of time?

2. ***Determination of Exempt Status*** – Has the company recently reviewed the duties performed by exempt employees? Is it comfortable with its classification of employees as exempt under the administrative, executive, or professional exemptions, or are there questions concerning potential liability for any specific group of jobs? Is it confident

that the persons employed as outside salespeople spend most of their day engaged in sales activity, as required by that exemption?

3. ***Review of Compensation Programs*** – Is the company's method of compensating its employees consistent with current law? If commissions or bonuses are paid, are payments made under the systems and time frames outlined in the DLSE Enforcement Manual? Is overtime being calculated and paid properly on a consistent basis?

4. ***Arbitration Agreement*** – Does the company either have or desire to have an enforceable arbitration agreement? If so, does the company prefer a "stand-alone" agreement or a "Dispute Resolution Policy" that could be added to its Employee Handbook? How does the company plan on disseminating the arbitration program to its employees?

A thorough self-audit of the company's employment policies and compensation programs is strongly recommended in order to maximize your chances for avoiding employment-related litigation. If you desire our assistance in reviewing any aspect of your employment policies or programs, please call us at (213) 620-0460.

STATE SUPREME COURT EXTENDS ARBITRATION REQUIREMENTS TO WRONGFUL DISCHARGE CLAIMS

In the recent case of *Little v. Auto Stigler, Inc.*, the California Supreme Court extended the requirements for valid arbitration agreements to claims for wrongful termination in violation of public policy. The requirements for a valid arbitration agreement covering claims asserted under the state discrimination statute were announced in the *Armendariz* case decided in 2000. Those factors are (1) the agreement may not limit the damages normally available to an

employee suing in court, (2) there must be a sufficient opportunity to conduct discovery to adequately arbitrate the claim, (3) a written decision and judicial review must be afforded to ensure the arbitrator's compliance with the law, and (4) the employer must pay all types of costs that are unique to the arbitration, including arbitrator's fees. The *Armendariz* court also held that an agreement must require both the employer and employee to arbitrate claims arising out of breach of the arbitration agreement.

The Supreme Court in *Little* held that adherence to the *Armendariz* criteria was required in order to enforce an employee's claim for wrongful discharge in violation of public policy, because that kind of claim was "unwaivable" by private agreement just as the statutory claim at issue in the *Armendariz* case. The court also reasoned that the employees making wrongful termination claims should have the benefit of the same minimal protections that exist for discrimination claims so that they can effectively prosecute such a claim in arbitration.

The court did, however, sever an overly one-sided provision of the arbitration agreement in the *Little* case which permitted either party to "appeal" an award of more than \$50,000 to a second arbitrator, because the employer was the only party who could reasonably have benefited from such a provision and that provision was apparently designed to maximize the employer's advantage in the arbitration process. In another recent decision, a California Court of Appeal in *Fittante v. Palm Springs Motors, Inc.* also enforced an arbitration agreement after severing a similar one-sided appeal provision. Both the *Little* and *Fittante* courts severed the offending provisions because they constituted the only illegal terms of the arbitration agreements.

The courts have not hesitated to invalidate the entire arbitration agreement, however, when more than one illegal provision exists. Thus, in *O'Hare v. Municipal Resource Consultants*, the court invalidated the entire agreement when it contained a one-sided provision permitting the company to use the judicial process to enjoin employee divulgence of trade secrets, while also impermissibly requiring the employee to share equally in the cost of the arbitration. These cases further serve to confirm that employers should carefully draft arbitration agreements to ensure conformity with the *Armendariz* requirements, and thereby avoid needless and costly disputes over enforcing their arbitration agreements in court.

CALIFORNIA DIR ISSUES LETTER EXTENDING PREVAILING WAGE LAWS TO OFF-SITE WORK

In a pair of letters issued on March 4, 2003, California Acting Director of Industrial Relations Chuck Cake issued two rulings which purport to extend the protections of the state's prevailing wage laws to workers employed to perform off-site fabrication of materials used in public construction projects. The letters involved determinations that electrical panels fabricated off-site by an electrical contractor, and sheet metal ducting fabricated in the shop of a sheet metal contractor, was work done in the "execution" of a prevailing wage project and thereby covered by the prevailing wage laws. This means that for such off-site fabricated material, the DIR's prevailing wage rates would apply to the workmen who perform such fabrication, even though there may be no prevailing wage determination applicable to such employees or the employees may be paid far less than the "prevailing wage rate" applicable to the project. Since such "prevailing wage rates" traditionally consist of a wage and benefit scale negotiated under union collective bargaining agreements, these determinations could substantially increase the cost of public construction in this state.

