THE ZAPPIA LAW FIRM
A Professional Corporation
- Labor and Employment Law -
www.zappialegal.com

Labor and Employment Law Update

May 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 $10 million wage/hour class action settlement for Petsmart employees for violations of meal and rest periods as well as failure to pay wages upon termination;
- Additional wage/hour class actions settlements for $3.5 and 3.2 million;
- A case holding that an employer cannot be held liable for damages caused by one employee's act of poisoning another employee's drink;
- A case holding that an employer is not liable for overtime wages if it isn't aware an employee is working off-the-clock hours;
- An article summarizing 5 cases from the National Labor Relations Board which even nonunion employers need to be made aware of; and
- A case requiring 2 police officers to face charges for violating the Fourth Amendment Rights of an arrestee for inducing a doctor to forcibly remove a golf ball-sized baggie of cocaine from his rectum.

DISCRIMINATION

University Director Cannot Revive Employment Discrimination Action Based On Evidence Prepared After Her Termination That Did Not Dispel Legitimate Reasons For Firing.

The California Court of Appeal held that a University Director's presentation of after acquired evidence, that her failure to perform her job duties had no adverse consequences against her employer, did not present evidence of discriminatory motive by the University. In an employment discrimination action, once the plaintiff creates a presumption of discrimination,

the employer has an opportunity to articulate legitimate, nondiscriminatory reasons for the challenged action/termination. Then, in order to proceed to trial, the Plaintiff must show that defendant's stated reasons for terminating her were untrue or pretextual such that a jury could conclude that the employer engaged in discrimination. Here, Plaintiff's evidence that her failure to perform her duties did not harm the defendant merely addressed her work performance, and did not adequately provide evidence that defendant's stated reasons for terminating her were untrue or pretextual.

Serri v. Santa Clara University (2014) ___ *Cal.App.4th* ___.
http://scholar.google.com/scholar_case?case=14316072402766075179&hl=en&as_sdt=6&as_vis=1&oi=scholarr

WAGE / HOUR

An Employer Is Not Liable For Unpaid Overtime Wages If The Employer Does Not Know An Employee Is Doing Overtime Work

The California Court of Appeal held that an employer's failure to pay an employee for overtime will not be deemed a violation of the Labor Code unless the employer has knowledge that an employee is doing overtime work. A group of pharmacy managers filed a class action lawsuit against Kaiser claiming that they were not being paid for performing off-the-clock work. The court affirmed judgment in favor of Kaiser when the employee acknowledged: (1) he knew he should be clocked in when working; (2) he was always paid for time for which he was clocked in, including overtime; (3) none of his supervisors had told him to work before clocking in or after clocking out; and (4) he could not prove that his supervisor knew or should have known that he was not correctly reporting his hours.

Jong v. Kaiser Foundation Health Plan Inc. (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/A138725.PDF

Car Wash Company May Not Force Employees to Arbitrate Wage and Hour Claims Based on Arbitration Agreements of Which They Had Little Understanding

The California Court of Appeal held that an agreement containing a clause requiring employees to settle any disputes regarding any aspect of their employment through arbitration was unenforceable. The Court found the arbitration clause "procedurally unconscionable" because it was the product of oppression and surprise due to unequal bargaining power. Here, the employees were forced to enter into the agreements even though they had little understanding of what they were, and the agreements did not mutually benefit the parties, because the employer could elect to avoid arbitration if they chose to.

Carmona v. Lincoln Millennium Car Wash Inc. (2014) ___ Cal.App.4th ___.
http://scholar.google.com/scholar_case?case=7670642844362127777&hl=en&as_sdt=6&as_vis=1&oi=scholarr

LABOR / UNION

5 NLRB Cases Nonunion Employers Need To Be Aware Of

Many union-free employers don't realize the National Labor Relations Board (NLRB) and the law it enforces can have a serious impact on them. While the National Labor Relations Act (NLRA) applies primarily to unionized private employers, the Act was really intended to protect concerted activity without a union. The NLRB has been taking an expansive view of employees' rights under Section 7 of the NLRA. This section safeguards workers' ability to form or join a union and to undertake concerted activities for their mutual benefit, and is not contingent on union membership.

There are five rulings of the NLRB that nonunionized employers should be aware of:

Purple Communications Inc. and Communications Workers of America, AFL-CIO

The Purple Communications Inc. case provided a ruling called Register-Guard and held that workers have no statutory right to use their employers' email for "concerted activities" related to joining or forming a union. The NLRB's general counsel is working to overturn the Register-Guard ruling, arguing that the NLRB should adopt a presumption that a "total ban" on communicating about non-work matters through employer equipment and email systems is unlawful.

