Fenwick Employment Brief

August 12, 2008
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CALIFORNIA DLSE: EMPLOYERS MUST MAKE MEAL AND REST BREAKS AVAILABLE, NEED NOT ENSURE EMPLOYEES TAKE BREAKS—AND YET ANOTHER COURT AGREES

The California Division of Labor Standards Enforcement ("DLSE") just released a memorandum to its staff announcing that it has adopted the rulings announced in the California Court of Appeal's decision in *Brinker Restaurant Corp. v. Superior Court of San Diego County* regarding meal and rest periods. In *Brinker* (as previously reported here) the court held that California employers must make meal and rest breaks available to their employees, but need not ensure that employees actually take the breaks. Effective immediately, the DLSE will apply the standards outlined in *Brinker* to wage claims filed with the DLSE. The *Brinker* court also held that: (1) rest periods need not be scheduled in the middle of the work period if not practical to do so; (2) meal periods need not be provided on a rolling five-hour basis; (3) meal periods are not required to be scheduled in the middle of shifts; and (4) employers are liable for off-the-clock work only if management knew or should have known about the unrecorded work.

In addition to the DLSE and the *Brinker* Court of Appeal, the federal Southern District Court in *Salazar v. Avis Budget Group, Inc.* also recently interpreted the Labor Code's requirement that employers "provide" breaks as meaning that employers must make breaks available, but need not ensure employees take breaks. The clear trend among federal and state courts, and the DLSE, to apply this common sense approach to meal and rest periods provides some long awaited clarity and relief to the employer community.

CALIFORNIA SUPREME COURT CONFIRMS NON-COMPETES ARE UNENFORCEABLE IN CALIFORNIA, EASES REQUIREMENTS ON RELEASES

Confirming the prevailing wisdom, the California Supreme Court has just ruled in *Edwards v. Arthur Andersen LLP* that non-competes are unenforceable under California Business and Professions Code Section 16600 except in limited situations as provided by statute. The Supreme Court also held that contractual releases need not be qualified with an explanation that the release does not include claims that cannot be waived as a matter of law.

The Supreme Court's decision on non-competes may have little practical impact, as many California employers already understood non-competes to be unenforceable except under very limited circumstances. However, this ruling serves as a warning to employers that requiring an employee to sign an invalid non-compete can lead to legal trouble down the road. Indeed, non-competes that extend beyond the statutory exceptions are now absolutely invalid under California law, despite earlier Ninth Circuit precedent seemingly allowing such agreements if they were "narrowly drawn."

The Supreme Court's ruling that waivers of "any and all" claims are no longer presumptively invalid provides relief to employers concerned about crafting enforceable releases. While the lower court had been concerned that such broad releases failed to protect "non-waivable rights" (*e.g.*, statutory right to indemnification), the Supreme Court took a more permissive view. Employers wishing to proceed with caution may choose to continue including language stating that the release is not intended to cover claims that cannot be waived.

NLRB STRIKES DOWN FIRING OF EMPLOYEE WHO BREACHED AN ILLEGAL CONFIDENTIALITY PROVISION

The National Labor Relations Board has ruled that employers may not take adverse employment actions against employees who breach confidentiality clauses when the clauses are illegally overbroad. In *Northeastern Land Services Ltd.*, the employer ("NLS") was a temp agency whose standard employment contract had a confidentiality clause prohibiting employees from disclosing their terms of employment with the agency (including compensation) to "other" parties. Violation of the clause was punishable by dismissal. One of the agency's employees, Jamison Dupuy, had a dispute about his compensation. While on assignment, Dupuy disclosed the dispute to a third party and sought its intervention on his behalf. NLS fired Dupuy for violating his confidentiality obligations.

Under NLRB precedent, work rules may not prohibit employees from engaging in "protected" activities such as discussing terms and conditions of employment for "mutual and or protection." Further, even work rules that do not directly prohibit employees from engaging in protected activities may still violate the NLRA if an employee would reasonably construe the rule to prohibit protected activity.

In this case, the NLRB held that Dupuy could have reasonably construed NLS's confidentiality clause as prohibiting "protected" discussions because it forbade disclosure to "other parties," a characterization far too broad since other parties could include union representatives. Because the confidentiality clause was illegally overbroad, Dupuy's termination was unlawful.

NEWS BITES

GROCERY AND DRUG STORES PAY $18.5 MILLION TO SETTLE EMPLOYEES' CLAIMS OF UNTIMELY WAGE PAYMENTS

Albertson's, Inc., Lucky Stores Inc. and Sav-on Drugs recently paid $18,500,000 to settle a class action that alleged the stores failed to pay some 200,000 employees who quit or were fired their remaining wages on their last day of work. Of the settlement, $15,000,000 went to the class members and $3,500,000 went to plaintiffs' counsel in attorneys' fees. This sizeable settlement serves as a powerful reminder of the need for employers to ensure compliance with all wage payment requirements.

EMPLOYER JUSTIFIED IN TERMINATING EMPLOYEE SUSPECTED OF MISUSING MEDICAL LEAVE

The federal Seventh Circuit Court of Appeals (Chicago) recently upheld the firing of an employee suspected of abusing medical leave under the federal Family and Medical Leave Act. In *Vail v. Raybestos Products Co.*, the employee had obtained approval for medical leave related to her migraine headaches. Over time, the employer grew suspicious of the legitimacy of the employee's requests for time off. After an investigation revealed that the employee was engaged in a side business while she was supposed to be on medical leave, the employer terminated her. The Seventh Circuit upheld the termination because the investigation "was sufficient to give Raybestos an 'honest suspicion' that Vail was not using her leave 'for the intended purpose.'"

EMPLOYEE DISCRIMINATED AGAINST FOR UNDERGOING IN VITRO FERTILIZATION MAY HAVE A CLAIM

In a notable development, the federal Seventh Circuit Court of Appeals has allowed a female former employee to proceed to trial on claims she was fired because she was undergoing in vitro fertilization treatment. In *Hall v. Nalco Co.*, plaintiff Hall took medical leave to undergo in vitro fertilization. While undergoing a reorganization, the Company terminated Hall and told her that the termination "was in [her] best interest due to [her] health condition." The Seventh Circuit stated: "Because adverse employment actions taken on account of childbearing capacity affect only women, Hall has stated a cognizable sex-discrimination claim under the language of the [Pregnancy Discrimination Act]."

CALIFORNIA SUPREME COURT TO HEAR ARGUMENTS IN "STRAY REMARKS" CASE, STAYS APPELLATE COURT RULING

The California Supreme Court has agreed to hear arguments on whether stray discriminatory remarks by non-decisionmakers can constitute a basis for a hostile work environment claim. The trial court in *Reid v. Google Inc.* granted summary judgment for Google, finding that stray ageist remarks by employees who were not in a position to take action against the plaintiff were not sufficient to establish a claim for discrimination. The Court of Appeal reversed, stating, "We do not agree with suggestions that a 'single, isolated discriminatory comment' or comments that are 'unrelated to the decisional process' are 'stray' and therefore, insufficient to avoid summary judgment." This decision would have allowed the plaintiff to present his case to a jury. The Supreme Court's review means that the Court of Appeal's decision no longer stands, and that the High Court will consider the issue anew. Stay tuned . . .

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