The specific test articulated in these coverage determinations was as follows:

"Workers employed by contractors or subcontractors are employed in the execution of a contract for public work when they are engaged in the off-site fabrication of items produced specially for the public works project and not for sale on the general market."

The letter went on to state that whether a purely fabricated item is specially made for the public works project would turn on factors such as whether the item was produced in accordance with the plans and specifications of the project architects or "from a standard, generic item." However, even if the "prefabbed" item was a standard or generic item it would be "considered to be produced specially for the public works project if it was modified to meet the specific requirements of that project." The letter further stated that the logic of the analysis contained in the letter would apply as well to a firm doing fabrication work pursuant to a contract with a public works contractor, thus extending the prevailing wage laws to firms which merely fabricate materials which are used on the public works site.

Both determination letters acknowledged that they "clarified the test for whether off-site fabrication is covered by the prevailing wage law," and stated that they would be enforced only prospectively for projects bid on or after the date the decisions were posted on the DIR's website. In fact, these decisions so vastly expand the reach of the state's prevailing wage laws that challenges are certain to be made to them, and requests for restrictions on or "stays" of these rulings will likely be made in the immediate future. We are continuing to monitor the impact of these recent determinations, and will provide further updates regarding the effect of these rulings in future newsletters. In the meantime, if you would like a copy of either of these coverage determination letters, please contact Ronald W. Novotny or James A. Bowles.

**STATE LABOR COMMISSIONER ISSUES
TWO RULINGS OF IMPORTANCE TO
CALIFORNIA EMPLOYERS**

The California Labor Commissioner's office recently issued two opinion letters of import to California employers.

First, in a letter dated December 4, 2002, the Labor Commissioner's office issued guidelines for employers to transmit pay stub information via electronic means. The Division of Labor Standards Enforcement (DLSE) opined that employers may transmit such information to their employees electronically provided that employees have the unfettered right to "opt out" of the right to receive the information in electronic form. The electronic payroll information system must also be accessible through a website that is secure using standard security and encryption technology; be controlled through the use of unique employee identification and confidential personal identification numbers; be available through properly configured web browsers through terminals located at the work site and from home; be accessible to employees at all times except for occasional down time to permit standard system maintenance; and be capable of being printed out on an individual network printer at reasonable hours with no more than minimal delay at no cost to the employee.

Employers implementing such systems must make payroll information available by electronic form to employees for at least three years. Although the employer may delegate the procedure to a payroll company which acts as the employer's agent, advance approval by the DLSE of an electronic payroll information delivery system is required by the recent opinion letter.

In another opinion letter addressing a question

often posed by California employers, the DLSE narrowly construed the exception which exists under the law for withholding wages from an employee's pay due to his "gross negligence." In a letter dated February 24, 2003, the DLSE states that it takes very restrictive review of this exception, and that employers who resort to self-help do so at their own risk. The DLSE further defined the "gross negligence" required by an employee to withhold pay for losses resulting from the employee's conduct as such negligence that is so "aggravated, reckless or flagrant" as to constitute an indifference to the consequences of the act, and not the result of mere inattention and mistaken judgment. The DLSE concluded that it is a "very rare action" that would be found grossly negligent, and that losses resulting from even careless accidents are not sufficient to permit the employer to deduct losses from that employee's pay.

These opinion letters can be accessed through the DLSE's website at www.dir.ca.gov.

