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- Labor and Employment Law -
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Labor and Employment Law Update

January 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:

- A $19 million judgment for donning and doffing of protective gear;
- A wage/hour class action lawsuit by the Oakland Raider Cheerleaders;
- Another case finding exotic dancers are employees - not independent contractors;
- Multiple gender discrimination lawsuits which apply equally to both private and public sector employers;
- A new law which significantly expands the types of complaints which are eligible for whistle-blower protection; and
- Yet another opportunity - by way of a political example this time - to remind you all of the importance of being careful with emails at work.

"In the Trenches"

Recent Verdicts and Settlements and Current Cases

$250,000,000 Class Action for Gender Bias

Court Finds Sexual Harassment Despite Lack of Sexual Motive By Same Sex Assailants

The California Court of Appeal held that a heterosexual male was subjected to sexual harassment when he was harassed about his heterosexual identity despite a lack of sexual desire or interest by the assailants. It is clear the assailants would have treated a woman differently and not attacked her for the same reason, making their harassment "because of sex" within the meaning of the FEHA.

Taylor v. Nabors Drilling USA, LP, (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/B241914.PDF

Lawsuit

A discrimination class action - valued at $250 million - has been brought against Merck & Co. alleging that the company cultivated a "boys club" atmosphere by discouraging the hiring and promotion of women.

Merck Gender Bias Suit Swells To $250M After Plaintiffs Added, Law360 (January 21, 2014), Joshua Alston.

Tyson Foods Ordered To Pay $19,000,000 to Workers On Meat Processing Line

A federal judge in Nebraska entered a $19,000,000 judgment against Tyson Foods in a class action brought by workers who complained that they were not compensated for the time they spent putting on and taking off their protective gear pre and post-shift.

Tyson Foods Ordered To Pay $19M In Don, Doff Suit, Law360 (January 31, 2014), David McAfee.

$9,500,000

Oakland Raiders Under Investigation For Underpaying Cheerleaders

Lacy T., a cheerleader for the Oakland Raiders, filed a proposed class action lawsuit alleging the team paid members of the cheerleading squad less than minimum wage. The suit also accuses the Raiders of violating California law by requiring cheerleaders to pay for 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.

Raiderette Wages Lawsuit Prompts Labor Dept. Investigation, SFGate (January 30, 2014), Bob Egelko.
http://www.sfgate.com/raiders/article/Raiderette-wages-lawsuit-prompts-Labor-Dept-5190112.php

President Obama Plans to Raise the Federal Minimum Wage to $10.10

President Barack Obama plans to issue an executive order raising the federal minimum wage for federal contractors to $10.10 per hour along with pushing a bill in Congress that will increase the federal minimum wage to the same amount and index it to inflation. According to the Department of Labor these increases will affect businesses that have annual sales of $500,000 or more and smaller businesses that are engaged in interstate commerce, along with federal, state and local government agencies.

Obama To Raise Minimum Federal Contractor Wage to $10.10, Law360 (January 28, 2014), Stephanie Russell-Kraft.

Full Salary Not Guaranteed For Public Safety Employees On Modified Duty

The California Court of Appeal held that a Public Safety Employee returning from an on-the-job injury on modified duty is not guaranteed his previous full salary. The court concluded that Labor Code section 4850, which guarantees injured employees full salary in lieu of disability payments, applies only while the employee is on a "leave of absence."

County of Nevada v. Workers' Compensation Appeals Board,

(2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/C074133.PDF

Settlement for Wage/Hour Violations

R+L Carriers, a large shipping company, settled with a group of their truck drivers who contended their employer did not provide meal and rest periods and routinely failed to pay them for all hours worked.

Mendez v. R+L Carriers Inc., LA Daily Journal, Verdicts & Settlements (January 17, 2014), US District Court - N.D. California Case No.: 4:11-cv-02478-CW.

Aircraft Service Employees Prevented From Striking in Order to Avoid Adverse Effects on Interstate Commerce

The Ninth Circuit Court of Appeals upheld a district court's decision to enjoin employees of Aircraft Service International Inc. from striking without first engaging in labor dispute resolution procedures pursuant to the Railway Labor Act. The Act requires all carrier employees to participate in dispute resolution procedures before they resort to striking which, in this case, threatened to shut down Sea-Tac Airport. The court stated the injunction did not violate the employees' First Amendment rights, but furthered an important governmental interest in regulating labor relations within the national transportation industry to prevent adverse effects on interstate commerce.

