



# The Strategic EMPLOYER

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## Rest and Meal Periods Update

For several years, WAAG AND CO. has been reporting on the difficult and confusing requirements mandating rest and meal periods for non-exempt employees and the costs for non-compliance. Specifically, California law requires non-exempt employees to be paid one hour's pay at their regular rate for each workday they are not provided a meal period in compliance with legal standards; the same payment must be made for any day on which there is a missed rest period. This has not only been operationally burdensome for employers, but hugely expensive as well.

**Wages or Penalties?** Believe it or not, it has yet to be conclusively established whether this payment constitutes "wages" or "penalties." The legal impact of this determination is significant. Claims for unpaid wages are covered by a *three-year* statute of limitations which can potentially be expanded to *four years*. Claims for penalties, on the other hand, are covered by a *one-year* statute of limitations.

Also, wages are subject to payroll taxes, while penalties are not. Plus, there are a number of other consequences of the failure to pay wages, (i.e., interest, waiting time penalties, and a number of other items) that do not apply to the failure to pay a penalty. There has been much action on this issue in the past few months. Unless the Legislature acts first, it looks like this issue will be resolved by the California Supreme Court.

**Court Rulings Muddy the Waters:**

As previously reported, in June 2005, the Division of Labor Standards Enforcement ("DLSE") issued a precedential decision declaring missed break payments are "penalties." Since then, a series of appellate court rulings were issued: *Murphy v. Kenneth Cole Productions, Inc.*; *National Steel and Shipbuilding Company vs. Superior Court of San Diego*; and *Mills vs. Superior Court of Los Angeles*. Two of the three courts to rule on the issue declared the missed break payments to be penalties (only the court in the *National Steel* case disagreed). In concluding the payment was a penalty, the courts noted two primary factors:

- 1. There was no correlation between the amount of time worked when a break was missed and the amount of the payment (noting that such **Rest & Meal Periods:** *cont'd on next page*)

### Route to:

- HR Dept: \_\_\_\_\_
- Accounting Dept: \_\_\_\_\_
- Benefits Admin: \_\_\_\_\_
- Managers: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

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We take great pride in our reputation as one of the Central Coast's leading providers of employment law and human resources consulting services, working exclusively with employers. We believe that the success of our practice is based on our ability to provide practical, timely, accurate advice to employers of all sizes and industries.

Since 1998, WAAG AND CO. has worked with over 280 different employers with great success. These include companies engaged in industrial, high-tech, medical, dental, legal, non-profit, service, retail, wholesale, service, construction, engineering, government, hospitality, agriculture, ranch, communications, and media industries.

SUSAN WAAG has substantial experience as an employment law attorney and human resources consultant. Since 1985, she has devoted her practice exclusively to serving employers. MS. WAAG has provided expert consultation to more than one-third of the 75 largest employers in San Luis Obispo County.

WAAG AND CO. provides a variety of problem prevention services, including: Supervisor and Employee Training, Internal Investigations, Personnel Policy Manuals, Employment Relations Audits, Human Resources Consulting Services and Employment Contracts. Our services cover a broad range of expertise in the matters most important to employers.

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OVERTIME PREMIUM PAY CALCULATIONS

## Federal Court Split On Sick-Pay Cash-Out

Employers are not required to cash-out an employee's unused sick pay on termination, unless the employer has a policy promising to do so. There is currently a split among the federal courts as to the impact of cashing out sick pay when employers have such a policy. Specifically, the issue is whether or not the payment must be factored into the employee's overtime calculations.

When an employee works overtime, s/he must be paid at 1.5 or 2 times his/her "regular rate." With a few exceptions, all of the employee's compensation earned during the payroll workweek must be included in

determining the "regular rate." So if an employee is promised a non-discretionary bonus (such as an extra dollar for every unit his/her department produces in a month), then that bonus was earned over the course of each hour worked by the employee that month. Accordingly, that bonus will be allocated to all of the hours worked and proportionately added to the employee's hourly rate, thus deriving the employee's "regular rate" of pay for that period. Any overtime pay during that month would then need to be increased to account for the increased portion of the regular rate. The same is true of commission payments and most other

compensation that is not purely discretionary. Discretionary compensation, such as a gift or a holiday bonus, which have nothing to do with productivity or hours worked, would not be included in determining the "regular rate".

