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ON PREMISES, ON-CALL TIME COMPENSABLE; SLEEP TIME NOT EXCLUDED

Emphasizing that California law provides greater protections than federal law to on-call employees, the California Supreme Court in *Mendiola v. CPS Security Solutions, Inc.* held that security guards were entitled to compensation for time spent on-call at the premises of their employer, and that sleeping time during 24-hour shifts could not be excluded from working time.

In *Mendiola*, CPS employed guards to provide security at construction worksites. On weekdays, the guards were on patrol for eight hours, on-call for eight hours and off duty for eight hours. On weekends, the guards were on patrol for sixteen hours and on-call for eight hours. During the on-call hours, guards were required to reside in a trailer provided by CPS, which included residential amenities. Guards could generally use the on-call time as they chose, but could not consume alcohol or have visitors (except with approval of the construction company). Guards were not permitted to leave the trailer unless a relief worker was available to replace the guard. Guards received no compensation for the on-call time unless they were required to respond to a call or they waited for and were denied a relief worker.

A group of guards filed class action lawsuits against CPS in 2008, alleging that CPS's on-call policies violated California law. After the trial court determined that the on-call hours constituted "hours worked" under the applicable wage order and an appellate court affirmed and reversed the trial court's ruling in part, both parties petitioned for relief to the California Supreme Court.

The California Supreme Court resolved two key issues in favor of the guards. First, the Court held that the guards' on-call time was properly "hours worked" under the wage order, as CPS had sufficient "control" over the guards during the on-call time. The Court identified the following factors that bore on the control issue: (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time. Also relevant was whether the waiting time was spent "primarily for the benefit of the employer and its business." The Court found that these factors weighed in favor of working time, as the guards were required to reside in their trailers, could not easily trade on-call duties, were significantly restricted in their ability to leave the worksite (they could be no more than thirty minutes away) and were restricted in what they could do (i.e., limited visitors, no pets or alcohol use). The Court also noted that the on-call, on premises arrangement was primarily to benefit CPS, as the mere presence of security at the worksite was a strong deterrent to theft and vandalism.

Notably, the Court dismissed CPS's argument that federal regulations permitted free time on an employer's premises to count as uncompensated time rather than hours worked. The Court found no similar provision in the wage order at issue (Wage Order 4, which applies to professional, technical, clerical, mechanical and similar occupations), and held that California is "free to offer greater protection" to employees than federal law.

Next, the Court held that sleep time could not be excluded from working time in a 24-hour shift. Again the Court dismissed a federal regulation that permitted employers and employees to agree to exclude a sleeping period of no more than eight hours from an on-duty shift of twenty-four hours or more, finding that such a provision was not included in the California wage order at issue (although a similar provision exists in a California wage order that applies to ambulance drivers and attendants). While the Court recognized the difficulties faced by CPS and other

employers in attempting to comply with California law in light of uncertainty caused by inconsistent positions by the DLSE on this issue and defunding of the IWC, it said that "[s]uch issues, however, must be addressed by the Legislature."

The *Mendiola* ruling provides important guidance to California employers with all manner of on-call employees, not merely guards. Employees should review their on-call policies and practices to ensure compliance.

TERMINATION OF EMPLOYEE FOR ENGAGING IN OUTSIDE WORK WHILE ON FMLA/CFRA UPHELD, BUT "HONEST BELIEF" STANDARD NOT ADDRESSED

In *Richey v. AutoNation, Inc.*, the California Supreme Court held that an arbitrator committed no legal error when he determined that an employer lawfully terminated an employee for engaging in outside employment while on FMLA/CFRA leave, but declined to adopt the arbitrator's reliance on the "honest belief" defense.

Avery Richey was employed by Power Toyota, part of the AutoNation consortium of automobile dealerships, since 2004. In February 2008, Richey opened a seafood restaurant while working full-time at Power Toyota. That same month, Richey's supervisors discussed their concerns about performance and attendance issues with Richey, as they were concerned that Richey was "a bit off his game" and that the restaurant was distracting him. There was a general understanding at Power Toyota that outside employment (including self-employment) was prohibited, and others were fired for violating this rule. The company's employee manual also stated that outside work while on CFRA leave was prohibited.

In March 2008, Richey injured his back at home and went on CFRA/FMLA leave. In April, Power Toyota sent Richey a letter that informed him that employees were not allowed to pursue outside employment while on leave and asked Richey to call if he had any questions. Richey failed to respond to the letter. Later, Power Toyota sent an employee to Richey's restaurant, who observed Richey working at the restaurant. Power Toyota then terminated Richey for engaging in outside employment while on leave in violation of company policy.

Richey file a lawsuit on various grounds, including violation of the CFRA, and eventually all claims were ordered to arbitration. The arbitrator ruled in favor of AutoNation on all claims, including the CFRA claim on the basis that Power Toyota was legally permitted to terminate Richey "if it has an 'honest' belief that he is abusing his medical leave and/or is not telling the company the truth about his outside employment."

Richey attempted to vacate the arbitration award on the basis that, as applied by the arbitrator, the "honest belief" standard – which some courts have determined provides a defense to employers who honestly, but perhaps mistakenly, rely on a nondiscriminatory reason for termination – was incorrect and constituted reversible legal error. The trial court denied Richey's motion, but an appellate court determined that Power Toyota violated Richey's right to reinstatement under the CFRA and that the honest belief defense did not apply. The California Supreme Court then granted AutoNation's petition for review.

