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treating people as independent contractors, as well as the basic tax, worker's compensation, and legal liability consequences of misclassifying workers.

We hope to see you there. If you are interested in attending the luncheon, please contact Janice Warren, assistant to Ronald W. Novotny, at (213) 620-0460.

### New State Laws Going Into Effect In 2008

#### Minimum Wage

The minimum wage in California is again going up as of January 1, 2008. The new minimum wage is \$8.00 per hour. This means that for exempt employees, the minimum monthly salary must be \$2,773.33, or \$33,280 per year. Employees who do not earn a fixed salary of at least this amount will not qualify for the professional, administrative or executive exemptions under California law.

#### Pay Stub Requirements

Effective New Year's 2008, employers are prohibited from putting employees' social security numbers on pay stubs or paychecks. Instead they must include only the last four digits of the employee's SSN or some other employee identification number that is unrelated to the SSN.

### Seminar on Terminating Employees, Effects of Misclassifying Employees Set for February 28, 2008

Hill, Farrer & Burrill, LLP and Mellon First Business Bank will be sponsoring a luncheon on **The Twelve Most Common Mistakes Made in Terminating Employees** on February 28, 2008. The luncheon will be held from **11:30 a.m. to 1:30 p.m. at The Balboa**

**Bay Club & Resort located at 1221 Coast Highway, Newport Beach, CA 92663**, phone number (888) 445-7153, and will focus on the most common errors that employers make in terminating employees that lead to legal claims and litigation.

The luncheon will also include a presentation on **The Effects of Misclassifying Employees as Independent Contractors**. We will review some of the most common misperceptions about

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 advise of the Firm regarding any specific matter.

### **Military Family Leave**

Employers with 25 or more employees are now required to permit an employee whose spouse is on leave from military deployment up to 10 days of unpaid leave. Employees are eligible for leave if they regularly work 20 or more hours per week.

### **New Computer Professional Pay Rate**

Computer professionals must now earn a minimum of \$36.00 per hour in order to be exempt from the state overtime laws.

### **Cell Phone Use While Driving**

On July 1, 2008, California law will prohibit all drivers from using cell phones unless they are used with a hands-free device. Employment policies should take this new law into effect and should discourage use of cell phones and other significant distractions while driving on employment-related business. The law also prohibits individuals under the age of 18 from driving while using a cell phone even with a hands-free device.

## **Employers May Use Lump Sum Payments to Compensate Employees for Work-Related Expenses**

Recently, in *Gattuso v. Harte-Hanks Shoppers, Inc.*, the California Supreme Court held that employers may use a lump-sum method to reimburse employees for work-related expenses, as long as (1) the amount paid is sufficient to fully reimburse employees for the expenses they necessarily incur, and (2) the reimbursement is accounted for separately from their regular income. The Court decided that such an arrangement is lawful under

Labor Code section 2802, which requires that employers indemnify their employees for all expenses they necessarily incur in the discharge of their duties.

At issue in *Gattuso* was whether an employer could reimburse its outside sales force for vehicle expenses using a "lump-sum" method by giving the outside sales employees a higher base salary or commission rate to approximate vehicle cost. The Court held that although lump-sum payments are lawful, an employee is still permitted to challenge the lump-sum payment as being insufficient under Labor Code section 2802 by comparing the lump-sum payment with the amount they would be entitled to receive under either an actual expense method or a mileage reimbursement method. If the comparison reveals that the lump-sum is inadequate, the employer is obligated to make up the difference. Additionally, if an employer combines wages and business expense reimbursements in a single enhanced employee compensation payment, the employer must be able to articulate the method or formula used to identify the amount of the combined employee compensation payment that is intended to provide expense reimbursement.

This case provides an important defense to expense reimbursement claims brought against employers who reimburse certain employee expenses by lump-sum payments or "enhanced compensation." However, in order to take advantage of the defense, employers still need to set the amounts of the payments at levels that will reasonably exceed actual expenses incurred on a monthly

basis, and to periodically audit actual expenses incurred by employees to ensure that they do not exceed the lump sum amount. If a lump-sum payment does not adequately compensate employees for their actual expenses, the additional reimbursement is required.

## **CA High Court Allows Union to Urge Boycott of Store on Privately Owned Mall Property**

Closing out an interesting year of decisions for the California Supreme Court was its ruling in *Fashion Valley Mall v. NLRB* on December 24. The question before the Court was whether a privately owned shopping mall that is open to the public may prohibit individuals on its property from urging customers in the mall to boycott one of the stores located there. Deciding that free speech guarantees protect such demonstrations, the Court by a narrow 4-3 majority held that Fashion Valley Mall in San Diego had violated the constitutional rights of the protestors it ejected in 1998.