In a recent case before the federal Eighth Circuit Court of Appeals, some firefighters claimed that their employer's policy of cashing out unused sick pay was a non-discretionary bonus, and that the dollars represented by the cash-out needed to be included in calculating their regular rate of pay when paying overtime premiums. The judges in

**Sick-Pay Cash-Out:** *cont'd on next page*

## Rest & Meal Periods

*Continued from front page*

a correlation is a hallmark of wages); and

**2.** The comments made by legislators and even Governor Davis at the time the missed break rules were enacted all discussed the payment in "penalty" terms.

Interestingly, despite the Legislature's attempt via resolution last year to negate its apparent prior intent to create a penalty, the Legislative Counsel's Digest summary of some of its currently-pending bills states that "existing law" imposes "penalties" for an employer's failure to provide mandated breaks.

Additionally, *Caliber Bodyworks, Inc. vs. Superior Court of Los Angeles* (decided in November 2005), commented in a footnote that the payment was a penalty. The split in the courts will be resolved however, since the California Supreme Court has decided to review the *Murphy v. Kenneth Cole* decision.

Unfortunately, another issue that was brought up in *Mills* will not be resolved by the review of the *Murphy* decision. In *Mills*, the Court addressed the issue of whether a missed meal break plus one or more missed rest breaks in a single day count as two one-hour penalties or just one per workday. In this regard, the Court instructed that "[i]f all of the break

periods in an eight-hour shift are missed, an entire hour's pay is due." This conclusion is certain to cause additional concern to plaintiff's attorneys who regularly seek two hours of pay per workday against employers, i.e., one hour's pay per day for a meal period violation and one additional hour's pay per day for rest period violations.

**Still Confused?** Meanwhile, during most of 2005, the DLSE had been holding public hearings on some proposed regulations intended to ease the burden of the rest and meal period requirements and to clarify a number of issues, most significantly, the proper characterization of the payments due to employees who miss any breaks.

On January 13, 2006, shortly after the first appellate court decision (in *Murphy*) was issued in favor of the DLSE's "penalty" position, the DLSE elected to drop its proposed regulations, considering the matter resolved by the *Murphy* decision. This was disappointing, since the proposed regulations addressed more than the one issue. More unfortunate, however, was that the DLSE did not anticipate the fact that one court decision does not usually signal the end to disputes over hot topics like missed break payments. Not only did two more cases soon follow (with one declaring the payments as wages), but review of the *Murphy* case is now pending before the

Supreme Court. After a full year of rule-making activity and hearings, the DLSE now intends to issue new proposed regulations again in the future, setting off an entirely new rule-making process.

**Related Court Ruling:** A California appellate court recently struck down an exception under Wage Order 16 to the requirement that employers provide a second meal period after 10 hours to employees working 12-hour shifts. Wage Order 16 covers employers in the construction, drilling, logging and mining industries. The exception was allowed only in the context of a collective bargaining agreement, subject to specific requirements. The court in *Bearden v. U.S. Borax, Inc.* held that the Wage Order could not contradict the statutory requirement for the second meal period.

**Conclusion:** The issue of missed break payments has been in a state of confusion and flux since the requirements first went into effect in October 2000. As always, *The Strategic EMPLOYER* will continue to provide updates on this important topic. Meanwhile, employers should continue strict compliance with the original (and only) regulations on meal and rest periods.



FLEXIBLE WORK SCHEDULES, MINIMUM WAGE INCREASES &amp; MORE

## Pending State Legislation

### Wage & Hour

**AB 2217 and SB 1254:** All non-exempt employees currently must get overtime if they work more than 8 hours in a workday or 40 in a workweek. Existing law authorizes the adoption by a two-thirds vote of employees in a work unit of alternative workweek schedules providing for workdays no longer than 10 hours within a 40-hour workweek, without overtime pay. This option is currently available *only* to groups or units of employees, and *only* if specific, detailed procedures are properly followed and documented.

This bill would permit an individual nonexempt employee to request an employee-selected flexible work schedule providing for workdays up to 10 hours per day within a 40-hour workweek, and would allow an employer to implement this schedule without any obligation to pay overtime compensation for hours within the new regular schedule. The employee would need to initiate the request for a flexible schedule; employers would be prohibited from encouraging or otherwise soliciting an employee to

submit such a request. There would be detailed regulations governing how such a schedule could be implemented and documented.

