Fenwick Employment Brief

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CA AND WA MINIMUM WAGE UPDATE

Beginning January 1, 2014, the hourly minimum wage rate will increase in both California and Washington:

- With the passage of AB 10, the California minimum wage will increase to $9 per hour on January 1, 2014, and to $10 per hour on January 1, 2016.
- The Washington minimum wage will increase to $9.32 as of January 1, 2014, the highest state minimum wage in the nation.

EMPLOYER LIABLE FOR DISREGARDING COMPLAINTS ABOUT SOILED TOILET, PORN, AND RETALIATION — POSSIBLE PUNITIVE DAMAGES

In *Davis v. Kiewit Pacific Company*, Lisa Davis, a heavy machine operator and one of two female employees at a 100-employee excavation project, prevailed in her claims of gender discrimination, hostile work environment, and retaliation.

At trial, the evidence showed that Davis had difficulty accessing the portable toilets, which were often located miles away and unsanitary. She sought assistance from the foreman, two superintendents, and the safety officer, to no avail. In fact, the foreman once told her to "find a bush." She complained to the project manager and nothing changed. Shortly after, she found the women's toilet seat smeared with feces and a pornographic magazine on the paper dispenser. Although she immediately informed the foreman and superintendent, the company did not investigate and thereafter her crew members would not speak to her. Davis complained to the EEO officer, saying she feared retribution; again, no action was taken. Weeks later, the company conducted an unexpected layoff. When the company started rehiring crew members a week later, Davis was not recalled. She sued for discrimination, harassment, and retaliation, among other claims. A jury agreed with Davis and awarded her $270,000 in past lost earnings and non-economic damages.

The jury, however, was not allowed to consider Davis' claim for punitive damages. Specifically, the trial court concluded that Davis failed to show that the challenged conduct was done, approved, or ratified by a "managing agent," a condition for the imposition of punitive damages on a company based on employee conduct. Davis appealed this ruling and argued that both the project manager and EEO officer were managing agents. To be a managing agent, the employee must "exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine company policy." Davis cited evidence that the project manager was the top manager in charge of a $170 million project and all other managers reported to him. She also showed that the EEO officer administered corporate policies on preventing discrimination, retaliation, and harassment for the northwest district and trained onsite EEO officers. The court of appeal agreed that such evidence, together with Davis' punitive damages request, should have been presented to a jury, and ordered a new trial on the issue.

While it remains to be seen whether the jury will ultimately impose punitive damages against the company for its employees' conduct, the decision reminds employers of the importance of taking employee concerns seriously and taking prompt action to correct misconduct.

PUTATIVE CLASS TARGETS PURPORTED DEFICIENCIES IN EMPLOYER MEAL AND REST BREAK POLICIES

Following the California Supreme Court's *Brinker* ruling (April 2012 Employment Alert) that a California employer satisfies its meal/rest period obligations by "providing" rather than "ensuring" employees take rest and meal breaks, the trial court certified meal and rest break classes that focused on the language of the applicable employment policies. On remand in *Hohnbaum v. Brinker Restaurant Corporation*, the

plaintiffs asserted that Brinker's policies on meal and rest breaks — on their face — violated California law and such claims should be certified for class treatment.

Meal Periods: Prior to 2002, Brinker did not maintain a policy on any breaks. Starting in 2002, each employee acknowledged that she was "entitled to a 30-minute meal period when I work a shift that is over five hours." From May 2012, Brinker augmented that policy to show the 30-minute period was "uninterrupted" and the employee became entitled to a second, uninterrupted meal period when she worked more than ten hours in one day.

Plaintiffs argued that Brinker's failure to adopt a written policy prior to 2002 was itself unlawful. According to plaintiffs, the pre-May 2012 policy was unlawful for several reasons, including failure to inform employees of their right to take a first meal period by the end of their fifth hour of work or to take a second meal period at all. Plaintiffs further claim that the post-May 2012 policy was unlawful for failure to inform employees of their right to take a second meal period by the end of their tenth hour and only permitting such meal periods after completion of a full ten-hour shift.

Relying on *Brinker*, and without commenting on the merits of the claims, the trial court recognized that "'[c]laims *alleging* that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment.'" Thus, the court found that, based on plaintiff's theory of liability, the claims were amenable to class treatment.

Rest Breaks: The already-certified subclass, which Brinker sought to decertify, consisted of employees who worked in excess of three and one-half hours without receiving a paid 10-minute break in or after October 2000. On prior review before the California Supreme Court, the Court explained that where an employer adopts a uniform policy — as it concluded Brinker had conceded in this case — and that policy does not "authorize and permit the amount of rest break time called for under the wage order for its industry, … it has violated the wage order and is liable." The Court further recognized that assessing the validity of that policy would be an issue common to all class members and "the trial court's certification of a rest break subclass should not have been disturbed." The trial court noted that Brinker did not show, on remand, a changed circumstance to justify decertification, and reiterated that the need for individual proof of damages did not undermine class treatment.

As anticipated in our April 2012 Employment Alert and as aptly demonstrated by this case, plaintiffs have honed in on a potentially viable avenue for certifying break-related claims — by targeting the validity of the corporate policy. Such tactics underscore the importance of careful review of meal and rest break policies for compliance with the technical requirements of the California Labor Code and the Wage Orders.

