FENWICK & WEST LLP

Fenwick Employment Brief

September 8, 2004

Daniel J. McCoy	Contributor	650.335.7897
Trey Wichmann	Contributor	415.875.2418
John C. Fox	Editor	650.335.7144

California Supreme Court Lowers the Bar for Wage and Hour Class Actions

In a blow to California employers, the California Supreme Court recently reversed an appellate court decision that had decertified a class of drug store chain employees who claimed entitlement to overtime compensation. In *Sav-on Drug Stores, Inc. v. Superior Court*, the plaintiffs sought to certify a class of between 600 and 1400 assistant managers and operating managers, claiming that under Sav-on's "standardized" operations and "uniform" policies, these employees were misclassified as exempt from overtime. The trial court credited the plaintiffs' evidence of uniform and standardized operations and certified the class. The appellate court reversed class certification, citing the defendant's evidence, contained in more than 50 declarations of potential class members, which showed the actual activities performed by the potential class members varied significantly from store to store and individual to individual. See April 29, 2002 Weekly Employment Brief.

The California Supreme Court reinstated the trial court's original certification decision, holding that the appellate court abused its discretion in reweighing the evidence, finding instead that sufficient evidence existed to support the trial court's decision to certify a class. Specifically, the Court noted that even if the individual managers did different tasks, there still was a finite number of types of tasks they performed, and a court in a class action could make uniform decisions concerning whether or not those types of tasks were exempt or non-exempt work. The Court also noted the existence of common (even though disputed) questions concerning the existence of alleged standardized policies and practices, which supported the trial court's decision. Lastly, the Court explicitly stated that the fact that each individual class member might be required ultimately to justify an individual claim or itemize their individual damages did not necessarily preclude the maintenance of a class action.

EDITORIAL NOTE: This case emphasizes the importance of a trial court's initial class certification decision, as it demonstrates the difficulty to overturn the trial court's decision on appeal. Employers should also recognize that California Business and Professions Code section 17200 permits plaintiffs to maintain "representative" claims without having to strictly meet all of the requirements needed to certify a class action and with an expanded four-year statute of limitations.

Interference With At-Will Employment Requires Independently Wrongful Actions

The California Supreme Court has held that a defendant may be liable for interfering with another company's at-will employees, but only if the defendant engages in an independently wrongful act. In *Reeves v. Hanlon*, two attorneys at Reeves' law firm left the firm to create a separate law practice. They persuaded several other Reeves attorneys, who were at-will employees, to join them at their new firm. In the process of leaving, the defendants deleted certain of Reeves' computer files that contained client documents and forms, misappropriated confidential

information, improperly solicited Reeves' clients and cultivated employee discontent. The trial court found that these unlawful and unethical actions were designed in part to interfere with and disrupt the Reeves firm's relationships with their key at-will employees, and awarded Reeves $20,000 in costs the firm spent to recruit replacement employees. Defendants appealed, claiming there should be no liability for interference with a company's at-will employees, because the unlimited ability of an at-will employee to depart at any time without notice eliminates any protectable employer interest in a continuing employment relationship.

The Supreme Court disagreed and upheld the trial court's award, holding there could be tort liability for interfering with the employment of at-will employees if the interference is accomplished by means that are "independently wrongful," which is broadly defined as conduct that is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." The Court found that requiring an independently wrongful act strikes the proper balance between guarding against unlawful methods of competition in the job market and promoting California's twin public policies supporting the right of at-will employees to pursue better economic opportunities and the right of employers to compete for talented workers. The Court reiterated, however, that an individual or company "commits no actionable wrong by merely soliciting or hiring the at-will employee of another." Thus, merely extending a job offer that induces an at-will employee to leave his or her job, without proof of any violation of a statute or regulation, is not a tort.

EDITORIAL NOTE: Despite the Court's reaffirmation of California's public policies in favor of employee mobility and employers' freedom to recruit talent, employers must use care in their recruitment efforts in view of this case. Any improper conduct in the course of recruiting efforts, such as defaming the individual's present employer or encouraging an employee to bring along his or her former employer's confidential information, could result in liability for unlawful interference with the employment relationship, in addition to the underlying defamation or trade secrets violations.

Computer Worker Overtime Exemption Does Not Fit for IT Worker

Are your IT workers, especially those who carry out "help desk" functions, exempt from overtime compensation under the computer worker exemption? A recent federal court ruling casts substantial doubt on the validity of such classifications even under federal law which is more generous to employers than applicable California state law.

In *Martin v. Indiana-Mich. Power Co.*, a power facility "IT Support Specialist" sued for overtime based on his alleged misclassification as exempt under the federal computer professional exemption. A district court dismissed Martin's complaint, but the Sixth Circuit Court of Appeals (encompassing Michigan and other central U.S. states) reversed and entered judgment for the plaintiff.

Martin, a high school graduate who holds no computer certifications, is primarily responsible for installing and maintaining software for computer workstations, and performing general troubleshooting on computer problems employees experience. He makes no decisions (nor any recommendations) about hardware or software purchases for the power facility, nor does he install network programs, and he is not involved in the design or configuration of computer hardware or software for the facility.

To fall within the federal computer professional exemption, an employee must earn a minimum salary of $250 per week (currently $455 per week under newly enacted federal overtime regulations), consistently exercise discretion and independent judgment, and carry out as his primary duty work that requires the "theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering." The employee's "primary duty" must

also consist of either: (i) consultation with users to determine hardware, software, or system functional specifications, or (ii) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs.