**AB 1167, AB 1835, AB 1844 and SB 1162:** These are the various proposals for increasing minimum wage. For complete details on this mess, see the article on page 9 of this newsletter entitled "*Somehow, the Minimum Wage Will Go Up*".

**AB 2593:** Subject to specific requirements, this bill would permit parties in the transportation industry to establish by a collective bargaining agreement an off-duty meal period after 6 hours, and an on-duty meal period, without missed break penalties.

**AB 2095:** Under current law, an employer's payment of wages for labor in excess of the normal work period must be made not later than the payday for the next regular payroll period. That means an employee might work extra hours in one pay period that are not paid until the payroll for the following pay period. Existing law also requires an employer to furnish each employee with an itemized pay stub accurately

showing all hours worked in that pay period. That leaves a potential problem regarding the pay stub if an employee works extra hours in one pay period that are not paid until the next pay period. This bill would provide that an employer will be in compliance if the excess hours worked are itemized on the pay stub accompanying the pay for those hours.

**AB 2536 and AB 2613:** Employers are not required to pay overtime premiums to certain "personal attendants" or to "teachers," as defined in the pertinent regulations. AB 2536 would mostly eliminate this overtime exemption for personal attendants. AB 2613 would eliminate the exemption for teachers.

**AB 2327:** Employees must receive a pay stub showing, among other things, the name and address of the legal entity that is their employer. This bill would require an employer who is a farm labor contractor, as defined, to also disclose in the pay stub the name and address of the legal entity that secured the employer's services.

### Discrimination & Harassment

**AB 2555:** Existing law prohibits pay discrimination based upon the gender of the employee. This bill would increase the damages for which an employer may be liable to include a civil penalty of twice the balance of the wages due to the aggrieved employee, or, if the employer's violation is willful, four times the balance of the wages due. The bill would also require an employer of 50 or more employees to provide reports to the government and to provide each employee with a written statement setting forth the employee's job title, wage rate, and explanation as to how the employee's wages are calculated.

*State Legislation: cont'd on next page*

### Sick-Pay Cash-Out

*Continued from page 2*

*Acton v. City of Columbia* agreed.

At least one other federal court, for the Sixth Circuit, issued the *opposite* ruling. In 1995, that court, in *Featsent v. City of Youngstown*, held that year-end payments for unused sick time were similar to the regular use of sick pay, in which payments are made when no work is performed due to illness. As such, the court held that the payments were excluded from calculating the employees' regular rate.

Neither of these courts has jurisdiction over California; however, it is possible that the recent Eighth Circuit decision could spark some claims here.

If so, the Ninth Circuit could find the *Acton* ruling persuasive.

**Sick Pay Management Tip:** Policies that reward employees for not using their sick pay can be very beneficial; however there are a number of ways to accomplish that goal. Employers should consider their current policies and their options in this regard.

**Recommendation:** More importantly, the *Acton* case should serve as a reminder that the proper payment of overtime premiums is not always as simple as paying a multiple of the employee's nominal "hourly" rate. Employers should consult a wage-and-hour expert to ensure that they are properly calculating their employees' "regular rates."

## State Legislation

*Cont'd from front previous page*

**SB 1745:** California's anti-discrimination laws prohibit discrimination or harassment based on any of a large number of enumerated "protected classes," such as race, gender, etc. This bill would add a new protected class: a person's status as a victim of domestic violence, sexual assault, or stalking.

**AB 2095:** This would *clarify* the recently-enacted law that requires employers of 50 or more employees to provide all supervisors with training in preventing sexual harassment. This bill would limit this training requirement to supervisors within California.

## Lawsuit Incentives

**AB 2385:** Under existing law, an employer is required to indemnify an employee for all necessary expenditures or losses incurred as a direct consequence of the discharge of his or her duties. The term "necessary expenditures or losses" normally includes all reasonable costs, including attorney's fees incurred by the employee in enforcing the indemnification rights established by these provisions. This bill would specifically add litigation costs to this definition.

**AB 2371:** This bill would invalidate agreements to arbitrate claims brought under the Fair Employment and Housing Act ("FEHA"), which covers discrimination and harassment. This bill would also make it unlawful for employers to require new or existing employees to waive their right to file suit alleging claims under the FEHA.

