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Fenwick Employment Brief

December 4, 2006
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IBM AND SIEBEL CONCLUDE OVERTIME CLASS ACTIONS WITH MULTI-MILLION DOLLAR SETTLEMENTS

The recent settlement of class action overtime lawsuits against IBM and Siebel confirm that the plaintiffs' bar has its sights set on the technology industry, with an aggressive attack on the historical treatment of most engineers and other technology workers as exempt from overtime compensation.

Siebel recently settled, for $27.5 million, a California state court class action involving claims that the company misclassified software engineers as exempt. A few days later, IBM agreed to settle, for $65 million, a nationwide class action involving claims that the company misclassified various groups of installers and customer support personnel as exempt.

These settlements are a further reminder to California employers that exempt classifications must be carefully applied, and periodically re-examined as jobs evolve.

COURT RESTRICTS STATUTE OF LIMITATIONS DEFENSE IN CLAIMS FOR UNPAID VACATION

In a surprising and unfavorable decision for employers, a California court of appeal held that the statute of limitations does not limit claims for unpaid vacation to vacation time the employee accrued within four years prior to the employee's termination. Generally, upon termination of employment, California employers must pay the employee for all accrued unused vacation. However, courts and the California Labor Commissioner have consistently ruled that only unused vacation accrued within four years prior to termination are payable, and that claims for unpaid vacation beyond four years were barred by the statute of limitations.

In *Church v. Jamison*, John Church sued his former attorney for malpractice after his complaint for unpaid wages against a former employer was dismissed as time barred. Defendant-attorney argued that the underlying wage complaint was timely and the court agreed. The court held that the statute of limitations runs from termination of employment, such that pay for all vacation accrued before termination is recoverable–even vacation that accrued more than four years prior to termination. This ruling provides further justification for the imposition of a reasonable cap on vacation accrual, so that employers may avoid limitless exposure for wage claims like the one asserted by Mr. Church.

COURT REJECTS FORMER EMPLOYEE'S RETALIATION AND BONUS CLAIMS

In a common scenario for employers, a manager provides performance counseling to a poorly-performing employee, the employee refuses to acknowledge her performance deficiencies, and then leaves the workplace on a disability leave of absence. This set of facts confronted the employer in *Neisendorf v. Levi Strauss & Company*. There, after eight weeks of leave, Barbara Neisendorf was medically cleared to return to work with restrictions, including a requirement that she must work for different supervisor. After discussions with Neisendorf, during which she refused to acknowledge any performance deficiencies, Levi Strauss rejected Neisendorf's demand for a change in supervisor and terminated her employment. The California court of appeal held that Levi Strauss properly discharged Neisendorf, and rejected her claim that her termination violated the California Family Rights Act. The court was persuaded by the well-documented evidence of Neisendorf's performance issues, which preceded her leave of absence.

The court also held that Neisendorf had no entitlement to an annual bonus under a bonus program based on individual and company performance. The bonus plan expressly required that the employee "must be an active employee of the company on the payment date" to receive the bonus, regardless of whether termination was voluntary or involuntarily. Neisendorf argued that Levi Strauss terminated her for taking a medical leave of absence in violation of CFRA, and that to deprive her of the bonus would violate California public policy. Rejecting the argument, the court held that there was nothing in California's public policy concerning employee wages that would supersede the bonus plan's express terms.

San Francisco Voters Mandate Sick Pay for Employees.
San Francisco voters approved a mandatory sick leave benefit for employees working within city limits. Commencing February 2007, certain employers in San Francisco must provide employees (including part-time and temporary employees) with one hour of paid sick leave for every 30 hours worked.

Highlights of the Ordinance

- Accrued sick leave carries over from year to year, subject to caps: 40 hours for small businesses (10 employees or less), and 72 hours for all other employers.
- Employers need not pay employees for unused sick leave upon termination.
- Leave may be used for the employee's illness, injury, medical condition, diagnosis or treatment, or medical reason, and for time taken off to care for a child, parent, legal guardian or ward, sibling, grandparent, grandchild; and spouse, domestic partner, or other "designated person" who does not fall within a family category.
- All or any portion of these requirements may be waived through a collective bargaining agreement.
- Employers are not required to provide additional paid sick leave if they have a policy in place that permits employees to use leave for the same purposes set forth in the ordinance.

The full text of the ordinance may be found at http://www.sfgov.org/site/uploadedfiles/olse/Paid_Sick_Leave_Ordinance,_Administrative_Code_Chapter_12W.pdf

Ninth Circuit Finds Insurance Adjusters Exempt Under FLSA.
In *In re Farmers Insurance Exchange*, the federal Ninth Circuit Court of Appeals held that Farmers' claims adjusters fell within the federal Fair Labor Standards Act's administrative exemption from overtime compensation, and thus dismissed a national class action against the insurer for back overtime. California employers are reminded, however, that a California court considering the same issue under California's administrative exemption found that the adjusters were misclassified as exempt and entitled to overtime.

Executive Properly Discharged for Lying about Affair with Subordinate.
In *Freeman v. Ace Telephone Association dba Ace Communications Group*, the federal Eighth Circuit Court of Appeals (covering Midwestern states including Minnesota) rejected an executive's whistleblower claim. Plaintiff CEO had advised the company's board of directors that the company may be violating federal tax laws. Three weeks later, the board terminated him. Though Plaintiff claimed retaliation arising out of his whistleblower activity, the court concluded he was terminated for lying about his relationship with a female subordinate during an investigation into the CEO's conduct.