This decision reaffirms the nearly 30-year-old case of *Robins v. Pruneyard Shopping Center*, which extended free speech rights to speech conducted in privately owned shopping centers. While *Pruneyard* held that shopping centers may adopt reasonable regulations to keep protests and other speech related activities from interfering with normal business operations, the Court in *Fashion Valley Mall* decided that in the context of a labor dispute, a union may conduct a leafleting campaign urging the boycott of a store in the mall even if this activity may interfere with the store's business. Ultimately, the Court determined that "[t]he Mall's

purpose to maximize profits of its merchants is not compelling compared to the Union's right to free expression."

As noted by Justice Chin in dissent, *Pruneyard* "has received scant support and overwhelming rejection around the country," even in states with similar free speech provisions in their state constitutions. Nevertheless, it remains well intact here in California, leaving the door open for unions and other protestors to encourage the boycotting of stores located within private shopping centers.

## San Francisco Ordinance Regulating Employer Health Spending Held Preempted

On December 26, the U. S. District Court for the Northern District of California held on a summary judgment motion that the San Francisco Health Care Security Ordinance, which regulated employer health spending requirements and provided for a government health care program funded partially by employer contributions, was preempted by the federal Employee Retirement Income Security Act (ERISA). The Ordinance was passed unanimously by San Francisco's Board of Supervisors and signed into law by the Mayor just a year before.

One of the protections provided by ERISA to employers who sponsor such plans is federal preemption – the principle that the federal law alone governs an employer's obligations to plan participants. In respect to the San Francisco Ordinance, the court determined that expenditure requirements were preempted because "they have an impermissible

connection with employee welfare benefit plans." The court reasoned that by regulating benefit structures and administration, the Ordinance "interferes with preserving employer autonomy over whether and how to provide employee health coverage, and ensuring uniform national regulation of such coverage."

While the City argued that the Ordinance's requirements do not necessarily affect the contributions to any specific ERISA plan, the court concluded that the ordinance impacted administration of ERISA plans, "a core area of ERISA concern." Moreover, the court felt that alternatives were possible, such as "funding a public health care system by requiring an hourly rate paid to the City."

An appeal was thereafter taken to the Ninth Circuit Court of Appeals, which lifted the injunction and allowed the City to enforce the law pending the court's consideration of the preemption argument. The appeals court ruled that the City showed a likelihood of success on the merits of its argument that the ordinance was not preempted by ERISA because it did not require any employer to adopt an ERISA or other health benefit plan and did not require an employer to provide specific benefits through an existing plan. Instead, the court said the Ordinance allows an employer to discharge its responsibilities without affecting an ERISA plan at all, although it recognized that an employer could choose to adopt or change an ERISA plan in lieu of paying the required health expenditures to the City. The Ninth Circuit decision raises the prospect of similar city ordinances being upheld in the future.

## Court Denies Arbitration Based On Absence of Signed Agreement

Can a provision in an employee handbook require arbitration by merely referring to the requirement that all employees sign an arbitration agreement? Not unless they actually sign such an agreement, according to the California appellate court in *Mitri v. Arnel Management Co.*

There, an employee filed numerous discrimination and harassment claims and was asked to arbitrate the claims in accordance with a provision in an employee handbook stating that "any dispute arising out of employment with the company . . . would be settled by binding arbitration." The provision went on to describe the arbitration process, but expressly stated that "as a condition of employment, all employees are required to sign an arbitration agreement." It also stated that all employees would be provided with a copy of their signed arbitration agreement. However, the company was unable to produce any evidence of the existence of such an agreement signed by the plaintiff employee.

The court denied arbitration of the claims based on the specific wording in the employee handbook. The court rejected the company's argument that reference to the arbitration agreement was sufficient to compel arbitration, absent the actual signed agreement that was expressly contemplated by the handbook. The Court stated that it would not create a term of the contract between the parties that was never agreed upon.

Although arbitration was denied under this factual scenario, arbitration policies contained in employee handbooks have been upheld when employees have acknowledged they are bound by them in receiving the Handbook. This case accordingly highlights the importance of having a lawful and enforceable arbitration agreement or dispute resolution policy. If you have need for such a policy or are interested in developing one, please call Sean McLoughlin, who specializes in alternative dispute resolution mechanisms.