## Benefits

**AB 1952:** This bill is this year's "pay or play" attempt by the State Legislature to solve the health insurance crisis. As previously reported in *The Strategic*

*EMPLOYER*, the last time the Legislature passed such a bill (signed by Governor Davis), the program was overturned by voters in the initiative process. This bill includes many features of the old, rejected program, but adds a new significant requirement: every person in California would be required to have health insurance. Some proposed bills left over from last year may also see some action this year.

AB 1952 would lead to establishment of an "Essential Health Benefits Plan," which would set the minimum level of insurance each person must have. The bill presumes employers will be the main provider of this coverage, and employers who do not offer the minimum level of coverage would be assessed penalties. Specifically, employers would need to pay an annual assessment of up to 7% of their total payroll cost for full and part-time employees. This assessment would be reduced if the employer provided coverage to its full-time employees, but excluded the part-time ones.

Each person who is not insured through work would be required to demonstrate annually that he/she has insurance from some other source or be fined. This insurance could be purchased through the State program being established by this bill. The funds collected through fines and assessments would subsidize the cost of insurance for people who otherwise could not afford it.

**AB 1884 and AB 2209:** One of the few "weapons" an employer has in labor disputes is the possibility of locking-out employees. Currently, workers who are striking or locked-out do not receive any unemployment insurance benefits. These bills would allow otherwise eligible locked-out workers to receive such benefits. This would effectively inoculate locked-out workers against some of the impact of being locked out and enable them to withstand the lock-out longer — not only subsidizing workers against their employers in a trade dispute, but potentially prolonging the lock-out as well. AB 2209 would also invalidate any

agreements between an employer and worker in which the worker agrees not to file or appeal a claim for unemployment benefits. This would negatively impact any otherwise legitimate settlement agreements in which an employer may require such a waiver in exchange for extra compensation to the worker.

## Miscellaneous

**AB 2186:** Misclassification of employees as independent contractors has always been a legal nightmare. This bill would subject employers to various increased penalties for misclassification.

**SB 1194:** California attempts to influence the immigration debate by requiring all employers to utilize the federal government's "Basic Pilot Program" for verifying that a new employee is authorized to work in the U.S. This Program allows employers to access government data bases for work-authorization status.

The Basic Pilot Program has come under fire for providing inaccurate information, causing increased discrimination, and increasing the risk of identity theft. Also of concern is the provision in SB 1194 requiring employers not only to verify their own employees, but also verify the work authorization status of every person hired by other employers with which the first employer contracts, something that would be very burdensome and not always possible.

The bill also contradicts federal I-9 rules by requiring verifications "prior to the hiring" of the employee; federal law requires verification within three days after hiring. Moreover, verifying someone before hiring them could lead to discrimination claims.

**AB 2277:** This bill would require that the multitude of required workplace postings and notices be written in plain language so that employers and employees can easily understand them.



MANY ARE ALREADY LAW IN CALIFORNIA

## Pending Federal Legislation

### Discrimination

**S 677 and H.R. 1445:** The Workplace Religious Freedom Act would amend the Civil Rights Act with regard to religious accommodation in employment. The proposed law would require accommodation of religious beliefs and practices of an employee or prospective employee if the individual can perform the essential functions of the positions. "Essential functions" are related to the position, but may not include functions related to clothing, taking time off, or other functions that have a "temporary impact" on the employee's ability to perform the job.

**H.R. 3128:** This bill would prohibit discrimination in federal employment based on sexual orientation.

**H.R. 288:** This bill would prohibit employment discrimination based on "affectational or sexual orientation," which means male or female homosexuality, heterosexuality, and bisexuality, by orientation or practice, by and between consenting adults.

**H.R. 2122:** This bill would prohibit discrimination against new mothers who are breastfeeding their infants and create a tax credit for employers that provide an appropriate environment (including equipment) for working mothers to breastfeed or express milk for their infants. California law already requires accommodations for breastfeeding mothers.

### Health Insurance

**S 1955:** California is unique in that, since the mid-1990's, it has had a "guaranteed issue" insurance program with "community rating" that prevented insurers from gouging small employers or cherry-picking which employees to insure. Insurance companies could not refuse to cover an employee who was eligible under an employer's plan. Small

businesses could get insurance for their employees at rates that were capped at 10% over a benchmark rate; even though most small businesses paid that 110% rate, the cap prevented the cost from spiraling without limits. Most states do not have such controls, and S 1955 is a popular bill in Washington that would help in such states.