Aircraft Service International Inc. v. International Brotherhood of Teamsters AFL CIO Local 117, (January 10, 2014, Ninth Cir.)___ F.3d___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2014/01/13/12-36026%20web%20corrected.pdf

$8,000,000 Settlement for Gender Bias / Discrimination

Costco settled with a class of female employees for $8,000,000 over allegations of gender discrimination by using a uniform, corporate-directed system that failed to promote women with qualifications as good as or better than their male counterparts into the position of Assistant General Manager and General Manager. In addition to the monetary settlement, Costco agreed to address

Collective Bargaining Agreement Governs Overtime Compensation Where Employer Meets All Requirements For Exception

California Labor Code section 510 requires overtime pay for hours worked that exceed 8 hours in a day or 40 hours in a week. Employees of Exxon Mobil recently claimed overtime pay under this section in lieu of the overtime already paid by Exxon pursuant to their collective bargaining agreement (CBA). Section 514 provides an exemption from section 510 "if the agreement (CBA) provides premium wage rates for all overtime worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage." The California Court of Appeal held that section 510's traditional definition of "overtime" is inapplicable and the CBA's definition governs when assessing whether the agreement provides premium pay for "all overtime worked" under section 514. The Court also found the CBA and Exxon were in compliance with the Fair Labor Standards Act (FLSA) requiring payment for all hours worked over 40 hours in a work week.

Vranish v. Exxon Mobil Corporation (2014)___ Cal.App.4th___.
http://www.courts.ca.gov/opinions/documents/B243443.PDF

the gender promotion issue through certain programmatic relief.

Ellis, et al. v. Costco Wholesale Corporation, LA Daily Journal, Verdicts & Settlements (January 24, 2014), US District Court - N.D. California Case No.: 04-cv-03341-EMC.

Exotic Dancers Are Employees Not Independent Contractors

A federal judge in Georgia ruled that exotic dancers are not independent contractors, but are deemed employees under the FLSA because they are an integral part of the strip club's business.

The dancers are therefore entitled to pursue their action for alleged wage-and-hour violations against the club.

Exotic Dancers Are Employees Under FLSA, Ga. Judge Rules, Law360 (January 6, 2014), Jeff Sistrunk.

$1,478,819 Settlement for Overtime Compensation

Agilysis Inc., a

San Diego Imposes Cap on Retiree Health Benefits

The California Court of Appeal held that the retiree health benefit offered to members of the San Diego Police Officer's Association labor union is not a benefit under the City's retirement system, but a separate employment benefit that is provided at the option of the City, subject to collective bargaining negotiations. Additionally, the City's monetary contributions to pay for the retiree heath benefit are not placed in the retirement fund and are not managed or invested by the City's pension plan administrators. Therefore, it was legal for the City to implement an $8,800 cap on employees' retiree health benefits without an affirmative vote by all members of the pension system which is only required for amendments to the retirement system.

Dailey v. City of San Diego (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/D060049.PDF

Good Cop, Bad Cop?

The Los Angeles County Sheriff's Department hired nearly 100 deputies last December in spite of discovering their history of serious misconduct after a background check. It is common for judges and juries to side with law enforcement absent evidence of their misconduct or dishonesty. This fact in conjunction with rules of evidence that favor exclusion of officers' prior misconduct may lead to irreparable injustices suffered by those wrongly accused. Most notably, Evidence Code Section 1045(b)(1) categorically excludes evidence of misconduct that is more than five years old from discovery. Once these recent hires' previous transgressions are sheltered from discovery, the presumption of honesty without the opportunity to disclose their previous misconduct may pose a serious threat to future criminal defendants whose fate hinges on the veracity of these deputies' testimonies.

Discovery When Deputies Break Bad, LA Daily Journal (December 23, 2013), Konrad Moore.

Emails Link Governor Chris Christie to Bridgegate Scandal

Several emails released as a result of a subpoena have linked a top aide for New Jersey Governor Chris Christie with the controversial closure of multiple lanes last September on the George Washington Bridge that caused severe gridlock in the town of Fort Lee, N.J. The emails suggest the road closure was political retribution against Fort Lee's Mayor Mark Sokolich for not supporting Christie's reelection. Bridget Anne Kelly, the deputy chief of staff for Christie, wrote several incriminating emails to Port Authority officials, including

software development company, settled with a class of employees for $1,478,819 over allegations of misclassifying them as exempt from overtime pay pursuant to the Fair Labor Standards Act. There are 127 members in the class.

Jones et. al. v. Agilysis Inc., LA Daily Journal, Verdicts & Settlements (January 31, 2014) US District Court - N.D. California Case No.: 4:12-cv-03516-SBA.

$1,178,341 Verdict for Disability Discrimination

A Los Angeles jury awarded $1,178,341 in damages to a former DIRECTV employee who alleged that the company discriminated against her based on her eye disease that caused severe visual displacement and failed to engage in the interactive process to determine necessary accommodations for her disability.

