Fenwick Employment Brief

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## MEAL AND REST BREAK OBLIGATIONS STILL UP IN THE AIR

The California Supreme Court recently granted review of *Brinker Restaurant Corp. v. Superior Court*, in which a Court of Appeal held that an employer's obligation to "provide" rest and meal breaks to employees means only that the employer must make such breaks available to employees, but need not ensure that employees actually take the breaks (*see* July 23, 2008 FEB). In granting review, the supreme court depublished the appellate court's decision, which means it may not be cited or relied on by a court or a party in any other action.

In response to the supreme court's review of *Brinker*, the DLSE acknowledged to its staff that, while *Brinker* may not be relied upon as precedent, there is "compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken." In addition, just days later, another Court of Appeal issued *Brinkley v. Public Storage, Inc.*, which determined that an employer need only make meal and rest periods available to employees and need not ensure that the breaks are actually taken. The *Brinkley* decision emphasized that, as a practical matter, instituting a stricter standard would make it impossible for large employers to ensure that breaks are actually taken and would create a "perverse and incoherent" incentive for employees not to take full breaks. The positions of *Brinkley* and the DLSE are consistent with several federal district courts in California which have also enforced the "make available" interpretation.

We expect the supreme court to provide definitive guidance on employers' meal and rest break obligations. Until then, we recommend that employers maintain their current meal and rest break enforcement practices.

## CALIFORNIA OVERTIME LAW GOVERNS IN-STATE WORK BY NON-RESIDENTS

The Ninth Circuit Court of Appeals held that California wage laws apply to work performed within California by out-of-state employees. In *Sullivan v. Oracle*, three former Oracle employees, residents of Colorado and Arizona, sued Oracle for failing to pay them for overtime worked while training customers in California.

Oracle historically treated the former employees and all other "Instructors" as exempt teachers. In 2003 and 2004, Oracle reclassified its Instructors as non-exempt and began paying them overtime.

The plaintiffs claimed that, between 2001 and 2004, they worked approximately 20 to 80 days in California. They argued that California law, which provides for overtime for hours worked in excess of eight in one day and double-time calculations (Colorado and Arizona law do not), should apply to their overtime claims. The district court refused to apply California law and dismissed the claims.

On appeal, the Ninth Circuit determined that California law governed work performed within California by the Colorado and Arizona residents. Specifically examining Colorado's and Arizona's overtime laws, the court found Arizona and Colorado had no interest in applying their less favorable overtime laws to work performed by their residents in California. Further, the court found sufficient ties to California – Oracle is headquartered in California, the classification decisions were made in California, and the at-issue work was performed in California – that application of California law was neither arbitrary nor unfair. Thus, the three former employees could proceed on their claims and recover certain overtime compensation for which they would not have been eligible under Colorado or Arizona law.

It remains to be seen how broadly this decision will impact employers. The Ninth Circuit did not impose a blanket rule requiring the application of California law where an out-of-state worker performs work in the state. Nevertheless, employers (both those based in California as well as outside the state) which send non-exempt employees into California to perform work should be mindful of this decision and prepared to calculate overtime in a matter consistent with California law.

## NEWS BITES

**"Me, Too" Evidence Inadmissible In Age Discrimination Suit**
A federal district judge in Kansas, once again, determined a plaintiff's "me, too" discrimination evidence was inadmissible to prove age discrimination tainted her discharge. At trial in *Mendelsohn v. Sprint/United Mgmt. Co.*, the court excluded five former employees' testimony about alleged age and other discrimination by supervisors who were not involved in the plaintiff's selection for a reduction in force. On appeal, the Tenth Circuit Court of Appeals ruled such evidence was always admissible, but the United States Supreme Court reversed that decision, holding that admissibility required a fact- and context-specific inquiry (*see* March 11, 2008 FEB).

On remand, the district court again found the "me, too" evidence inadmissible. The plaintiff failed to connect purported age discrimination by other supervisors to her termination, and otherwise failed to show a company-wide practice of discrimination. Moreover, any probative value would have been outweighed by the risk of confusion and wasted time, as Sprint would require an opportunity to refute the "me, too" evidence.

**FEHA Filing Period "Tolled" While Pursuing Internal Administrative Remedy**

In *McDonald v. Antelope Valley Community College District*, the California Supreme Court held that the deadline for filing a FEHA claim may be equitably "tolled" while an employee voluntarily pursues an employer's internal administrative remedy. In other words, the FEHA limitations period does not begin to run until the conclusion of the internal process.

While *Antelope Valley* specifically addressed an administrative remedy established by government regulation, it left open the question of whether using a private employer's internal complaint or grievance procedure could also toll the FEHA limitations period. In light of this uncertainty, employers must be vigilant in providing written notice to complainants (even if no longer employed) upon conclusion of the internal process to ensure the FEHA limitations period commences.

**$14.4 Million Damages for Improperly Classified FedEx Drivers**

According to news reports and lead counsel in the *Estrada v. FedEx* class action, FedEx drivers who were improperly classified as independent contractors are entitled to an additional $9.1 million beyond the $5.3 million awarded in 2005. Following a ruling late last year that the drivers could recover expenses (*see* November 20, 2007 FEB), a court-appointed referee increased nearly twofold the drivers' recovery for unreimbursed expenses. The $14.4 million damages award, which does not yet include plaintiffs' attorneys' fees, provides a sobering reminder of the legal and financial risks associated with worker misclassification.

**New Lawsuit Challenges Unpaid Computer Booting Time**

Home-based customer service representatives have sued their employer, a Minneapolis managed health care company, alleging failure to pay for time spent turning on and booting up computers, starting programs, and logging into computer systems and programs, among other asserted overtime and wage violations. According to news reports, the representatives claim they performed such tasks as necessary preparation for their scheduled shifts, but were not paid for the time in violation of federal law. Employers should be aware that time spent preparing to work is often compensable time, and those who do not currently pay employees for such preparation time are advised to consult legal counsel.

**HR Managers Sue Dell for Age and Gender Discrimination**

On October 29, 2008, four former HR managers sued Dell claiming systemic discrimination against women in job promotions and compensation as well as gender and age discrimination in its April 2008 reduction in force. In *Chapman v. Dell, Inc.*, filed as a class action in federal district court in San Francisco, four senior managers, all formerly of Dell's HR department, claim Dell hired them into positions at lower grade levels than similarly or less qualified male employees, paid them less than similarly-situated men, and denied them promotional opportunities and pay increases despite greater responsibility and exemplary performance. The complaint further alleges Dell disproportionately terminated women and older workers in an April 2008 reduction. The plaintiffs purport to represent two classes comprising female workers and workers over age 40. Dell has asserted the claims are "without merit," according to news reports.

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