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By **Anthony J. Oncidi***

California Employment Law Blog

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Newly Enacted California Statutes

The Word "Alien" Is Stricken From The California Labor Code

Section 1725 of the California Labor Code defines "alien" as "any person who is not a born or fully naturalized citizen of the United States." Section 2015 sets forth the "preference for employment" for the extension of public works by the state and requires the extension of such preference "First, to citizens of this State. Second, to citizens of other States within the United States… Third, to aliens who are within the State…." This law repeals both of these provisions (SB 432).

Grocery Workers Must Be Given Preferential Treatment Following a "Change In Control"

Following a change in control (a sale, transfer or other disposition) of a supermarket or other grocery establishment, the successor grocery employer will be required to maintain a preferential hiring list of eligible grocery workers composed of former employees of the selling entity. The successor employer shall hire from the preferential hiring list for the first 90 days after the grocery establishment is fully operational and open to the public. The successor employer shall retain eligible workers for at least 90 days after opening unless it determines it needs fewer workers in which case it shall retain eligible workers based upon their seniority and shall not discharge them without cause. After 90 days, the successor employer shall provide written performance evaluations of eligible employees and if the performance was satisfactory during the prior 90 days, the employer shall "consider offering the eligible grocery worker continued employment." This law shall not apply to grocery establishments located in an area designated as a "food desert" or in establishments where a collective bargaining agreement supersedes its requirements (AB 359).

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Employment Protections For Members Of National Guard Expanded

Existing law provides employment protections for members of the National Guard who have been ordered into active state or federal service. Among other things, the member of the National Guard is entitled to be restored to his or her former position or to a position of similar seniority, status and pay without loss of retirement or other benefits unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. The returning member of the National Guard also shall not be discharged without cause within one year after he or she has been restored to the position. This law extends these protections to members of the National Guard of other states who have left a position in private employment in California (AB 583).

Employer May Not Retaliate Against Person Who Requests An Accommodation Regardless Of Whether It Was Granted

This law prohibits an employer from retaliating or otherwise discriminating against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted (AB 987).

Cheerleaders Of Professional Sports Teams Are Employees Under California Law

This law, for purposes of all provisions of state law that govern employment, including the California Labor Code, the California Unemployment Insurance Code and the California Fair Employment and Housing Act, requires a cheerleader who is utilized by a California-based professional sports team during its exhibitions, events or games to be deemed an employee (AB 202).

Trial Court Need Only Rule On Evidentiary Objections That It Deems Material To Summary Judgment/Adjudication Motion

This law provides that in granting or denying a motion for summary judgment or summary adjudication, the trial court need rule only on objections made to evidence that the court deems material to the disposition of the motion. Any objections to evidence not ruled on for purposes of the motion are preserved for appellate review (SB 470).

New Case Law

Background Check Law Is Not Unconstitutionally Vague

Connor v. First Student, Inc., 2015 WL 4768123 (Cal. Ct. App. 2015)

Eileen Connor worked as a school bus driver for Laidlaw Education Services. After First Student acquired Laidlaw, it hired a third party agency (the "agency") to conduct background checks on Connor and all other former Laidlaw school bus drivers and aides. Before conducting the background checks, First Student sent to each employee a "Safety Packet" that included a notice that an investigative consumer report might be requested by the agency. In her lawsuit, Connor alleges that the notice she received did not satisfy the specific requirements of the California Investigative Consumer Reporting Agencies Act ("ICRAA") and that First Student did not obtain her written authorization for the background check as required by the statute. The trial court granted First Student's motion for summary judgment based upon an earlier opinion of the California Court of Appeal. The Court in this opinion refused to follow the earlier opinion and held that the agency, as an investigative consumer reporting agency, was required to comply with the applicable provisions of the ICRAA despite the possible applicability of another statute governing consumer credit reports (the California Consumer Credit Reporting Agencies Act ("CCRAA")).