Noel Salinda v. DIRECTV Enterprises LLC, LA Daily Journal, Verdicts &

David Wildstein who was appointed by Christie. In one email Bridget wrote, "Time for some traffic problems in Fort Lee." In another email, a text from Sokolich pleading for help, describing the gridlock and how it was preventing kids from going to school was forwarded. Their controversial commentary followed: "Is it wrong that I am smiling?" - "No" - "I feel badly about the kids...I guess" - "They are the children of Buono voters." (Referencing Democratic state Sen. Barbara Buono, Christie's opponent in his reelection campaign). Governor Christie denies any involvement with the scandal and claims it was "inappropriate and unsanctioned conduct" made without his knowledge.

Emails Link Top Christie Aide to New Jersey Bridge Scandal, Los Angeles Times (January 8, 2014), Alana Semuels.

http://articles.latimes.com/2014/jan/08/nation/la-na-christie-emails-20140109

Read controversial Christie Staffer emails:

http://www.latimes.com/nation/politics/politicsnow/la-pn-christie-staffer-bridge-email-highlights-20140108,0,4946506.photogallery - axzz2sNfZQxLV

Governor Christie's email scandal allows us the opportunity to remind you all once again of the importance of being careful with work emails:

From our October 2009 Newsletter:

Wrongful Termination/Age Discrimination - A jury verdict in an employment wrongful termination/age discrimination matter from the Riverside Superior Court in the amount of $25,916,917. Plaintiff was a store manager for Kmart with consistent exceeds expectations evaluations, who was terminated after 20 years on the job at the age of 64. Plaintiff alleged that after Kmart emerged from bankruptcy and merged with Sears, Kmart embarked on a policy to get rid of older workers, and to employ younger, more aggressive (lower paid) managers. Kmart alleged the termination was due to unsatisfactory performance. The award was $916,917 in lost wages and emotional distress, and $25,000,000 in punitive damages. The key piece of evidence in Plaintiff's favor was an email from a Kmart Officer which stated: "Hawkins is 64 years old with 20 years on. I think I can get him to retire. Let me work on him."

(Hawkins v. Kmart, Riverside County Superior Court, Case No. RIC 462322, LA Daily Journal, Verdicts and Settlements, August 21, 2009)

From our September 2010 Newsletter:

EMAILS - As a regular reminder to employers to be cautious about internal emails given their significance in litigation: In a recent lawsuit by the creator of "Who Wants to be a Millionaire" against Disney for $250,000,000 over alleged failure to share profits,

Settlements (January 10, 2014), Los Angeles Superior Court Case No.: BC475999.

Defense Verdict: Motion to Compel Arbitration Granted

Employees of 24 Hour Fitness alleged their employer violated the Fair Labor Standards Act and California Labor Code by failing to pay them for missed meals, rest periods, and overtime. 24 Hour Fitness' motion to compel arbitration was granted based on finding an arbitration agreement contained within the plaintiffs' employee handbooks enforceable. Plaintiffs' argument that the agreement was unenforceable because they had not agreed to the latest update of the handbook was denied.

Fimby-Christensen v. 24 Hour Fitness, USA Inc., LA Daily Journal, Verdicts & Settlements (January 3, 2014) US District Court - N.D. California Case No.: 5:13-cv-01007-EJD.

plaintiff presented internal emails from former Disney CEO Michael Eisner admitting awareness that Disney anticipated over $1.1 billion in profits from the show. This contradicted Disney's position at trial that it did not know how much anticipated profits would be at the time they reached profit-sharing agreements with the show's creator. After trial, the jury found against Disney, and awarded the show's creator $269,000,000.00.

New Law Significantly Expands Whistle-Blower Protection to Include Complaints About Any Rule or Regulation; and Employee Need Only Have a Reasonable Belief of a Violation

In 2013 the California legislature passed SB 496, significantly expanding whistle-blower protection. The new law protects against retaliation for internal complaints made to a supervisor or anyone with any authority over the employee. The types of complaints eligible for protection, which were limited to those referencing some state or federal law violation, now include complaints about any rule or regulation; state, federal, local, or municipal, and the employee only needs a reasonable belief of a violation to be granted statutory protection. The bill also eliminated the "job duties" exception, extending whistle-blower protection to anyone whose job involves analyzing company information, such as accountants, auditors and quality control personnel. Lastly, the new law holds employers liable for third party retaliation against an employee for whistle-blowing.

Suits Will Soar Under Whistle-Blower Law, LA Daily Journal (December 31, 2013), Kenneth Sulzer.