The problem is that the bill would *replace* California's insurance protections, which are much greater than what is proposed in S 1955. For example, the new cap on premiums small group plans would be as much as 25% over the benchmark rate. There are also concerns that California's community rating system would be undermined. The bill would establish a commission to harmonize the various state programs with the new federal one. A complete report is available at [www.insurance.ca.gov](http://www.insurance.ca.gov) v — search "S 1955" and select "Bad for Business."

**H.R. 525 and S. 406:** Small businesses would be permitted to band together through national trade associations to offer health insurance coverage to their employees across state lines.

**H.R. 2133:** Employers would be required to make substantial contributions for health benefits coverage for employees, depending on the employer's size.

### Illegal Immigration

There are numerous proposals currently before Congress to address the issue of illegal immigration. Among these is one much like California's proposed solution: require all employers to tap into the federal Basic Pilot Program system to verify all workers. Unlike the California proposal, the federal bills would continue to allow employers to make the verification within 3 days of hire. As with the State bill, critics have noted the *15% error rate* experienced in the Pilot Program

and contend that this rate would be unacceptable (if not exacerbated) if used on a wider scale.

Other proposals would change I-9 procedures and documentation, increase penalties against employers for hiring unauthorized workers, and permitting more H1-B visas.

A controversial, yet bipartisan, bill recently passed by the Senate includes a new electronic system for employee verification. This bill also emphasizes employer accountability for hiring decisions, since employers would be expected to use the new verification system. The bill provides for maximum employer fines of \$20,000 for each unauthorized worker and possible *jail time* for repeat violators.

### Family & Medical Leave

**H.R. 3192:** This bill would establish an *employer-funded* paid family and medical leave insurance program. California currently has a paid family and medical leave insurance program, which is funded instead by *employees*.

**H.R. 475:** Coverage under the Family and Medical Leave Act ("FMLA") would be extended to care for an ill domestic partner, same-sex spouse, parent-in-law, adult child, sibling, or grandparent. California law already includes registered domestic partners.

**H.R. 279 and H.R. 476:** FMLA leave would be expanded to 24 weeks for spouses employed by the same employer. H.R. 476 would expand FMLA to cover employees at worksites employing between 25 and 49 employees.



TWO CASE RULINGS

## Disability Discrimination / Accommodation

Most employers know that they must not discriminate against employees because of any disability the employee has, and that they must make reasonable accommodations to enable such employees to perform the essential functions of their jobs. Two recent rulings provide further guidance in handling such situations. One case shows how discrimination may exist because of preferential treatment of an employee in an earlier situation. The other case addresses the limits of the employer's accommodation obligations.

**Case 1 - Violence and Mental Illness:** Pacific Bell hired Joshua Josephs to install and repair phones unsupervised in people's homes. On his job application, he answered "no" to the question asking if he had ever been convicted of a crime. A few months later, Pacific Bell learned that 15 years earlier, Joseph had been found not guilty by reason of insanity for the attempted murder of a friend, and that three years after that, he had been convicted for a misdemeanor battery on a police officer. The company also learned Josephs had spent several years in a mental hospital related to the attempted murder charge.

The company fired Josephs for lying on his application form. Josephs requested reinstatement, but his request was denied. Josephs sued, claiming that other employees who were fired for lying on their applications were reinstated. Pacific Bell stated that Josephs' case was different, since the company could not allow someone who had been in a mental institution because of violent behavior to work unsupervised in people's homes. Pacific Bell did not consider reinstating him in a position that would not involve unsupervised access to people's homes.

The jury found that the initial termination was legal, but that the refusal to reinstate him was discriminatory. The Ninth Circuit Court (the federal court overseeing California) upheld this verdict on appeal.

Pacific Bell did not treat Josephs

differently when terminating him; the company had terminated other, non-disabled employees for lying on their applications. However, the company had reinstated such non-disabled employees upon request and had stated the reason for treating Josephs differently was his history of mental illness.

Pacific Bell argued that Josephs was not qualified for employment because of his past violent acts. However, Pacific Bell had no written policy prohibiting employment of people with a history of violence, and once had reinstated an employee who had a felony conviction for domestic violence to the same job Josephs had. This damaged Pacific Bell's contention that a person with a history of violence was not employable.

