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– Labor & Employment Law –
Defending Employers Rights

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CONFIDENTIAL
CLIENT LABOR & EMPLOYMENT LAW UPDATE

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Hello 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 of particular interest for all the details, and feel free to contact us if you have any questions or comments.

I. DISCRIMINATION

1. **Discrimination Claims Cannot Be Forced To Arbitration** – The California Court of Appeal held that a venture capital firm cannot force a former employee to arbitrate her discrimination claim against it. The employee accused her employer of favoring men over women. The employer argues that the employee agreed to arbitrate any and all claims against the employer. The court held that the company's obligation not to illegally discriminate, retaliate, or fail to prevent discrimination, is rooted in the employment relationship, and not imposed by an arbitration agreement in a contract that she entered.

   Venture Firm Forced to Face Bias Suit in Court, LA Daily Journal (June 27, 2013), Saul Sugarman.

II. HARASSMENT

2. **Harassment – Supervisor Liability** – The United States Supreme Court held that in order for an employer to be liable for a supervisory employee's discrimination, the supervisor must be "empowered by the employer to take tangible employment actions against the victim." In this case, the plaintiff employee sued her employer under Title VII of the Civil Rights Act of 1964 for workplace harassment, claiming that another worker racially harassed her. Under Title VII, an employer is liable for workplace harassment by a *co-worker* only if the employee can prove

that her employer negligently controlled working conditions. However, an employee claiming harassment by a *supervisor* does not need to prove employer negligence in order for there to be liability. While the plaintiff argued that the harassing worker was her supervisor since she directed the plaintiff's day-to-day activities the court disagreed, holding that an employee must have the power to hire, fire, promote, demote, or discipline the victim in order to be a supervisor.

Vance v. Ball State University (June 24, 2013) ___ U.S. ___.
http://www.supremecourt.gov/opinions/12pdf/11-556_11o2.pdf.

III. WAGE/HOUR

3. **Arbitration Clauses May Not Waive Statutory Rights to Bring Representative Actions** – The California Court of Appeal held that employees suing for wage violations under the Private Attorneys General Act of 2004 ("PAGA") are not required to arbitrate their claims with their employer, even if the employees signed an arbitration agreement waiving their right to bring representative claims. The court noted that PAGA lawsuits are representative actions where employees are suing on behalf of the state for employers' violations of the Labor Code. Even if the employees signed agreements waiving their right to bring such claims, the court determined that such waivers are invalid, as PAGA claims are representative actions intended to advance a predominately public purpose and are therefore an unwaivable statutory right.

Brown v. Superior Court (Morgan Tire & Auto LLC) (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/H037271.PDF.

IV. LABOR/UNION LAW

4. **City Has Obligation To Arbitrate Implementation Of Unpaid Furloughs** – The California Supreme Court held that the City of Los Angeles must arbitrate with a union of public employees over the implementation of unpaid furloughs. After the Mayor and city council adopted the furloughs in response to a fiscal emergency in 2009, the union filed a grievance and sought to compel arbitration. However, the city denied the grievance and refused to arbitrate the issue. The court concluded that the arbitration of the dispute would not unlawfully delegate the city's discretionary authority to the arbitrator, since the arbitrator's role would be limited to interpreting the terms the city agreed to under its memorandum of understanding ("MOU") with the union. The court also held that since the union alleged that the furloughs violated the MOU, the city was contractually obligated to arbitrate this issue.

City of Los Angeles v. Superior Court (Engineers & Architects Association) (2013) ___ Cal.4th ___.
http://www.courts.ca.gov/opinions/documents/S192828.PDF.

V. PUBLIC EMPLOYERS LAW

5. **Immunity From Tort Liability For Basic Policy Decisions** – The California Court of Appeal held that public employees are immune from tort liability when they make "basic policy decisions in a legislative capacity," even when those decisions are alleged to involve making fraudulent misrepresentations. After their permit to build a retirement community was overturned by the city council, the plaintiffs sued the city and individual council members for the torts of fraud, misrepresentation and elder abuse. The court emphasized that council members are immune from liability for denying permits or from any acts or omissions which were the result of discretion vested in them, even if the discretion was abused. The court also concluded that because the council members were immune, the city was also immune.

