THE ZAPPIA LAW FIRM
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Labor and Employment Law Update

April 2014

Good afternoon everyone,

Following are brief reviews of recent labor and employment related cases and articles of interest. Click on the link of any case or article for all the details, and feel free to contact us if you have any questions or comments.

In this month's update:

- Another opportunity to remind you all to be extremely careful with the content of your emails;
- A $6 million jury verdict for a retaliation claim by a 56-year old, female, former Playboy executive - with punitive damages likely to follow;
- $4 and $5 million dollar class action settlements for rest period/meal break violations;
- An article re the California Employment Development Department "Stepping Over" $516 Million To "Pick Up" $323,000;
- An $80,000 reason why not to share confidential settlement information with your family, especially a daughter with 1,200 friends on Facebook; and
- Two articles re student athletes: Should they be paid? Should they be permitted to unionize?

Yet Another Case of Incriminating Emails by Corporate Executives: Silicon Valley Conspiracy

In 2011, a large class consisting of over 100,000 employees brought an action alleging Silicon Valley firms conspired to suppress wages through the use of "do-not-cold-call" lists and other verbal agreements to not hire each other's employees which cost the employees a total of $9 billion in lost wages. During discovery, plaintiffs' attorneys found a written agreement between the defendants to work out their shady deals "verbally" because, according to Google CEO Eric Schmidt: "I don't want to create a paper trail over which we can be sued later." Despite the CEO's prophetic warnings, top executives continued to write emails to each other. One of the most damning emails was written by Steve Jobs, which contained a warning to Google executives to stop all recruiting at Apple: "If you hire a single one of these people, this means war." In another email chain, Jobs demanded that a Google headhunter be fired for disregarding the do-not-

cold-call agreement. Google complied with his demand. The Silicon Valley giants implicated in the alleged conspiracy may be found in violation of California job mobility laws (California Business and Professions Code Section 16600).

Email(s) Heard 'Round The Valley, LA Daily Journal (April 10, 2014), Orly Lobel.
In re High-Tech Employee Antitrust Litigation, CV11-2509 (N.D. Cal., filed May 23, 2011).

Raiderettes Will Not Be Afforded Federal Minimum Wage Law Protections

A couple of Raiderettes originally filed a lawsuit against the Oakland Raiders for wage violations on January 22, 2014, prompting the U.S. Department of Labor to investigate the situation.

> **From our January 2014 Newsletter:**
> Lacy T., a cheerleader for the Oakland Raiders, filed a proposed class action lawsuit alleging the team paid members of the cheerleading squad less then minimum wage. The suit also accuses the Raiders of violating California law by requiring cheerleaders to pay their own travel expenses and other team-mandated items, withholding their pay until the end of the season, and fining them for trivial offenses such as bringing the wrong pom-poms to practice. Raiderettes are paid $1,250 a season for performing at ten home games, which averages to less than $5 an hour after factoring in required practice time, charity events and photo shoot obligations. The Labor Department is investigating the Raiders' treatment of the Raiderettes, and may assess penalties up to twice the amount of the back-wage payments owed.

Last month, the investigation was closed based on the finding that cheerleaders work on a seasonal basis and not year round, exempting them from the protections and benefits of federal minimum wage laws. In March, the Raiders filed a motion to settle the dispute in arbitration. It is unclear whether a California judge will grant the motion due to the tenuous validity of arbitration clauses in California. If it does, NFL commissioner Roger Goodell will be the overseeing arbitrator. The Raiderettes may argue that the arbitration clause is inherently unfair and unenforceable based on the fact that the Raiders contribute to the NFL commissioner's salary along with all the other NFL teams.