Accordingly, the Court held that the company regarded Josephs as having a disability and treated him adversely because of its assumptions about mental illness, rather than an individualized assessment of the particular risks involved.

**Case 2 - Disabled Police Officer Rejects Civilian Desk Job:** In another court case, an employer won a ruling that an employee is not entitled to have a temporary light-duty accommodation converted into a permanent position.

In *Raine v. City of Burbank*, a police officer, Raine, injured his knee on duty and was given a temporary light-duty desk assignment as an accommodation while he recovered. His assignment was to staff the front desk, a task normally handled by civilian employees who are paid less than officers and receive a lesser benefit package.

Since this was a temporary assignment for Raine, he was paid at his normal officer pay rate. Raine was kept on the front desk for six years, at which point, the City concluded that Raine would never again be able to perform the essential functions of a police officer.

The City contended that there were no vacant positions for a sworn officer that Raine was qualified and able to

perform, so they offered him a permanent job as a civilian staff member. Raine rejected the offer because of the lower rate of pay and benefits and sued claiming the City failed to accommodate him.

The California Court of Appeals ruled that the City met its accommodation obligations. If an accommodation cannot be made to enable the employee to perform his existing job, then the obligation to reassign the employee requires the employer to look at existing, available positions. The employer does not need to create new positions, promote the employee or violate another employee's seniority rights.

Also, the Court held, the duty to make reasonable accommodations does not require the employer to transform a temporary accommodation into a permanent job assignment (unless the employer has a practice of doing so for other employees).

Here, the City did run a risk that a court might consider the assignment to the front desk had already become "permanent," given that Raine had already held the position for six years. The City had other facts available to establish that sworn officers were never "permanently" assigned to the front desk, and so won this issue.

**Recommendation:** Employers who have light-duty jobs that are set aside for temporary accommodations should carefully identify these assignments and include a written limitation as to how long these "temporary" placements can last. Otherwise, the mere length of a light-duty assignment may lead to a dispute over the temporary or permanent nature of the assignment.



CALIFORNIA APPELLATE COURT RULING

## First Court Ruling on "Bounty-Hunter" Law

A California Appellate Court recently issued the first ruling on the recently-enacted "Bounty-Hunter" law, officially known as the Private Attorney General Act of 2004 ("PAGA"). That law encourages employees to sue their employers by splitting the fines that would normally go entirely to the government with the employee who brings a claim. In this way, the employee acts like a "private attorney general" by enforcing claims the government otherwise could bring, but where the government has failed to act.

PAGA permits "aggrieved employees" to bring lawsuits on behalf of themselves and others to recover "civil penalties" if the California Labor Workforce Development Agency ("LWDA") does not do so.

The law requires that the LWDA gets the first crack at bringing suit before an individual can say the LWDA decided not to act. That principle is known as "exhaustion of administrative remedies." The individual who wants to bring a PAGA claim must exhaust the available administrative remedies before being allowed to file such a claim.

**Statutory v. s. Civil Penalties:** In *Caliber Bodyworks, Inc. v. Superior*

*Court*, the court examined the various circumstances in which exhaustion of administrative remedies would and would not be required. In arriving at its conclusions, the court made a distinction between "civil penalties" and "statutory penalties."

"Statutory penalties" were those penalties available to aggrieved employees independent of PAGA. These were set forth in statutes that authorized employees to directly recover such penalties, with no portion going to the government.

"Civil penalties" are those that are recoverable by the government, such as fines; individuals are authorized to pursue those only because of PAGA, and only get 25% of the penalties awarded.

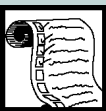
**Court Ruling 1:** The Court ruled that an individual cannot pursue civil penalties without first exhausting the administrative remedies. The court held that exhaustion of administrative remedies would not be required where the claim was for statutory penalties.

**Court Ruling 2:** The Court also examined the procedural requirements for a lawsuit containing hybrid claims seeking both civil and statutory penalties. The Court ruled that those

portions of a lawsuit seeking civil penalties would be stricken from the case, unless the exhaustion of remedies had been accomplished before the suit was filed. The remaining portions seeking statutory penalties would remain viable.

