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— Labor & Employment Law —

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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. WAGE/HOUR LAW

1. **Overtime Pay – Administrative Exemption** – The California Court of Appeal held that an insurance adjuster who did not receive a guaranteed salary was entitled to overtime pay. Unless an employee is exempt, California law holds that he must be paid time-and-a-half for hours worked in excess of 40 hours per week. Although insurance adjusters are often exempt from overtime pay requirements under the administrative exemption, the exemption requires that they must perform specific duties and receive a minimum monthly salary for full-time work. Here, although the adjuster often worked well over forty hours per week and received income above the administrative exemption's monthly minimum, he received an hourly wage rather than a guaranteed salary, and was therefore not exempt from overtime pay requirements.

   Negri v. Koning & Associates (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/H037804.PDF.

2. **Overtime Pay – Executive Exemption** – The California Court of Appeal held that a former Safeway assistant manager who spent more than half of her time bagging and stocking groceries was not covered by the executive exemption from overtime pay. In California, an employee is not entitled to overtime pay under the executive exemption if she is "primarily engaged" in management (exempt) duties. The court found that since the manager spent more than 50% of her time engaged in nonexempt tasks such as bagging groceries and stocking shelves, she was not an exempt employee and therefore was entitled to overtime wages.

   Heyen v. Safeway Inc. (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B237418.PDF.

3. **Class Action Certification – Meal Breaks** – The California Court of Appeal certified a class action filed by 4,000 security guards over alleged meal/rest break violations. In order for a class action to be certified, class members' individual issues must prevail over any individual issues. The security guards alleged that company policy required them to take paid, on-duty breaks in violation of state wage and hour law. The court noted that individual claims alleging that a uniform policy consistently applied to a group of employees violates wage and hours laws are usually found suitable for class treatment. Therefore, the legality of the employer's policy could be determined on a class-wide basis, making class certification proper.

   Faulkinbury v. Boyd & Associates, Inc. (2013) ___ Cal.App.4th ___.
   http://www.metnews.com/sos.cgi?0513//G041702.

II. LABOR/UNION LAW

4. **County's Obligation To Provide Private Employee Information To Unions** – The California Supreme Court held that Los Angeles County must provide Services Employees International Union ("SEIU") with the phone numbers and addresses of its 50,000 employees. This includes approximately 7,000 nonunion employees who are represented by SEIU yet repeatedly declined to provide the union with their contact information. The court reasoned that although employees have a reasonable expectation of privacy, this interest is outweighed by the union's obligation to communicate with employees it represents.

   State Supreme Court Hands Down Resounding Win To The State's Largest Union, LA Daily Journal (May 31, 2013), Emily Green.

5. **Employer Liability For Contractors** – A federal judge held that Wal-Mart Stores Inc. can be held liable for a contractors' violation of labor laws, noting that Wal-Mart is responsible for ensuring its contractors operate in accordance with state and federal laws. The court permitted the contractor's employees, who worked at the contractor's warehouse processing Wal-Mart products, to conduct discovery into Wal-Mart's knowledge of prior labor issues. The court further noted that Wal-Mart is responsible for "not drafting its warehouse contracts with provisions such as very low profit margins that would likely prompt contractors to violate wage and hour laws." Management-side observers are concerned about the burden this could place on the many California businesses who rely on outsourcing, and that the court's decision implies that "it's negligence to try to make your contractors operate efficiently."

   Judge Allows Labor Law Claims To Proceed Against Wal-Mart, LA Daily Journal (May 17, 2013), Laura Hautala.

6. **Drug Testing – Union Representative Consultation** – An administrative law judge for the National Labor Relations Board ordered Ralphs Grocery Company to cease and desist from requiring employees to immediately submit to a drug test without first being able to consult with a union representative. In this case, an employee was suspended and terminated after declining to take a drug test without consulting his union representative. The judge also ordered Ralphs to stop disciplining employees for their refusal, and to reinstate the terminated employee with backpay.

   Ralphs Grocery Co. and UFCW Union Local 324, LA Daily Journal, Verdicts & Settlements (May 17, 2013), National Labor Relations Board Case No.: 21-CA-039867

7. **Termination Of Outspoken Union Member Upheld By The NLRB** – A National Labor Relations Board administrative law judge held that a hospital's dismissal of an outspoken union member was not in violation of the National Labor Relations Act. The union member, a former lab technician, spoke out against hospital policies at a convention and was prominently featured on many union handbills supporting union positions against the hospital's practices. After the employee assisted another union member in a grievance matter, she was terminated. The hospital successfully argued that it did not terminate the employee based on her union activity in violation of the National Labor Relations Act.