The Court first recognized that courts grant substantial deference to arbitration awards, and there exist only limited grounds for judicial review of an arbitration award. One of these grounds is where a party is denied a hearing on the merits of a claim involving unwaivable statutory rights due to a legal error. However, the Court determined that, regardless of whether the "honest belief" defense applied in California, Richey was not deprived of an unwaivable statutory right because the arbitrator determined that Power Toyota terminated him for the lawful reason of violating company policy. The Court declined to opine as to whether the honest belief defense should be viable in California.

News Bites

California Security Guards' On-Call Break Periods Not Compensable Work Time

In contrast to the California Supreme Court's ruling in *Mendiola*, a California appeals court in *Augustus v. ABM Security Services, Inc.* held that security guards who were "on-call" during rest breaks did not violate the California Labor Code's rest period requirements.

Augustus was a class action lawsuit brought by former non-exempt security guards of ABM, who alleged that

ABM's requirement that they keep their pagers on and remain vigilant and respond when needs arise during paid rest breaks violated Labor Code 226.7's requirement that they be free from "work" during the rest periods. The plaintiffs principally sought labor code penalties as their remedy. The court determined that being on-call during a rest period – during which time the employee could engage in various non-work activities such as smoking, reading, making personal calls and browsing the Internet – did not constitute working, and that plaintiffs offered no evidence that anyone's rest period had ever been interrupted. The court further noted that unlike the meal break law, which requires that employees be relieved of all duties during a meal period, the rest period law contained no similar requirement.

The court also found that its decision was consistent with the California Supreme Court's decision in *Mendiola*, which acknowledged that remaining available to work was not equivalent to actually performing work.

Buyer Permitted To Enforce Arbitration Agreement With Acquired Company's Employees

A California court of appeal ruled in *Marenco v. DirecTV, LLC* that DirecTV could enforce an arbitration agreement between a company it purchased and the company's employee, even though it was not a party to the arbitration agreement.

In *Marenco*, DirecTV purchased 180 Connect and continued to employ 180 Connect's employees, including Francisco Marenco, who had previously executed a mandatory binding arbitration agreement with 180 Connect. Marenco subsequently left DirecTV and sued DirecTV for issuing wage payments through debit cards that required activation fees and cash withdrawal fees, allegedly in violation of California law. DirecTV moved to compel arbitration based on the arbitration agreement that Marenco executed with 180 Connect.

The court determined that Marenco was required to arbitrate his claim with DirecTV, finding that "Marenco's continued employment with DirecTV [following the acquisition] served as his implied consent to preserving the original terms of his employment, including the arbitration agreement."

…But No Agreement To Arbitrate Where Agreement Contains PAGA Waiver That Was Not Severable

When an arbitration agreement contained an unenforceable waiver of claims under California's Private Attorneys General Act ("PAGA") and the agreement further provided that the PAGA waiver was non-severable from the remainder of the arbitration agreement, a California court of appeal held that the arbitration agreement could not be enforced.

In *Montano v. The Wet Seal Retail, Inc.*, the arbitration agreement signed by Montano contained a waiver of the right to "make claims with others as a representative or a member of a class or as a private attorney general." However, the agreement also provided that if the waiver is found to be unenforceable by a court or arbitrator, then the entire agreement is void and unenforceable. In light of the California Supreme Court's recent decision in *Iskanian* (July 2014 FEB), the trial court in *Montano* held that the waiver of the right to assert a PAGA claims was unenforceable and therefore the entire arbitration agreement could not be enforced pursuant to the parties' non-severability agreement.

Inability To Work For Boss Not A Disability; Transfer To Another Supervisor Not A Reasonable Accommodation

In *Alsup v. U.S. Bancorp*, a federal district court in California dismissed a plaintiff's claims of disability discrimination, failure to accommodate and failure to engage in an interactive process against her former employer, finding that the plaintiff could not assert a disability discrimination claim on the basis of her inability to get along with her supervisor and that her requested accommodation of being transferred to a new supervisor was unreasonable as a matter of law.

Marlene Alsup alleged that after she was assigned a new boss in September 2012, she was subjected to belittlement and ridicule by her new boss that resulted in exacerbation of her bipolar depression condition. She requested to be accommodated under the ADA with a "switch in supervisors" because she could not work with her supervisor or her supervisor's boss. U.S. Bancorp asked Alsup to identify other restrictions that would allow her to continue working with her supervisor, and when she offered no other proposed accommodations, denied her request for transfer to a different supervisor.

Alsup filed a lawsuit against U.S. Bancorp under California's disability discrimination laws, but the trial court dismissed all of her claims. The court held that Alsup did not assert a disability discrimination claim because the only "disability" Alsup identified was an "inability to work with her supervisor," which is not, as a matter of law, a disability. Further, even if she had a disability, the court found that she could not perform the essential duties of her job with or without a reasonable accommodation. The court also dismissed Alsup's failure to accommodate claim because the only accommodation she requested was a transfer to a new supervisor, which was unreasonable as a matter of law. Finally, the court found that U.S. Bancorp fulfilled its duty to engage in a timely, good faith interactive process with Alsup.

Reminder: Obamacare Employer Mandate Begins

Effective January 1, 2015, the employer mandate of the Patient Protection and Affordable Care Act requires employers with 100 or more full-time employees (or full-time equivalents) to provide affordable health care coverage for at least 70% of its employees or be subject to "shared responsibility" payments to the IRS.

Reminder: Increase in Minimum Salary for California Computer Professional Exemption

Effective January 1, 2015, the minimum salary for the computer professional exemption in California has increased to $85,981.40 for full-time employment, or $41.27 an hour.

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