**Court Ruling 3:** Finally, the Court considered the nature of a specific claim typically tagged-on to PAGA suits and other employment-related claims: The alleged violation of the Business & Professions ("B&P") Code for "unfair business practices." This is an allegation that the employer's violation of some other law (such as full payment of overtime) gave that employer an unfair business advantage, causing harm to others. Such a claim can significantly increase the damages awarded against the employer.

In *Caliber Bodyworks*, the plaintiff did not seek civil penalties under its B&P claim, so the Court held there was no exhaustion requirement in this case.



REDUCING THE THREAT OF IDENTITY THEFT

## Social Security Numbers & Identity Theft

Last year, in order to reduce the risk of identity theft, California enacted a law that would require employers to stop placing an employee's Social Security number on employee pay stubs.

Starting as of January 1, 2008, employers may use only the last four digits of the employee's Social Security number on the pay stub, or they may use a unique employee I.D. number other than the employee's Social Security number. Although this requirement goes into effect in 2008, employers could have started following the new rule as early as Jan. 1, 2006.

**Protecting Confidential Data:** Many employers forget that they are the custodian of a significant amount of confidential information regarding their employees and their customers. Social Security numbers are just one item. Employers also have addresses, dates of birth, and may have medical and banking information as well. They also frequently have credit card and other sensitive information regarding their customers.

While businesses may be taking steps to ensure that hackers cannot get into their systems or that information is sent out in a secure manner, many

businesses would be surprised to learn that this reduces only part of the threat. A recent study showed that 13% of all identity theft involved employees who stole personal information from other employees at work. The average losses for each victim was \$92,000.

The recent loss of data pertaining to military personnel is also a grim reminder of the consequences of a lax attitude. A Veteran's Administration employee improperly took home data on a laptop to do some work; it was stolen in a burglary, with millions of veterans now at risk.

*Social Security: cont'd on next page*



INDEPENDENT CONTRACTORS RULING

## Non-Disclosed Hazards Create Liability

If you hire a contractor to do a job, are you responsible for any work-related injuries to that contractor's employees? If the worker is injured by a hazard that you knew of but did not disclose, the answer is "yes." Such liability would not be covered by your workers' compensation insurance, nor be limited to the compensation schedules for workers' compensation claims, since the claim would be brought by someone who was not your employee.

**General Rule:** There are some exceptions, but the general rule is that the hirer of an independent contractor is not liable for injuries to that contractor's employees unless the hirer had control over the dangerous condition and contributed to the worker's injuries. Otherwise, an injured employee of a contractor can pursue a workers' compensation claim against his / her employer, but not pursue any claim against the person / entity who hired that contractor.

**Case Expands Liability:** In *Kinsman v. Unocal Corp.*, the California Supreme Court expanded liability of the hirer. There, Unocal hired a contractor, Burke & Reynolds ("B&R") to perform scaffolding work at a refinery. B&R had a number of its employees performing the work, including Ray Kinsman. Unocal did not tell B&R or any of B&R's employees that the work would expose them to debris that contained asbestos;

evidence showed that Unocal knew of this hazard. Because Unocal did not disclose this hazard, none of B&R's employees wore masks or respirators while working. Kinsman developed a specific type of lung cancer that is caused by asbestos exposure.

Kinsman sued Unocal for negligence. Per the normal rule, Unocal could not be liable to B&R's employees, and the lower court held that Kinsman was limited to his workers' compensation claim against B&R.

However, the California Supreme Court overturned that holding and expanded the general rule. The Supreme Court ruled that — even where the hirer (Unocal) did nothing to contribute to the injury — the hirer may be liable to the contractor's employees if there is an undisclosed hazard. The Court explained that a hirer cannot delegate all of its responsibilities for workplace safety to the contractor, if the hirer does not give the contractor critical safety information that the contractor would need to fulfill such responsibilities.

The Court concluded that the hirer can be liable if it:

- 1. Knows or reasonably should know of a concealed hazard;
- 2. The contractor does not know and could not reasonably ascertain the condition; and

- 3. The hirer does not warn the contractor.

The case will now go back to the trial court to determine if all three of these elements occurred.

**Problem Prevention:** There are steps you can take to safeguard against injury claims by a contractor's employees. The most critical is to ensure that you disclose all possible hazards to contractors before they perform any work at your premises. To establish that you did this, you should make the disclosure in writing, signed by both you and the contractor.