Border Patrol Agent May Proceed With Age Discrimination Lawsuit

France v. Johnson, 2015 WL 4604730 (9th Cir. 2015)

John France, a border patrol agent assigned to the Tucson Sector Border Patrol, applied for a promotion to Assistant Chief Patrol Agent (GS-15 pay grade). Of the 24 eligible candidates, France was the oldest (age 54). Although France was among the top 12 candidates invited for interviews in Washington, DC, he was not among the top six who received final consideration for the position. In response, France sued the U.S. Department of Homeland Security for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). Although the district court found that France had established a prima facie case of age discrimination, he did not demonstrate a genuine issue of material fact with respect to the agency's proffered nondiscriminatory reasons for not promoting him. The United States Court of Appeals for the Ninth Circuit reversed, holding that less than an average 10-year age difference between France and the four selected candidates created a rebuttable presumption that the age difference was insubstantial but that France had rebutted that presumption with evidence of his supervisor's expression of a preference for "young, dynamic agents" and his repeated discussions with France about retirement (despite France's "clear indication that he did not want to retire"). The Court further held there was a genuine dispute of material fact as to whether France's supervisor influenced or was involved in the promotion decisions (even though he was not the final decisionmaker). In addition, the supervisor's repeated discussions about retirement suggested the nondiscriminatory reasons offered by the agency may have been pretextual.

Federal Court Has No Jurisdiction Over Title VII/ADEA Claims For Conduct That Occurred In The Netherlands

Ranza v. Nike, Inc., 2015 WL 4282986 (9th Cir. 2015)

Loredana Ranza sued her former employer, Nike European Operations Netherlands, B.V. ("NEON"), and NEON's parent company, Nike, Inc., which is headquartered in Oregon, in federal court in Oregon. All of the alleged discriminatory conduct (involving sex and age discrimination) occurred in the Netherlands. The district court dismissed Ranza's lawsuit for lack of personal jurisdiction over NEON and a failure to state a claim against Nike. The United States Court of Appeals for the Ninth Circuit affirmed, holding that it had no personal jurisdiction over NEON and that the Netherlands provided an adequate and more convenient forum in which to litigate Ranza's claims against Nike under the *forum non conveniens* doctrine. The Court rejected Nike's argument that Ranza had failed to exhaust her administrative remedies because of her initial failure to name Nike as a respondent in her EEOC charge.

Former Employees Could Proceed With Whistleblower Cases Under False Claims Act

United States ex rel. Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121 (9th Cir. 2015) (*en banc*)

Steven Hartpence and Geraldine Godecke ("Relators") alleged in these consolidated *qui tam* cases that their former employer (Kinetic) had fraudulently claimed reimbursements from Medicare. After the allegations of Medicare fraud were publicly disclosed, Relators each informed the government of the alleged fraud and then filed separate complaints in district court. Relying upon existing Ninth Circuit precedent, the district court dismissed Relators' claims because they were not "original sources" of the information under the False Claims Act ("FCA"). In this opinion, the Ninth Circuit, sitting *en banc*, overruled its earlier decision in *Wang ex rel. United States v. FMC Corp.*, 975 F.3d 1412 (9th Cir. 1992), as wrongly decided and remanded the actions to the district court to consider whether Relators were an "original source" based on the following test: (1) Before filing his or her action, the whistleblower must voluntarily inform the government of the facts that underlie the allegations of his or her complaint; and (2) He or she must have direct and independent knowledge of the allegations underlying the complaint. Abrogating its earlier precedent, the Court held that it does not matter whether the alleged whistleblower also played a role in the public disclosure of the allegations. The Court also held that the district court erred in finding Godecke's action barred by the first-to-file rule, because some of her claims are materially distinct from Hartpence's claims.

Lawyers (Not Their Clients) Are Potentially Liable For Allegedly Overbilling Insurance Carrier

Hartford Cas. Ins. Co. v. J.R. Marketing, L.L.C., 190 Cal. Rptr. 3d 599 (Cal. S. Ct. 2015)

Hartford Casualty issued commercial general liability ("CGL") policies to its insureds Noble Locks and J.R. Marketing. After the insureds were sued by a third party, Hartford issued reservation of rights letters based upon possible noncoverage under the policies but agreed to pay the reasonable costs of retaining independent counsel selected by the insureds ("*Cumis* counsel"). The law firm of Squire Sanders acted as the insureds' independent counsel. In this action, Hartford seeks reimbursement from Squire Sanders for allegedly unreasonable and unnecessary fees the firm charged to Hartford. Squire Sanders argued that if the insurer has any right at all to recover for overbilled amounts, the insurer's right runs solely against its insureds (not their attorneys). The California Supreme Court reversed the court of appeal and held that Hartford may seek reimbursement directly from the attorneys.