Why Are Most NFL Cheerleaders Paid Less Than Minimum Wage? (Poll), 89.3 KPCC (April 2, 2014), Michelle Lanz.
http://www.scpr.org/programs/take-two/2014/04/03/36756/why-are-most-nfl-cheerleaders-paid-less-than-minim/

Daughter's Facebook Post Costs Dad $80,000

A former headmaster at a Florida school lost his $80,000 age bias settlement by breaching the deal's confidentiality clause. He told his daughter about the settlement and she shared the news with her 1200 Facebook friends, a significant portion of whom were current or former students of the defendant school. The Facebook post read "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

Daughter's Facebook Boast Kills Dad's Age Bias Deal, Law360 (February 28, 2014), Abigail Rubenstein.

http://www.law360.com/articles/514264/daughter-s-facebook-boast-kills-dad-s-age-bias-deal

An Arbitration Agreement Is Enforceable Despite A Company Having the Exclusive Right To Modify It

The California Court of Appeal held that a former sales consultant of CarMax must arbitrate his disputes against his employer. Despite CarMax's exclusive right to modify the agreement, it still required the modification to be made by a specific date, with 30 days notice, and for any changes to be posted at CarMax locations. Additionally, the arbitration agreement did not allow CarMax to apply any modifications if it was made after an employee had filed a claim, supporting the finding that the agreement was enforceable and not invalidated by the modification clause.

Casas v. CarMax Auto Superstores California LLC, (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/nonpub/B246392.PDF

(note: When this opinion was filed on February 26, 2014 it was not certified for publication in the Official Reports. On March 20, 2014, the opinion was certified for publication.)

An Employer's Shortened Statute of Limitation Provision For Filing a Claim or Lawsuit Is Both Unreasonable and Unenforceable

The California Court of Appeal held that an employer's agreement that required their employees to file any claim or lawsuit "no more than six months after the date of the employment action" was unenforceable because the Fair Employment and Housing Act (FEHA) provides much longer limitation periods, making the shortened limitation provision unreasonable and against public policy. Ashley Ellis, who worked as a security guard for U.S. Security Associates, filed claims under FEHA claiming her supervisor (Haynes) sexually harassed her. Haynes called Ellis and proposed she join him and his wife in sexual activities. A host of offensive and unwanted sexual behavior ensued, including: sending Ellis a text telling her "he wanted to kiss her and he was sorry she did not want to be lovers"; making suggestive sexual comments to her; pulling up his pants and exposing the size of his penis to her. Hayne's wife also worked with Ellis and regularly spoke in front of Ellis about the couple's sexual behavior, their multiple partners, and described sexual activities and sexual fantasies.

Ellis v. U.S. Security Associates et al., (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/A136028.PDF

California EDD refused to participate in program to recoup $516 Million because it would have cost $323,000 to be able to use the program

The California Employment Development Department (EDD) could have recouped $516 million in unemployment benefit overpayments if it participated in a federal Treasury Offset Program that allows state and federal agencies to collect delinquent debts by intercepting federal tax refunds. EDD refused to participate because it determined they didn't have enough resources to

update their data systems and use the program. The update would have cost them roughly $323,000 and the state would have recaptured $100 million in its first year.

Calif. Missed $516M In Unemployment Refunds, Auditor Says, Law360 (March 17, 2014), Ama Sarfo.
http://www.law360.com/articles/519123/calif-missed-516m-in-unemployment-refunds-auditor-says

Co-Occupant May Override Roommate's Invocation Of 4th Amendment Right Against Warrantless Searches

A recent U.S. Supreme Court ruling has made it easier for law enforcement to conduct warrantless searches. Previously, the Supreme Court has held that when a physically present inhabitant refuses to consent to a warrantless search, the refusal is dispositive as to him, regardless of the consent of a fellow occupant. In the present case, police witnessed a violent robbery suspect (Fernandez) run into an apartment building, and soon after heard screams come from within. The officers knocked on the door and asked a beaten and bloody woman who answered to step outside so they could conduct a protective sweep. At that point Fernandez came to the door to object to the search and was then quickly arrested on suspicion of domestic assault. An hour after the arrest, officers returned to the apartment and obtained consent from his girlfriend, searched their home, and found incriminating evidence linking Fernandez to the Robbery. In a 6-3 opinion, the Supreme Court ruled that the co-tenant's consent was valid to eliminate the need for a warrant, because he was no longer physically present to continue to deny consent to the warrantless search once arrested. The court also added that the subjective motive of the police officers in removing an objecting joint occupant is irrelevant if they also have an objective basis for their removal. The court reasoned that Fernandez was in the same position as an occupant absent for any other reason, despite his absence being caused by the police removing him an hour earlier after he had clearly invoked his 4th amendment rights.