You should also make sure to provide all required "Material Safety Data Sheets" and other legally-required "haz-mat" information to the contractor at that time. Have the contractor commit to using the proper tools and equipment for the job and to providing complete training to its employees for safely performing the work involved. You should regularly inspect for, identify and remedy workplace hazards before there is a problem. Then strictly enforce all safety rules at all times for all workers, even if they are not your employees.

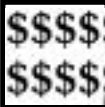
## Social Security

*Cont'd from front previous page*

**Recommendations:** What steps can employers take to reduce the risk of identity theft and other crimes involving sensitive information?

- 1. Don't include any personal information about employees on their paychecks — particularly their social security numbers. As mentioned above, only the last four digits should be used.

- 2. Keep all personnel records locked up. This is also a legal requirement.
- 3. When faced with getting rid of documents containing personal information from either clients or employees, federal law requires that you destroy the documents rather than throw them out.
- 4. Identify trigger points in your employees — personal crises, drug or alcohol addictions, extreme anger, employees living beyond their financial means, or terminations.
- 5. Let your employees know they are being monitored — they are less likely to commit a crime.
- 6. Try to avoid rapid turnover.
- 7. Conduct background checks on all prospective employees.
- 8. Do not let employees take sensitive work home with them; but if they must, make sure that the data is being carefully tracked.



BUT ON WHOSE TERMS?

## Somehow, the Minimum Wage Will Go Up

It seems that everyone in Sacramento agrees that the minimum wage (currently \$6.75 per hour in California) should be increased by \$1 over the next two years. Specifically, almost every proposal has the rate going to \$7.25 starting July 1, 2007 and then to \$7.75 on July 1, 2008.

**History:** A bill was passed in 2005 proposing the same increase; however, Governor Schwarzenegger vetoed it because, after the dollar increase was achieved, the law would require automatic annual increases tied to inflation. The Governor assured the public that he otherwise supported an increase in minimum wage; however, he also vetoed a similar increase in 2004 that did *not* include an automatic increase.

**Today:** This year, to show his sincerity in supporting the increase to minimum wage, the Governor put forward his own bill (**AB 1167**) that would enact the \$1 increase. Consistent with his 2005 veto, this bill did not contain automatic increases.

**Let the Games Begin!** Then, the political maneuvering ensued. Both the State Senate and Assembly put forth a number of bills that would include the automatic increase, which legislators knew the Governor would veto, just like last year. The Governor's bill was then killed in committee, and at the end of May, the Legislature passed a set of bills that included the \$1 increase followed by automatic increases starting on January 1, 2009.

The maneuvering has set up a political showdown between the Governor and the Legislature. The Governor's only apparent choice would be to sign a bill that included the automatic increase to which he objected, or to veto the bill and take the political heat for preventing minimum wage workers from earning a higher wage. However, the Governor

had at least one more political move of his own.

**Reawakening the Dormant IWC:** California law has long provided that the Industrial Welfare Commission ("IWC") has the authority to adjust minimum wage. This is the same agency that would have the authority to promulgate regulations related to rest and meal breaks. Unfortunately, the five-member IWC has not been funded for several years; only one member's original term has not already expired.

On June 1, 2006, the Governor appointed four Democratic Commissioners to the IWC (two who were previously appointed by Governor Davis) and requested the reconvened IWC to approve an increase in minimum wage of \$1 over the next two years. The California Labor Federation then petitioned the IWC to have automatic future increases tied to inflation.

In order to pass the increase to be effective for January 1, 2007 (and before the Governor has to decide whether to veto the bills passed by the Legislature), the IWC will need to act fast.

The IWC must hold a number of public-comment hearings, and must appoint a wage board (expected July 5, 2006) to study the issue and make recommendations to the IWC. Even if the IWC imposes an automatic increase, the IWC can potentially reverse that requirement (after the appropriate public hearings); legislation is much harder to change. So either way, if the IWC acts at all (with or without the automatic increase), the Governor can safely veto the passed legislation as unnecessary.

**Conclusion:** What can be expected with any certainty from all of this?

**1.** California can expect an increase in minimum wage very soon; and

**2.** there is no hope of any bipartisan collaboration in Sacramento, as they cannot even work together to pass the one part of all this they do agreed on.

WAAG AND CO. will keep you informed of developments.

## The Strategic *EMPLOYER*

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