**STATE HIGH COURT APPROVES
PENALTY FOR FILING FRIVOLOUS
WAGE CLAIM APPEALS**

Under Section 98.2 of the State Labor Code, employees may file claims for unpaid wages with the California Labor Commissioner. Either party may thereafter appeal the Labor Commissioner's ruling to a trial court and have a brand new or "de novo" hearing on the wage claim. The statute specifically states that the court shall assess costs and reasonable attorneys' fees against the party who appeals a Labor Commissioner decision and is "unsuccessful in the appeal." In the case of *Smith v. Rae-Venter Law Group*, the State Supreme Court held that under this law, a party is "unsuccessful in the appeal" unless it results in a trial court judgment that is more favorable to the appealing party than the administrative award from which the appeal was taken.

In the *Smith* case, an employee was awarded approximately \$8,800 in unpaid wages by the Labor Commissioner pursuant to a claim he made against his former employer. The Labor Commissioner denied the employee's claim for \$12,000 in bonuses and \$10,000 in "waiting time penalties." The employee then appealed that award to the superior court, but after trial the court awarded the same amount of damages except for an additional \$200 in interest. The employee's employer then asked the court to award statutory attorneys' fees and costs against the employee for filing the appeal.

The Supreme Court held that because the purpose of the law is to discourage unmeritorious

appeals, attorneys' fees and costs could be granted in the employer's favor in this setting. However, it refused to apply its holding retroactively to appeals filed before the decision became final on December 2, 2002, because the ruling represented a new standard for determining the availability of attorneys' fees in these kinds of cases. The *Smith* case should provide solace to employers who are required to defend against frivolous employee appeals of Labor Commissioner rulings, but should also make them think twice about filing appeals themselves in cases in which the chances of overturning an award are slim.

COURT REJECTS EMPLOYEE CLAIM OF HARASSMENT BY CUSTOMER

In *Salazar v. Diversified Paratransit*, a California Court of Appeal recently held that the state Fair Employment and Housing Act does not outlaw harassment of an employee by a client or customer. There, a female bus driver was harassed repeatedly by a bus passenger who fondled her and exposed himself to her on a number of occasions. The employee essentially contended that the employer knew of the passenger's conduct over a period of time but did nothing about it, and thereby permitted the harassment to occur. The appellate court noted that while harassment could be found illegal under federal law, the state law did not prohibit harassment of an employee by a customer in these circumstances. The state Supreme Court recently decided to review this case, and will be issuing its own ruling in the future.

In another recent ruling, the California Court of Appeal held in *Mackey v. Department of Corrections* that favoritism due to a consensual romantic relationship does not give rise to a sex discrimination or sexual harassment claim against the employer. In that case, certain female prison employees alleged that a warden gave preferential treatment to three subordinate female employees who had affairs with him. The court ruled that such favoritism did not amount to sex discrimination because all employees who did not have affairs with the warden were affected by the favoritism, regardless of their gender. The court also rejected the sexual harassment claim on the ground that the complaining employees were not themselves subjected to any sexual advances or treated any differently than the male employees at the prison. Accordingly, although favoritism of a paramour is certainly not recommended conduct in the work place, the courts have continued to reject claims that such conduct violates the anti-discrimination or harassment laws of this state.

WORKER LAWFULLY FIRED AFTER STATING INTENTION TO FILE FOR BANKRUPTCY

The federal bankruptcy laws make it illegal for a private employer to terminate the employment of an individual who "is or has been a debtor under the Bankruptcy Act" solely because the employee's debtor or bankrupt status. In *Leonard v. St. Rose Dominican Hospital*, the U.S. Ninth Circuit Court of Appeals held that this protection was not available to a hospital employee who merely stated his intention to file for bankruptcy due to a large medical debt but had not yet filed. According to the court, the protections of the law are available only to those who have actually filed a bankruptcy petition and "turned over their assets to the court so that their debts can be repaid," and not to those who have not invoked the "fresh start" process that the bankruptcy laws provide.