NEWSBITES

Family-Related Legislative and Ordinance Update
California employers should note the following legislative developments related to employees and their familial obligations:

- SB 770: Governor Brown signed into law a bill that expands the coverage of Paid Family Leave ("PFL"), a California benefit program funded by employer and employee tax contributions. PFL currently provides partial wage substitution when an employee takes a leave of absence to care for parents, spouses, children, and registered domestic partners. The PFL benefit, as revised, will also provide partial wage substitution during leaves to care for seriously ill siblings, grandparents, grandchildren, and parents-in-law. (*Note: The PFL law does not require employers to provide employees with such family-care leave.*)
- San Francisco Family Friendly Workplace Ordinance: The San Francisco Board of Supervisors passed an ordinance that (a) gives employees the right to request flexible work schedules to meet caregiving responsibilities for children, certain ill relatives or parents age 65+ years old and (b) prohibits discrimination against employees due to their caregiver status or retaliation for requesting a flexible work schedule. The ordinance applies to employers with twenty or more employees, and

provides a process by which an employee — with six months tenure and who is a caregiver or parent — may request a flexible work schedule. The ordinance contemplates that an employer may decline the request for business reasons, but requires the denial to be in writing and imposes a process for request, review, response and reconsideration of a request and record-keeping requirements. An employee whose request is denied may complain to San Francisco's Office of Labor Standards Enforcement, who has the discretion over whether to investigate. Any such investigation will be limited to the employer's procedural compliance with the ordinance, not its reasons for denying the request. The city may also take legal action against an employer that violates the ordinance. The ordinance provides two penalties, each measured at $50 per person per day — one payable to the aggrieved employee and the other payable to the city. According to reports, Mayor Ed Lee intends to sign the ordinance, which would take effect January 1, 2014.

Arbitration Agreement Withstands Challenge For Lack of Notice of Arbitration Rules or Mutuality

In *Peng v. First Republic Bank*, a former employee asserting discrimination and other claims challenged the enforceability of the arbitration agreement she signed as a condition of employment. Specifically, she asserted that the employer's failure to notify her of the content of the applicable arbitration rules and its reservation of the right to modify the agreement were unconscionable and rendered it unenforceable. Although the trial court agreed and refused to compel arbitration, a California appeals court reversed and upheld the arbitration agreement. While the court acknowledged that there will be some degree of procedural one-sidedness in an arbitration agreement imposed as a condition of employment, it rejected the notion that failing to provide the applicable rules (which it noted were available on the Internet) so "shocked the conscience" to make the agreement unenforceable. Further, the court observed that the employer's duty of good faith applied to (and limited) the employer's right to modify the arbitration agreement, so the agreement was neither illusory nor unfairly one-sided. Thus, the appellate court ordered the claims to arbitration.

California Supreme Court Still Focused on Arbitration Agreements

In September, the California Supreme Court granted review of *Brown v. Superior Court* (June 2013 FEB). There, the appellate court concluded that claims under the California Private Attorneys' General Act of 2004 advance a predominately public purpose and a private arbitration agreement purporting to waive such representative action was unenforceable. The Court deferred briefing pending resolution of *Iskanian v. CLS Transportation of Los Angeles* (October 2012 FEB), which is expected to address the same and other related issues. In *Iskanian*, the parties completed briefing in April 2013, followed by briefing of interested third-party groups (amicus curiae) in May and responses thereto in July; as a next step, the matter should be scheduled for hearing.

New Trial To Determine Whether Pregnancy Leave Was "Substantial Motivating Reason" For Termination Upon Return

Following the California Supreme Court's guidance in *Harris v. City of Santa Monica* (February 2013 FEB) that an employment action is illegal only where bias is a "substantial motivating factor" for the action, a California appellate court recently vacated a verdict where the court had instructed the jury that bias need only be "*a* motivating factor." In *Alamo v. Practice Management Information Corporation*, the employer terminated the plaintiff upon her return from pregnancy and baby bonding leave. The employer claimed it had concerns about the plaintiff's performance prior to the leave, which concerns were exacerbated by information discovered during the leave, and it planned to address those concerns upon her return. A few days prior to her return, the plaintiff visited the office for lunch with a colleague and engaged in an altercation with her temporary replacement. According to the company, it terminated the plaintiff's employment due to the altercation, the performance concerns, and her manager's insubordination concerns related to the office visit. Following trial, the jury awarded the plaintiff $10,000 in damages plus $50,000 in attorneys' fees. The appellate court remanded the case for retrial consistent with its instructional guidance.

VIDEO

Is An Honor Vacation Policy Right For My Company?

Companies in California and across the United States are moving away from traditional vacation accrual policies to unlimited vacation policies, or honor vacation policies. What is an honor vacation policy? How can start-ups implement an honor vacation policy? What should established companies consider in switching to an honor vacation policy from an accrual policy? Fenwick & West employment co-chair Dan McCoy and attorney Sheeva Ghassemi-Vanni discuss this hot new trend and the considerations involved in determining whether an honor vacation policy is right for your company. Watch the video to find out.

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