In October 2013 an NLRB judge declined the general counsel's invitation to overturn the Register-Guard ruling. But on April 30, 2014, the Board issued a request for briefing that asked for input on whether Register-Guard should be reconsidered. If this ruling is overturned, employees will be able to utilize company property, including company email, to further the organizational goals of a union.

Hispanics United of Buffalo Inc. and Carlos Ortiz

In December 2012 the NLRB's ruling in Hispanics United held that terminating an employee for a Facebook posting violated the NLRA. Hispanics United argued that the workers had been fired for harassing a colleague. The Board, however, believed that the employees were terminated for Facebook comments responding to a co-worker's criticisms of their job performance. The Board held that the employer's actions were unlawful because the employees had been engaging in protected, concerted activity for their mutual aid and protection when they posted their comments online.

Nonunion employers need to be cautious when disciplining workers over social media postings and be aware that policies prohibiting online comments that damage the company's reputation could also be found unlawful. Employers need to narrowly tailor any policies they may have which restrict the kinds of things employees can say about one another or their managers and supervisors.

D.R. Horton Inc.

In January 2012 the NLRB's ruling in D.R. Horton held that mandatory arbitration agreements including waivers in which employees give up the right to pursue class or collective claims are illegal under the NLRA. It is important to note, that even though the Fifth Circuit rejected the NLRB's finding, the Board still stands by the logic of its 2012 ruling. NLRB administrative law judges have applied the D.R. Horton ruling over employer objections, noting that it's binding on the employers unless and until the U.S. Supreme Court overturns it. In the meanwhile, there are 28 "Horton cases," which turn on the legality of arbitration agreements containing class waivers, currently pending at the NLRB.

Banner Health System d/b/a Banner Estrella Medical Center

In July 2012, the NLRB ruled that a human resources consultant's routine practice of asking employees who were involved in investigations not to discuss them with co-workers violated the NLRA. The ruling does permit employers to ask workers to keep investigations confidential under some circumstances, but it held that the employer must justify that the need for confidentiality is a legitimate business need which outweighs the employee's right to undertake concerted activities for their mutual benefit.

The Board's finding that a blanket policy forbidding workers from discussing ongoing investigations into employee misconduct is unlawful means employers may have a tougher time conducting effective workplace investigations. Accordingly, all employers, including nonunion employers, should frame their confidentiality requests very closely to the facts and circumstances of that particular investigation.

Wal-Mart Stores Inc. and The Organization United For Respect At Walmart

In January, the NLRB issued a consolidated complaint accusing Wal-Mart Stores Inc. of unlawfully threatening and disciplining workers, including 19 employees who were fired after going or committing to go on strike to protest wages and working conditions. According to the NLRB, Wal-Mart threatened, disciplined or fired workers for engaging in legally protected strikes and protests.

Conclusion: All private employers need to understand that they may be subject to the NLRA, even where a union doesn't already exist or a union organization campaign isn't already under way. As these 5 cases show, the NLRB will go out of its way to apply the NLRA when the actions of employees could possibly be deemed "concerted activities" in furtherance of their mutual benefit and/or their ability to form or join a union.

5 NLRB Cases Nonunion Employers Need To Know, Law360 (May 12, 2014), Ben James
http://www.law360.com/employment/articles/533626?nl_pk=a10b3ef9-255f-46d9-a6ce-679f71a8b826&utm_source=newsletter&utm_medium=email&utm_campaign=employment

POLICE / CIVIL RIGHTS

Two Police Officers Must Face Fourth Amendment Action Alleging They Induced Doctor To Forcibly Remove A Plastic Baggie Of Cocaine From An Arrestee's Rectum

The Ninth Circuit Court of Appeals found that two police officers may have violated an arrestee's Fourth Amendment Rights, reversed the summary judgment granted in favor of the officers, and ordered the matter to trial. The officers induced a doctor to perform a medical procedure requiring sedation to retrieve the baggie of cocaine. The officers allegedly told the doctor that the arrestee was having a seizure and that he had swallowed cocaine, even though they believed he was faking the seizure and had no evidence that he had swallowed anything. The Court held that in the analysis of whether a Fourth Amendment violation had occurred, where there is a close connection between the state and the private behavior, the private actions (of a doctor in this case) may fairly be treated as that of the state itself.