   Encino Medical Center and SEIU UHW-West, LA Daily Journal, Verdicts & Settlements (May 31, 2013), National Labor Relations Board Case No.: 31-CA-066945.

III. PUBLIC EMPLOYERS LAW

8. **Restrictions On Conduct At Public Meeting** – The Ninth Circuit Court of Appeals held that a Costa Mesa Municipal Code provision making "disorderly, insolent, or disruptive behavior" at City Council meetings a misdemeanor was unconstitutional. The plaintiff was removed by police from a City council meeting on immigration after he urged those who agreed with his viewpoint to stand and continued speaking during a recess. The Court reasoned that the municipal code provision was invalid since it failed to limit the proscribed activity to only actual disturbances, and was overbroad on its face because it could be construed as impermissibly regulating protected speech based on viewpoints expressed.

   Acosta v. City of Costa Mesa (May 3, 2013, Ninth Cir.) ___ F.3d ___.
   http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/03/10-56854.pdf.

IV. POLICE

9. **Police Officer Termination for Misdemeanor Battery Overturned** – The California Court of Appeal held that a Los Angeles County Sheriff's deputy convicted of simple battery against his live-in girlfriend under the state Penal Code was not precluded from employment by the federal Gun Control Act. The federal Act prohibits possession of a firearm by a person convicted of misdemeanor domestic battery; the Sheriff interpreted the Act as prohibiting the deputy from carrying a firearm and terminated him. However, the Court concluded that the deputy's conviction for battery under the California Penal Code did not qualify as the necessary misdemeanor domestic violence under the federal Act. While California law holds that "mere touching" may qualify as battery, federal misdemeanor domestic violence requires the "use of attempted use of physical force." Since offensive touching would qualify as battery under state but not federal law, the court concluded that the deputy's conviction did not qualify as misdemeanor domestic violence within the Gun Control Act's meaning.

   Shirey v. Los Angeles County Civil Service Commission (Los Angeles County Sherriff's Dept.) (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B238355.PDF.

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

10. **$8,825,000 Verdict – Police Shooting** – A Central District jury awarded $8,825,000 to the family of a man shot and killed by Culver City Police during a traffic stop for suspicion of robbery. The victim was shot by an officer after being ordered to exit his car. Although the shooting officer testified that the victim spun around suddenly and had "something shiny" in his hand, the other officers at the scene testified that the victim was cooperative, did not turn around suddenly, and had nothing in his hands. The plaintiffs also pointed to the fact that the shooter was at the end of a double shift and had slept a total of 8 hours in the preceding two days.

    Simplis v. Culver City Police Dept., LA Daily Journal, Verdicts & Settlements (May 24, 2013), C.D. California Case No.: 2:10-cv-09497-MWF-MAN.

11. **$7,500,000 Settlement – Racial Discrimination** – A class of African-American store managers settled with clothing company Wet Seal for $7.5 million over discriminatory employment practices. The managers claimed that they were denied pay and promotions because of their race, and cited a company Senior Vice President's email referring to high numbers of black workers in some stores as a "huge issue."

    Discrimination Case Nets $7.5 Million Settlement, LA Daily Journal (May 10, 2013), Laura Hautala.

12. **$1,777,000 Settlement – Replacement Workers During Strike** – A class of nurses hired to replace striking workers settled with a temporary services provider over payment practices. The temporary service provider, which hired the replacement nurses, required them to stay in a hotel and take a bus to the hospital. The nurses claimed that they were not paid on a daily basis and were not compensated for time spent on buses or waiting at the hospital before and after shifts, all in violation of California labor law.

    Bolton v. U.S. Nursing Corp, LA Daily Journal, Verdicts & Settlements (May 17, 2013), N.D. California Case No.: 3:12-cv-04466-LB.

13. **Defense Verdict – National Origin Discrimination** – A Los Angeles jury held for the City of Los Angeles against a terminated library worker's national origin discrimination and retaliation claims. The worker, of Ghanaian descent, claimed her African-American co-workers called her derogatory names more than 7,000 times over a four year period, and that she was terminated in retaliation for her complaints. The City successfully argued that the worker was terminated for rudeness and repeatedly mocking her co-workers in the library.

    Cofie v. City of Los Angeles, LA Daily Journal, Verdicts & Settlements (May 31, 2013), Los Angeles Superior Court Case No.: BC441369.

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