The court found that Martin performs no computer programming or software engineering; his duties "are all performed to predetermined specifications in the system design created by others;" and his duties revolve primarily around computer maintenance, rather than the design and development responsibilities described above. Further, although Martin "consult[s] with users," he does so to repair basic computer problems, not to determine hardware, software or system functional specifications. Finally, the court refused to consider the impact of training Martin received in systems analysis because the power facility offered no evidence that Martin implemented the training in his day-to-day duties. The court observed, "it is the job that one does, not the job one is trained to do, that determines exempt status."

For these reasons, the court held that the power facility misclassified Martin as a computer professional and further misclassified him as exempt under the administrative exemption).

Although the Department of Labor recently overhauled the federal computer professional regulations (increasing the salary threshold and streamlining the duties component of the exemption), it is doubtful that the Sixth Circuit would have reached a different result if it applied those regulations. Moreover, given the more stringent computer professional exemption test in California, it is also doubtful that the power facility would have prevailed under California law.

EDITORIAL NOTE: This decision is a wake-up call for many employers who have too liberally applied the computer professional exemption to IT staff employees. The test is complex, and very fact-specific, and it demands a close (and periodic) review from employers.

Scope of Employer Liability for Non-Employee Harassment Remains Unclear Following Court of Appeals Ruling

A California Court of Appeal recently held that the January 1, 2004 amendment to the Fair Employment and Housing Act ("FEHA") regarding employer liability for harassment inflicted by customers and other non-employees does not apply retroactively. The ruling creates confusion about whether employers will be liable for non-employee harassment that occurred prior to 2004.

In *Carter v. California Dep't of Veterans Affairs*, the plaintiff nurse alleged that her employer, a VA hospital, was liable on a hostile work environment theory for a patient's harassment of the nurse. The court of appeals initially held that FEHA did not impose liability on employers for harassment perpetrated by non-employees. Thereafter, former Governor Davis signed into law an amendment to FEHA that expressly imposes employer liability for such non-employee harassment. The legislation, effective January 1, 2004, called for the new FEHA provision to apply retroactively, such that employers could be held liable for non-employee harassment inflicted prior to 2004. Earlier this year, a California court of appeal in *Salazar v. Diversified Paratransit* adhered to this retroactivity language and held that a transit company could be liable for harassment by a bus passenger against one of its drivers.

Despite both the clear retroactivity language in the amendment and the *Salazar* ruling, the *Carter* Court rejected, on two grounds, the nurse's claim of liability for harassment that occurred prior to the effective date of the amendment. First, the amendment memorialized a change to the substantive law, and did not merely clarify existing law. Second, retroactive application of the amendment would violate constitutional due process considerations because it imposes substantial new obligations on employers for past conduct without fair notice.

EDITORIAL NOTE: In light of the split rulings, the California Supreme Court will probably accept review

of either or both decisions and render a dispositive opinion on the issue of retroactivity. In the meantime, employers may continue to assert a defense to non-employee harassment claims based on conduct prior to 2004, although it is not clear which decision (*Carter or Salazar*) trial courts or other courts of appeal will follow when they address such a defense.

Employer Successfully Asserts "Key Employee" Exception to FMLA Reinstatement Obligation

A Louisiana hotel recently asserted a successful "key employee" defense to a former employee's claim that the hotel violated the federal Family & Medical Leave Act ("FMLA") when it failed to reinstate the employee to her prior position upon return from a FMLA leave. The ruling sheds light for employers on a limited, but important, exception to the FMLA reinstatement obligation.

In *Oby v. Baton Rouge Marriott*, Ms. Oby, the defendant hotel's housekeeping manager and third highest paid employee, commenced an FMLA leave to care for her elderly parents. At the five week mark of the leave, Marriott advised Oby in writing that she was considered a "key employee," and that the hotel would deny her reinstatement to the housekeeping position unless she returned to work within the next two weeks. Oby did not return by the deadline and the hotel began a search for a replacement manager. Oby eventually returned to the hotel prior to the expiration of her 12-week maximum under the FMLA and the hotel, having offered her housekeeping position to another, offered Oby the position of food and beverage manager at the same salary and with the same benefits as her prior job. Oby declined the offer and sued the hotel for failing to place her in the same or an equivalent position following her return from FMLA leave.

The court dismissed Oby's FMLA claim on two grounds. First, the court held that the hotel offered Oby a virtually identical position in terms of pay, benefits, and working conditions, and therefore satisfied its obligation to offer her a return to an "equivalent" position, despite the fact that Oby needed training to occupy the new position. Second, the court held that the hotel had the right to deny reinstatement under the "key employee" exception because: (i) Oby was among the highest paid 10% of employees at the hotel; (ii) Oby's reinstatement to the housekeeping manager position (which the hotel had already filled) would result in "substantial and grievous economic injury" to the hotel's operations; and (iii) the hotel, upon learning that reinstatement to the prior position would cause such injury, properly notified Oby of its intent to deny her reinstatement to the prior position.

EDITORIAL NOTE: The decision highlights the notion that "equivalent" does not mean "identical" for purposes of the FMLA reinstatement obligation. It also highlights the importance of timely notice to the employee of her key employee status, and of the impact that status may have on reinstatement.