George v. Edholm (May 28, 2014, Ninth Cir.) ___ F3d. ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2014/05/28/11-57075.pdf

OTHER

Staffing Company Not Liable For Employee's Poisoning of Coworker

The California Court of Appeal held that an employer was not liable for damages caused to an employee who was poisoned by another coworker. After multiple arguments between two employees, one employee poured carbolic acid into the other's water bottle. The acid-laced water caused vomiting and burns to her tongue and throat. The Court found that the employer, a staffing company that provided prescreened nurses to medical facilities, could not be held liable for negligent training because the poisoning was "highly unusual and startling," and could not have been caused by the employer's failure to properly train its employees.

Montague v. AMN Healthcare, Inc. (2014) 223 Cal.App.4th 1515
http://www.courts.ca.gov/opinions/documents/D063385.PDF

Failure to Timely File a Tort Claim Against a Public Entity Results in the Lawsuit Being Thrown Out of Court

The California Court of Appeal held that a property developer could not continue to pursue her lawsuit against the City of Rosemead on allegations that a City Council member extorted her, because she failed to present her claim to the City prior to filing her lawsuit. While the Government Tort Claims Act provides that a public entity may be liable for injuries caused by an employee of the public entity, the Plaintiff must first submit a timely claim for money or damages to the public entity prior to filing a lawsuit.

Gong v. City of Rosemead (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/B247601.PDF

"In the Trenches"

Recent Verdicts, Settlements, and Current Cases

U.S. Bank Escapes $15 Million Verdict In Wage/Hour class Action

The California Supreme Court affirmed the reversal of a $15,000,000.00 verdict which had been granted to a class of business banking officers who had been misclassified as exempt from overtime pay. The Supreme Court found that damages calculations at the trial court, which used seriously flawed statistical sampling, could not be relied upon. The statistical model based upon 21 biased plaintiffs was not developed by expert input, nor was the defendant/bank given an opportunity to impeach the model or to show that some of the class members were in fact exempt.

Duran v. U.S. Bank National Association (2014) ___ Cal.4th ___.
http://www.courts.ca.gov/opinions/documents/S200923.PDF

$10 Million Wage/Hour Class Action Settlement

A class of Petsmart employees settled with Petsmart for $10,000,000.00 after they alleged Petsmart had failed to pay wages, failed to provide meal and rest periods, and failed to pay wages due upon termination.

Moore v. Petsmart Inc., LA Daily Journal, Verdicts and Settlements (May 9, 2014), United States District Court, Northern District, Case number: 5:12-cv-03577-EJD.

$3.5 Million Wage/Hour Class Action Settlement

A US District Court judge finalized a settlement for steel plant workers for their employer's failure to provide required meal and rest breaks, failure to pay workers for pre-shift donning of gear, failure to provide itemized wage statements, and failure to make timely payment of wages upon termination or resignation.

Cordy v. USS-Posco Industries, et al., Case number 3:12-cv-00553, U.S. District Court for the Northern District of California.
http://www.law360.com/articles/532875/print?section=employment

$3.2 Million Class Action Settlement for Overtime Compensation

A class of employees of Sears retail stores reached a settlement for up to $3,200,000.00 after the employees alleged that Sears paid them an impermissibly low overtime rate, failed to provide accurate pay stubs, and failed to provide rest periods.

Chookey v. Sears Roebuck and Co., LA Daily Journal, Verdicts and Settlements (May 16, 2014) U.S. District Court for the Central District of California, Case number 2:12-cv-02491-GW-MRW.

$2.1 Million Whistleblower Verdict

A San Diego Gas & Electric employee received a jury verdict awarding him $864,000 in past and future compensatory damages and $1.3 million in punitive damages. The employee claimed he was terminated for bringing attention to allegedly illegal collection practices, while the company claimed he was terminated for violating company policies including harassing his subordinates.

Bryant v. San Diego Gas & Electric Co., LA Daily Journal, Verdicts and Settlements (May 30, 2014) San Diego Superior Court, Case number 37-2011-00091876-CU-WT-CTL.

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.

Ed Zappia
THE ZAPPIA LAW FIRM
A Professional Corporation
333 S. Hope Street, Suite 3600
Los Angeles, California 90071
Phone: (213) 814-5550
Facsimile: (213) 814-5560
ezappia@zappialegal.com
www.zappialegal.com