Fernandez v. California (2014) ___ U.S. ___.
http://www.supremecourt.gov/opinions/13pdf/12-7822_he4l.pdf

Collection of DNA From Anyone Arrested For A Felony Offense Is Permitted As A Legitimate Police Booking Procedure

The Ninth Circuit Court of Appeals ruled on March 20 that California's DNA collection law is constitutional, allowing state and local officials to obtain, store and analyze the DNA of anyone arrested for, or charged with a felony offense. More than half the states have similar laws allowing DNA collection. One of the judges stated that California's law is "materially indistinguishable" from Maryland's DNA law, which was upheld by the U.S. Supreme Court a few months ago. The high court ruled that the DNA collection practice "is like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."

Haskell v. Harris, (March 20, 2014, Ninth Cir.) ___ F.3d ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/20/10-15152.pdf

Excessive Deadly Force Claim Moves Forward Against Two Officers in Anaheim

The Ninth Circuit, in an en banc ruling, reinstated a portion of a lawsuit accusing two Anaheim police officers of unlawful use of deadly force for shooting and killing a man. The decedent, Adolf Anthony Sanchez Gonzalez, was pulled over by Officers Daron Wyatt and Matthew Ellis and struggled with them as he tried to get rid of what appeared to be a controlled substance by swallowing it. Wyatt entered the vehicle on the passenger side and began punching Gonzalez in the face, which he claimed he did because he believed Gonzales was attempting to hit Ellis with his van. Gonzalez proceeded to put the van in drive and accelerate with Wyatt still in the vehicle. Officers estimated the van was traveling about 50 mph. Wyatt shot Gonzalez in the head, allegedly after he ignored his command to stop. The court held that the successors of the decedent raised triable issues of fact with respect to their Fourth Amendment claim of excessive deadly force, where there were significant inconsistencies in the officers' testimony regarding whether the decedent had indeed "stomped" on the gas to get away and whether the relative speed of the van posed an immediate threat to the safety of the Officers. Based on the current record, a jury could find that Wyatt did not act reasonably in using deadly force. The court was unanimous in upholding the dismissal of the plaintiffs' substantive due process claim however, finding that officers had no ulterior motives for using force against decedent.

Gonzalez v. City of Anaheim (March 31, 2014, Ninth Cir.) ___ F.3d. ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/13/11-56360.pdf

Police Officers Entitled to Qualified Immunity in a Deadly Shooting

The Ninth Circuit affirmed the district court's summary judgment and agreed that police officers were entitled to qualified immunity in a Civil Rights action alleging that excessive force was used when they shot and killed Kamal Lal following a high-speed chase. The decedent, after a domestic disturbance with his wife, led police on a 45 minute high-speed car chase before officers were able to disable his vehicle. When Lal exited, he attempted to provoke officers into shooting him, and advanced towards two officers while holding a large rock over his head, coming within a few feet of the officers before he was shot down. Based on the totality of circumstances, the district court properly determined that the officers thought that Lal posed an immediate threat of serious physical harm and that the officers' beliefs were reasonable.

Lal v. State of California (March 31, 2014, Ninth Cir.) ___ F3d. ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/31/12-15266.pdf

Holiday Pay Used To Calculate Retirement Benefits

The California Court of Appeal held that the premium pay police officers and fire fighters receive for working on designated holidays should be included when calculating retirement benefits. Oakland Police and Fire Retirement System (PFRS) retirees receive benefits that fluctuate based on "compensation attached to rank" paid to personnel who currently hold the rank that the member held prior to retirement. The question of whether holiday pay is "compensation attached to rank" for purposes of calculating PFRS retirement benefits was already answered in the affirmative by the court in the case of *Buck v. City of Oakland* (August 25, 1971, 1 Civ. 28402). [nonpub. Opn.]. In that case the court held that the extra holiday pay granted to a department member for working on a "legal holiday" that coincided with his regular 40-hour work week was "extra compensation" and "must be included in the computation of retirement allowances." The harm suffered by PFRS retirees which led to the First District's decision in *Buck* is the same harm the City of Oakland is seeking redress for now. The Court concluded their previous decision was res judicata for the City's claim, since "having had one

chance to litigate this issue before the First District, the City is not now entitled to take another bite at the same apple."