### **NLRB Clarifies Law on E-Mail Policies**

In its recent decision in the case of *Guard Publishing d/b/a Register-Guard*, the National Labor Relations Board (NLRB) clarified the law pertaining to an employee's use of an employer's e-mail system for union organizing purposes. The Board found that an employer had a basic property right to regulate and restrict employee use of its e-mail system, and to enforce a non-discriminatory rule that limited use of e-mail for business-related purposes.

The newspaper issued a policy stating that its communication systems and the equipment "are not to be used to solicit or distribute for commercial interests, or religious or political causes, outside organizations, or other non-job related solicitations." Likening the electronic mail system to other employer-provided speech forums such as bulletin boards, telephones, and televisions, the Board concluded that employees do not have the right to use an employer's equipment or media as long as its restrictions are non-discriminatory. Because there was no evidence that the

employer permitted employees to solicit other employees to support any group or organizations, the company's enforcement of its policy prohibiting communications regarding union activity were proper. The Board noted that the policy did not eliminate face-to-face communication between employees, and that there were other means for workers to engage in oral solicitation and distribute literature on non-working time and in non-work areas.

### **NLRB Holds Taxi Drivers to be Employees and Not Independent Contractors**

Enforcing a decision by the NLRB finding that taxi cab drivers in the Bay Area were employees and not independent contractors, the Ninth Circuit Court of Appeals in *NLRB v. East Bay Taxi Drivers Ass'n.* reviewed the factors under the National Labor Relations Act for determining independent contractor status. The Board found that because a taxi cab company exercised considerable control over the means and manner of its drivers' performance and did not provide the drivers with the ability to pursue entrepreneurial opportunities, the drivers were employees who could be organized by a union and not independent contractors.

The employer in that case, Friendly Cab Company, leased 80 cabs to drivers for amounts ranging between \$450 to \$600 per week, which was determined in part by the drivers' driving records. The cab company leased out the cabs for weekly periods that renewed automatically, and required the drivers to use one day a week

to perform maintenance on the vehicles. The leasing agreements expressly stated that the relationship between the cab company and the drivers was not an employee-employer relationship, but also required the drivers to comply with a company policy manual that instructed them to brake smoothly and "avoid abrupt stops" and to dress appropriately and professionally in accordance with a dress code. Importantly, the manual restricted outside business opportunities for the drivers by stating that "all calls for service must be conducted over a company-provided communication systems and telephone number" and that drivers were prohibited from picking up passengers who did not place a call to the company's dispatcher.

The appellate court had little trouble in upholding the Board's finding that the drivers were employees of the cab company in these circumstances. The court noted that the company's prohibition against the drivers developing entrepreneurial opportunities on their own was antithetical to classifying them as independent contractors, because the hallmark of a true independent contractor is the freedom to develop their own business interests. The fact that the drivers did not invest in or own cabs, and that they were subject to rules requiring how they dressed and received fares, also indicated substantial control over their work that precluded independent contractor status.

The case serves as an important reminder that the courts and government agencies will review all the facts pertaining to an employee versus independent contractor

classification issue carefully, regardless of how the parties characterize their relationship. We will review these factors in depth at our upcoming meeting.

## Harassed Employee Who Quit Allowed to Proceed with Sexual Harassment Claim

In the recent case of *Carpenter v. AADG, Inc. d/b/a Curries Co.*, a federal district court in Iowa permitted a female production worker who quit her job after being slapped on the buttocks by a male crew leader to proceed to trial on a sexual harassment claim. The court rejected the company's motion for summary judgment based on the argument that the employer did not know of the conduct and could not be held liable for it under Title VII.

In that case, the lead person apologized to the female employee after learning that his conduct had upset her, but was not issued a written reprimand until after she quit her job. In addition, the employee's supervisor made additional comments during the two years prior to that time that the female employee "was looking fine today" and that "her ass looks good." She also alleged that when she asked for a leave of absence the supervisor and lead person teased her by trying to guess her bra size and that the lead would state "let's see them," referring to her breasts.

Under federal employment discrimination law, an employer can avoid liability for sexual harassment by a supervisor when (1) it actively tries to prevent harassment from occurring, (2) the employee fails to complain about the harassment, and (3) the

harassment does not result in a "tangible job action." The court held in this case that the alleged constructive discharge of the female employee could constitute tangible employment action as a matter of law, and that she could proceed to trial with a claim for hostile work environment harassment against her employer.