Two Class Actions Should Have Been Treated As One For Purposes Of CAFA Removal

Bridewell-Sledge v. Blue Cross of Cal., 2015 WL 4939641 (9th Cir. 2015)

Two similar class actions filed 13 minutes apart against the same defendants in the same California state court were consolidated by the state court "for all purposes." Despite the fact that the two actions had been consolidated into a single action, defendants filed two separate notices of removal under the Class Action Fairness Act of 2005 ("CAFA"). The district court treated the two cases as separate and concluded that CAFA's local controversy exception applied to the first-filed class action but not the second and remanded the first while retaining jurisdiction over the second. The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, holding that the consolidated action should have been viewed by the district court as a single class action and that CAFA's local controversy exception applies to the consolidated action, thus requiring remand of the entire action (i.e., both cases). *See also Yocupicio v. PAE Group, LLC*, 2015 WL 4568722 (9th Cir. 2015) (matter removed under CAFA should have been remanded to state court because the class claims alone did not meet the $5 million CAFA amount-in-controversy requirement).

Truck Drivers Were Misclassified As Independent Contractors

Garcia v. Seacon Logix, Inc., 190 Cal. Rptr. 3d 400 (Cal. Ct. App. 2015)

Romeo Garcia and other plaintiffs were truck drivers who transported cargo for Seacon Logix. After the Ports of Los Angeles and Long Beach began to implement a clean air program, which prohibited older trucks from accessing the ports, companies such as Seacon purchased new, less polluting trucks to replace the older, higher emission trucks that had been owned and operated by the truck drivers. Although the truck drivers no longer owned the trucks they drove, Seacon continued to treat the drivers as independent contractors (which had been their traditional relationship with Seacon), requiring them to enter into lease agreements for the use of the trucks and deducting lease and insurance

payments from their paychecks. In this lawsuit, the truck drivers sought reimbursement for those deductions on the ground that they are employees and not independent contractors. The Labor Commissioner and the trial court agreed and entered judgment in favor of the drivers. The Court of Appeal affirmed, holding that the trial court's judgment is supported by substantial evidence that Seacon controlled the manner and means of the drivers' work and that secondary factors such as the right to discharge at will and the provision by Seacon of the instrumentalities, tools and place of work proved the drivers are employees and not independent contractors.

Missed Meal Break Class Action Was Properly Certified

Safeway, Inc. v. Superior Court, 238 Cal. App. 4th 1138 (2015)

Plaintiffs in this class action lawsuit alleged claims against Safeway and Vons for failure to provide meal and rest breaks, failure to provide itemized pay statements, unfair business practices under the Unfair Competition Law ("UCL") and penalties under the Labor Code Private Attorneys General Act of 2004 ("PAGA"). Plaintiffs asserted that the employers had a policy of never paying the meal break premium wages set forth in Labor Code § 226.7 "under any circumstances." The trial court granted plaintiffs' motion to certify the class on the ground that there was a "central and predominating common issue: Did Safeway's system-wide failure to pay appropriate meal break premiums make it liable to the class?" The employers filed a petition for writ of mandate with the Court of Appeal, but the Court denied the petition on the ground that a UCL claim may be predicated on a practice of not paying premium wages for missed, shortened, or delayed meal breaks attributable to the employer's instructions or undue pressure and unaccompanied by a suitable employee waiver or agreement. The Court also determined that class certification was appropriate in the case because the employers' challenged practice and the fact of damage were capable of common proof.

Proskauer's nearly 200 Labor and Employment lawyers address the most complex and challenging labor and employment law issues faced by employers.

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