COURTS ISSUE RESTRICTIVE RULINGS ON FAMILY LEAVE LAWS

In the case of *Gradilla v. Ruskin Manufacturing*, the Ninth Circuit ruled that an employee who left work to travel with and care for a family member with a serious health condition was not entitled to leave under the California Family Rights Act when the family member decided to travel away from home for reasons unrelated to medical treatment. The employee left work to travel with his ailing wife, who had a serious heart condition, to Mexico to bury his wife's father who had died in a car accident. He claimed that he needed the leave to accompany his wife because of her heart condition, but her condition was not the primary purpose for the leave. His employer fired him when he overstayed his leave, and the court rejected his claim for violation of the state family leave law. The court ruled that leave taken for the purpose of "caring for" a family member with a serious health condition involved some level of participation in ongoing medical or psychological treatment of the condition, either in-patient or at home, and that by merely accompanying his wife on the trip to Mexico the employee did not satisfy this criteria.

In another ruling under the state family leave law, the court in *Stevens v. California Department of Corrections* held that an employer's refusal to grant an employee's request for vacation time over the Christmas holidays to spend time with his ailing parents did not violate the statute. The court ruled that an employee must provide at least some notice sufficient to make the employer aware that he needs a CFR-qualifying leave, and that the employee's request in that case gave no hint of a desire to actually care for his parents. Instead, the employee merely sought time

to be with his parents who were both in "declining health," without any reference to an intent to provide any actual care for them. Both of these decisions suggest that the courts are attempting to narrowly construe the family leave law to ensure that it is not interpreted more broadly than intended.

ADA UPDATE

- A federal district court in Alabama ruled that a store manager was not disabled due to her acute hemorrhoidal condition. The court noted that her condition was a "common malady," and that even though it affected her bowel control on occasion it was not so disabling as to require production under the Americans With Disabilities Act. The manager's physician placed no restrictions on her, and only requested the company allow her additional time in the bathroom while working. He also expected her to make a full recovery. (*Davis v. BellSouth Mobility LLC*)
- The U.S. Seventh Circuit Court of Appeals in Chicago held that a former software engineer's request for an accommodation of working at home due to fatigue and discomfort after cancer treatment was not reasonable, when her primary job responsibilities required her presence at an office to interact with contractor personnel. The employee in that case was routinely required to monitor contractors' work, answer their questions as they arose, and ensure that the contractors' work on additions to the employer's facility did not interfere with the manufacturing process there. Since her job involved addressing problems which required immediate resolution as well as teamwork and coordination of the type that required being in the work place, the employee's requested accommodation of being permitted to work at home was not reasonable under the ADA. (*Rauen v. U.S. Tobacco Manufacturing Limited Partnership*)
- The U.S. First Circuit Court of Appeals in Boston held that a production mechanic with a history of physical altercations with fellow employees was not protected by the ADA despite a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). The employee had three incidents over an eleven-month period in which he became physically or verbally abusive towards his co-workers due to his ADHD, which caused him to act more impulsively and be unable to focus during highly stressful situations. The court

ruled that he was not disabled within the meaning of the ADA because his condition did not significantly affect his ability to engage in the major life activities of learning or speaking compared with the average person, and because his inability to control his anger did not predominate during his employment. (*Calef v. Gillette Co.*)

Each of these cases was decided under the federal ADA, which protects qualified individuals with disabilities which "substantially limit" one's ability to engage in major life activities. In *Colmenares v. Braemar Country Club, Inc.*, the state Supreme Court recently affirmed that the more liberal test for establishing a disability under California law existed before the amendments to the state law were made in 2001. That test merely requires a showing of a physiological condition or disease which *limits* a person's ability to participate in major life activities in order to establish a disability. The results of these cases might therefore have been different if they had been decided under the California statute.

If you have any questions about these issues or any other labor matters, please contact any member of the Labor Department at Hill, Farrer & Burrill LLP -- we're here to help.

Kyle D. Brown
Stuart H. Young, Jr.
Jonathan M. Brandler
James A. Bowles
Ronald W. Novotny
Michael S. Turner
Suzanne J. Holland
Raymond W. Thomas
Richard S. Zuniga
Warren J. Higgins
E. Sean McLoughlin

Management News
 is published periodically
 by the law firm of
 Hill, Farrer & Burrill LLP
 300 South Grand Avenue, 37th Floor
 Los Angeles, California 90071-3147
 (213) 620-0460 (714) 641-6605
 Fax (213) 624-4840
<http://www.hfbllp.com>
 Ronald W. Novotny, Editor

This occasional newsletter is
 published 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.