   Freeny v. City of San Buenaventura (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B240893.PDF.

6. **Administrative Hearing Decisions Of A University Will Be Upheld When Supported by Substantial Evidence** – The California Court of Appeal held that the University of California could terminate an employee for threatening violence after telling a coworker to "get out of my face," as long as the decision was supported by substantial evidence. When the employee was asked at a disciplinary meeting about his statement during the confrontation, he explained that he was resisting from hitting his coworker. The University then fired the employee for threatening violence. Although the employee appealed through the University's internal grievance system, his termination was upheld. Since the University of California is delegated limited judicial power to conduct its own administrative hearings on the evidence as a constitutionally-created state institution, the court held that the University's disciplinary decisions would be upheld as long as they were supported by substantial evidence. The plaintiff unsuccessfully argued that the court should instead exercise its independent judgment on the evidence.

   Do v. Regents of the University of California (2013) ___ Cal.App.4th ___.
   http://www.metnews.com/sos.cgi?0613//D061056.

7. **Notice Of Termination Need Not Be Personally Served To Be Deemed Actual Notice** – The California Court of Appeal held that a probationary school nurse did not need personal service to receive actual notice that she was being laid off. Case law requires that a laid-off probationary school employee must receive "personal service or some other method equivalent to imparting actual notice." Although the nurse did not receive personal service of the decision to lay her off, she was present at the school board meeting where the decision was made and received an email from the school district informing her of the decision. The court concluded that this was enough to constitute actual notice.

   Grace v. Beaumont USD (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/E054801.PDF.

8. **Mandatory Arbitration Clauses Are Enforceable Provided They Are Not Too One-Sided** – The California Court of Appeal held that a mandatory arbitration provision in an employment contract may still be enforceable against former employees if it is not overly harsh or one-sided. The former employees argued that the arbitration clause was unconscionable since signing it was a condition of their employment and they were unable to change its terms. Although the court recognized that the agreement was procedurally unconscionable since employees were required to sign it, it was not substantively unconscionable since it was fair to both parties, and therefore arbitration could be compelled.

   Leos v. Darden Restaurants Inc. (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/nonpub/B241630.PDF

VI. POLICE

9. **Peace Officers' Photographs NOT Confidential Personnel Records and Must be Disclosed** – The California Court of Appeal held that a peace officer's official service photograph is not a personnel record and therefore must be disclosed during discovery in litigation. The Court concluded that, since officers routinely work out in public, their photographs are not protected by either the right to privacy under the California Constitution or the official information privilege. The Court did hold that it can be appropriate to limit the use/disclosure of their photographs as appropriate to avoid potential harm to the officer.

   Ibarra v. Superior Court, (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B244824.PDF

VII. OTHER

10. **Hospitals – Administrative Review** – The California Supreme Court held that an immaterial delegation of authority by a hospital's Medical Executive Committee ("MEC") did not deprive a doctor of a fair reinstatement hearing, even if it was in violation of the hospital's bylaws. Although the hospital's bylaws designated the MEC to select the panel members of a committee that would hear the doctor's reinstatement case, the MEC delegated this task to the hospital's Governing Board. The court held that the MEC's delegation did not violate California statutes governing hospital peer review mechanisms and even if it was against the hospital's bylaws, it would not result in prejudice to the doctor.

    El-Attar v. Hollywood Presbyterian Medical Center (2013) ___ Cal.4th ___.
    http://www.courts.ca.gov/opinions/documents/S196830.PDF.

VIII. "In the Trenches" (The Blow by Blow of Active Court Cases)

11. **$4,430,000 Settlement – Overtime Compensation** – A class of bus tour directors alleging wage and hour violations, received a $4,430,000 settlement from their employer. The directors, who were responsible for conducting and facilitating tours for tour passengers, claimed that they were

improperly classified as administrative employees exempt from overtime pay requirements. The employer classified the directors as exempt administrative employees since they were the sole company representatives responsible for overseeing the tours and supervising the services of hotel, restaurant, and attraction vendors. However, the employees successfully argued they were not administrative employees subject to the exemption, since their duties included routine tasks such as following the employer's itinerary, assembling luggage, and offering commentary on sites.