This case serves as an important reminder that management should be vigilant about preventing inappropriate or harassing conduct in the workplace at all times, so that acts of harassment are remedied promptly before employees choose to resign and make harassment claims.

## Police Officers Entitled to Pay for Donning and Doffing Police Gear at Home

In a somewhat unusual case decided under the Fair Labor Standards Act, the U.S. District Court in San Francisco ruled that San Leandro City Police Officers were entitled to be compensated for donning and doffing their police related gear at home. The department required officers to wear a uniform shirt and shoulder patch, name tag, police badge, uniform trousers, socks, shoes and belt, and to carry a holster, ammunition, handcuffs, tazers, radio, and gun. The court ruled that because putting on and taking off this protective gear was "integral and indispensable" to the employees' principal activities of performing police work, it was compensable time even though most officers performed it while at the police station and not at home. The court noted that the "donning and doffing" requirement was still subject to the "de minimus" rule, which

provides that payment is not required for very brief periods of time (usually no more than 10 minutes).

The court was careful to distinguish the police gear from mere "clothes," which employees are not entitled to be paid for changing. The court also based its decision on its conclusion that the wearing of the police gear was required for the department's, as opposed to the officers', benefit. The court also held that the officers were not entitled to be paid for their commute time if they chose to don their uniform at home because the Portal-to-Portal Act specifically excludes such time from compensation.

## Auto Damage Appraisers Found Exempt

In a recent case decided by the U.S. Seventh Circuit Court of Appeals in Chicago, *Roe-Midgett v. CC Services, Inc.*, auto damage appraisers who estimated and settled property damage claims for insurance company clients were found to be administrative employees who were exempt from overtime pay under the federal FLSA. Their employer, CCS, processed auto, home and commercial claims for various insurance companies, and paid its material damage appraisers salaries of between \$37,000 and \$55,000 for investigating and settling claims when liability was established and insurance coverage was approved. The appraisers spent most of their time inspecting damaged vehicles, interviewing claimants and witnesses, and reporting inconsistencies or suspected insurance fraud to CCS supervisors. The appraisers estimated the cost of the labor and parts that were required, and used computer software

supplied by CCS in arriving at their final damage estimates.

The appraisers contended that they were mere non-exempt "production employees" who were responsible for "producing" the company's product of damage appraisals. However, the court held that the appraisers performed an administrative function for CCS's customers consisting of processing claims against their customer's policies, and that they were exempt from federal overtime law based on the administrative exemption. Vital to the court's determination was that the appraisers' assessments of auto damage and causation directly affected CCS's ultimate determination of insurance coverage. Moreover, although the appraisers were required to comply with a company manual in performing their duties, the court viewed the manual as "a tool that channeled rather than limited the appraisers' discretion."

## Truck Drivers Held Exempt from Prevailing Wage Law

In the recent case of *Williams v. SnSands Corporation*, a California Court of Appeal clarified the circumstances under which a material supplier is required to pay prevailing wages to drivers who deliver materials to a construction job site covered by the prevailing wage laws. The court held that a driver who hauled rock and sand both to and from such a job site was not entitled to prevailing wages when that work was not an "integrated aspect of the full process of construction" and was not specifically required by the public works contract.

The court distinguished the case from *Sansone Co. v. Dept. of Transportation*, which held that the employees who hauled aggregate sub-base from a "borrow pit" located directly adjacent to a public work were required to be paid the prevailing wages. The employees in this case were different from those in *Sansone* because their employer was a bona fide material supplier which ran an operation truly independent of the performance of the general contract for the public work. The court noted that the trucking company sold its products to the general public, was not established specifically to furnish materials for a specific public works contract, and did not maintain the source of materials at the public work site. The court accordingly reversed a judgment for approximately \$77,000 in unpaid wages that had been assessed for failing to pay the truck driver the prevailing wage applicable to the public work site.

## Safety Director Found Not FLSA-Exempt

A federal district court in Florida recently found that a supervisor whose authority was limited to safety matters was not exempt from the overtime requirements of the Fair Labor Standards Act based on the executive exemption. The supervisor in that case was a Safety Director for an electrical/mechanical contractor who had the responsibility of training all employees on how to perform their assigned jobs in a safe manner and could shut down an entire operation for safety-related reasons. However, because he did not customarily and regularly direct the work of

at least two or more other employees or their functional equivalent, he did not possess sufficient authority over other employees to qualify for the exemption. (*Jones v. Riggs Distler & Co.*).

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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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