City of Oakland v. Oakland Police & Fire Ret. Sys., ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/A136769.PDF

Misclassified LAFD Employees Will Get Standard Overtime Pay and Damages Once They Are Properly Classified

The Ninth Circuit Court of Appeals held that Long Angeles Fire Department's aeromedical technicians and dispatchers are not "employees engaged in fire protection." Thus these employees are entitled to standard overtime pay and will receive damages offsets based on amounts they should have been paid per week. The misclassification is relevant due to an exemption written into the Fair Labor Standards Act ("FLSA") that states Los Angeles City employees "engaged in fire protection" (i.e. firefighters) do not receive standard overtime pay, that is, time and a half for all hours worked over forty in one workweek. Instead, firefighters receive overtime only after working 212 hours in a twenty-eight-day period.

Haro v. City of Los Angeles, (March 18, 2014, Ninth Cir.) ___ F.3d ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/18/12-55062.pdf

Should College Athletes Get Paid?

The NCAA is facing an antitrust class action accusing them of colluding to restrict pay for student-athletes. The suit says they have conspired with Southeastern, Big Ten, Pacific-12, Atlantic Coast, and Big 12 conferences to establish "pernicious" nationwide restrictions on paying college athletes that are a "blatant violation of the antitrust laws" which are justified by alluding to "false claims of amateurism." The athletes' counsel, Jeffrey Kessler, is pursuing a complete removal of the no-pay requirements: "The goal is to change the system. The college set of rules are illegal and grossly unfair to the student-athletes and have to be struck down... The idea is to enable the parties to revisit the entire issue of what's appropriate with regard to this big business that they have in Division I men's basketball and college football." To the argument that the nationwide restriction on paying NCAA athletes is necessary to maintain the integrity of amateur sports, Kessler responds: "if this notion had any validity when the NCAA started, it certainly has no meaning in these two sports today, when you have billions of dollars generated that everyone benefits from except the athletes. There's nothing amateur about these sports."

NCAA Smacked With New Antitrust Suit Over Amateur Rules, Law360 (March 17, 2014), Bill Donahue.
http://www.law360.com/articles/519100/ncaa-smacked-with-new-antitrust-suit-over-amateur-rules

Winston's Kessler Going For the Jugular In NCAA Suit, Law360 (March 18, 2014), Bill Donahue.
http://www.law360.com/articles/519720/winston-s-kessler-going-for-the-jugular-in-ncaa-suit

Northwestern Football Players Considered Employees And May Unionize

The NLRB recently decided that Northwestern's grant-in-aid scholarship football players are "employees" under the National Labor Relations Act (NLRA) and allowed the players to unionize. The football players were scheduled to vote April 25 on whether they want to be represented by a union. Peter Sung Ohr is the director of region 13 for the NLRB and authored the written decision that stated, "As the record demonstrates, players receiving scholarships to perform football-related services for the employer under a contract for hire in return for compensation are subject to the employer's control and are therefore employees within the meaning of the act." 85 out of the 112 Northwestern football players receive scholarships that cover their tuition, fees, room, board and books. Football players spend 50 to 60 hours per week training before the start of the academic year and almost the same amount of time per week during the football season, which is more than any full time position and more than any player spends on their studies. Ohr also noted that Northwestern's football team generated $235 million in total revenues and incurred $159 million in expenses between 2003 and 2012 as evidence that clearly shows the "employer's players perform valuable services for their employer." Since the NLRA only applies to employees in the private sector, the regional director's decision will only affect private schools like Northwestern. On April 9, Northwestern University asked the NLRB to review their groundbreaking decision, alleging the ruling ignored key evidence in the school's favor that showed their athletic program treated their athletes as students first and was "fully integrated with its academic mission." Evidence of this kind showing how the university prioritized academics first with their athletes would increase the precedential value of the board's earlier decision in favor of Brown University. That Bush-era ruling from 2004 held that graduate student assistants don't qualify as employees because their relationship with their schools is primarily educational, not economic.