Waterhouse v. Group Voyagers, Inc., LA Daily Journal, Verdicts & Settlements (June 21, 2013), San Francisco Superior Court Case No.: CGC-07-463602.

12. **$4,400,000 Settlement – Wrongful Death** – Orange County officials settled a wrongful death action filed by the family of an unarmed Marine sergeant shot and killed by a Sheriff's deputy for $4.4 million. The decedent, who regularly took his young daughters on early morning "prayer walks" around San Clemente High School, crashed his SUV through a school gate. Leaving his daughters in the car, the decedent went to the football field carrying a bible. After returning, he was told to stop and show his hands by the deputy (a former Marine), who heard the crash and decided to investigate. The decedent, displaying a "mean expression," ignored the deputy, told him to "give me my kids back," and entered the SUV. After entering the vehicle, the deputy shot him three times through the window. The deputy claimed that he acted out of concern for the girls' safety, he was not certified to use a taser, and did not use his baton because he feared the decedent would overpower him. Despite the settlement, county authorities maintained that the deputy acted reasonably and cleared him of any wrongdoing.

    O.C. to Pay $4.4 Million Settlement In Deputy's Slaying Of Marine, Los Angeles Times (May 30, 2013)
    http://articles.latimes.com/2013/may/30/local/la-me-ln-oc-to-pay-44-million-settlement-in-deputys-slaying-of-marine-20130530.

13. **$500,671 Verdict – Breach of Implied Contract** – A San Luis Obispo jury awarded $500,671 in damages to an at-will employee for his breach of implied contract claims. The plaintiff was a 28-year employee who last served as a vice president for the defendant employer. After the employer changed ownership, an investigation took place regarding the plaintiff's alleged harassment of another employee. The plaintiff, who received no notice of the investigation, was suspended and terminated shortly thereafter. The defendant unsuccessfully argued that the plaintiff was an at-will employee who could be terminated at any time for any reason, and claimed that the plaintiff signed two express writings indicating his at-will employment. However, the plaintiff contended that he was an exemplary employee and provided undisputed testimony that the defendant "never terminated employees at will."

    Kenyon v. Applied Technologies Associates Inc., LA Daily Journal, Verdicts & Settlements (June 21, 2013), San Luis Obispo Superior Court Case No.: CV128052.

14. **Defense Verdict – Pregnancy Discrimination** – A Los Angeles jury ruled for Wells Fargo Bank in a teller's action for pregnancy discrimination. After the teller became pregnant with her eighth child, she alleged that her direct supervisor made repeated disparaging remarks about her pregnancy and told her to take birth control. The teller also claimed that her supervisor denied her time to seek prenatal care and that her complaints to Human Resources about the supervisor's conduct were not investigated. While the jury concluded that Wells Fargo was not negligent, it found that the teller's supervisor behaved negligently. Nevertheless, while the jury also found that the teller suffered serious emotional distress, it concluded that her supervisor's negligence was not a substantial factor in causing the distress and rendered a defense verdict.

    Sara Valdez v. Wells Faro Bank N.A., LA Daily Journal, Verdicts & Settlements (June 28, 2013), Los Angeles Superior Court Case No.: BC474591.

15. **Defense Verdict - Wage and Hour** – A San Diego jury ruled in favor of Catalina Restaurant Group (which does business as CoCo's) finding that two general managers of the restaurant chain were in fact exempt and not entitled to overtime wages and penalties. The restaurant claimed that the managers were expected to exercise discretion and independent judgment on a regular basis, and their positions fit all the requirements for the executive and administrative exemptions in California. The Plaintiffs argued that the restaurants policies were so restrictive, that all discretion and independent judgment had been removed from them.

    Frances Peters, Janet Moller v. Catalina Restaurant Group dba CoCo's., LA Daily Journal, Verdicts & Settlements (June 7, 2013), San Diego Superior Court Case No.: 37-2011-00094467-CU-OE-CTL.

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

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