Northwestern Football Players Get Green Light To Unionize, Law360 (March 26, 2014), Ben James.
http://www.law360.com/employment/articles/522284?nl_pk=754155a2-aefd-4dbd-80cf-2847a1179852&utm_source=newsletter&utm_medium=email&utm_campaign=employment

Northwestern Calls For Overturn Of Football Union Ruling, Law360 (April 9, 2014), Kat Greene.
http://www.law360.com/employment/articles/526793?nl_pk=a10b3ef9-255f-46d9-a6ce-679f71a8b826&utm_source=newsletter&utm_medium=email&utm_campaign=employment

"In the Trenches"

Recent Verdicts, Settlements, and Current Cases

Former Playboy Executive Receives $6 Million Verdict with Punitive Damages Likely To Follow

A District Court jury awarded a former Playboy accounting executive $6 million, the largest compensatory damages award to date under the Sarbanes-Oxley law. The jury found that Playboy acted maliciously and oppressively when they wrongfully terminated the executive in retaliation for refusing to grant large bonuses to top executives without first attaining proper board approval. They also found them guilty of age discrimination. She was 56 when they fired her in 2012. The plaintiff says she was "shunned, humiliated and treated like an outcast." The U.S. District Court jury decided the company acted with "malice, fraud or oppression," which

potentially makes the award considerably higher by allowing punitive damages to be assessed against Playboy. The determination of the total amount is still pending.

Playboy Must Pay $6 Million to Fired Whistleblower, nbcnews.com (March, 6, 2014), Reuters. http://www.nbcnews.com/news/us-news/playboy-must-pay-6-million-fired-whistleblower-n46466

Zulfer v. Playboy Enterprises Inc., LA Daily Journal, Verdicts & Settlement (April 11, 2014), USDC Central Court Case No.: (2:12-cv-8263BRO-SH) 14-JV_543.

$5,000,000 Settlement for Rest Period / Meal Break Violations

A contract food service company settled with a class of over 100 former employees for $5,000,000 to settle a claim alleging failure to provide rest periods and meal breaks; requiring their employees to pay for all or part of their uniforms and clothing required as a condition of employment; and requiring employees to purchase and maintain tools and equipment.

Mojica et al. v. Compass Group U.S.A. Inc., Bon Appetit Management Co., LA Daily Journal, Verdicts & Settlements (April 4, 2014), Orange County Superior Court Case No.: (8:13-cv-01754DSF-GR) 14-JV_643.

$4,425,000 Settlement for Rest Period / Meal Break Violations

A United States District Court jury awarded $4,425,000 to a class of former service technicians at Canon. Canon utilized timekeeping technology that recorded various breaks in service technicians' work without their input. As a result, the timekeeping program would automatically make deductions even when workers did not take meal periods or breaks, causing them to incur unpaid work time.

Jones et al. v. Canon Business Solutions, LA Daily Journal, Verdicts & Settlements (April 11, 2014), USDC Central Court Case No.: (2:12-cv-07195-JAK-JEM) 4-JV_646.

Pep Boys Must Cease and Desist Enforcement of Arbitration Agreement and Revise It to Comply with the Law

A court found that the arbitration agreement between Pep Boys and their employees, violated the National labor Relations Act by preventing employees from participating in collective class actions. The court ordered Pep Boys to cease and desist from enforcing the unlawful arbitration agreement and to revise the agreement to comply with the law.

The Pep Boys Manny Moe & Jack of California and Robert Nash, LA Daily Journal, Verdicts & Settlements (March 7, 2014), National Labor Relations Board. Case No.:31-CA-104178.

Workplace Training

We offer group and private training to meet your needs:

- California's Mandatory Harassment Training
- FMLA / CFRA / Pregnancy Leave
- Disability Discrimination Amendments
- Pregnancy Disability Law Amendments
- Employee Discipline
- Workplace Investigations
- Union Avoidance and Relations

Presentations

We also present on various topics, including:

- Labor Negotiations
- Pension Reform; and
- The Limitations of AB 646 Post Impasse Procedures

As always, don't hesitate to contact any of our attorneys if you have any questions or comments.

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