SIMS & LAYTON
ATTORNEYS AT LAW
LawNotes

ROUTE TO:

Volume 23 Number 1 Winter 2009

SEMINAR

2010 EMPLOYMENT LAW UPDATE

Sims & Layton will be presenting its Annual Employment Law Update for employers to explain what decisions were made this past year by the courts; what new laws and policies have been adopted by state and federal governmental agencies and the California Legislature; and what employers can expect for the coming year.

The breakfast program is scheduled for 8:00 to 10:00 a.m. on Thursday, **January 21, 2010** at Bella Mia Restaurant, 58 South First St., San Jose. Materials will be distributed. If you would like to attend, please complete the enclosed form or contact our office for more information. Registration fee is $50.00 per person (*includes complimentary parking, space permitting, at the lot on 2nd Street behind Bella Mia*). Early registration is encouraged as seating is limited.

BASE PAY RATES

HOSPITAL'S POLICY OF SETTING DIFFERENT PAY RATES LEGAL

In October of 2009, in the class action lawsuit ***Louise Parth v. Pomona Valley Hospital Medical Center***, the Northern California Federal District court concluded that when an employer changes its shift schedule to accommodate its employees' scheduling desires, the mere fact that pay rates changed, between the old and new scheduling schemes in an attempt to keep overall pay revenue neutral, does not establish a violation of the Fair Labor Standards Act's (FLSA's) overtime pay requirements.

Prior to 1989 or 1990, Pomona Valley Hospital Medical Center ("PVHMC" or "Employer"), scheduled its nurses to work almost exclusively in 8-hour shifts. Many PVHMC nurses however, preferred to work 12-hour shifts in order to have more days away from the hospital. In response to these requests, PVHMC developed a 12-hour shift schedule in 1989-1990 where the nurses had the option of working a 12-hour shift schedule in exchange for receiving a lower base hourly salary (that at all times exceeded the minimum wage set forth by the FLSA). As a result, nurses who volunteered for the 12-hour shift schedule would make approximately the same amount of money as they made on the 8-hour shift schedule (while working the same number of hours and performing the same duties). After making the 12-hour shifts available, many PVHMC nurses opted to work these 12-hour shifts.

In 1993, Plaintiff Louise Parth worked as a nurse in PVHMC's ER and voluntarily agreed to work the 12-hour shifts. Ms. Parth entered into a voluntary agreement with PVHMC where her base hourly wage rate dropped from $22.83 to $19.57 in exchange for the 12-hour shift schedule. Parth has worked the 12-hour shift schedule without interruption since 1993.

In 2003, the PVHMC nurses decided to unionize. The union and the hospital entered into a collective bargaining agreement ("CBA") where all nurses' salaries, for both 8-hour and 12-hour shifts, would raise 10% during the CBA's first year and then 5% for both the second and third year of the CBA. All members voted on the proposed CBA after being advised on its contents and being provided with an opportunity to review its provisions.

Two years later, Ms. Parth filed a class action complaint against PVHMC, claiming that PVHMC's use of two differently based hourly rates violated the FLSA since it denies unionized employees of overtime pay, to which they're allegedly entitled. She claimed that PVHMC created the two different base wage rates in order to sidestep the FLSA's requirement to pay overtime to employees.

In siding with PVHMC, the court found no evidence to suggest that PVHMC was attempting to avoid paying overtime to its employees, nor was any authority provided that prohibits PVHMC from paying employees different hourly rates when they are assigned different shifts. These new schedules did not impede Congress' goals when enacting the FLSA, which was "to induce the employer to reduce the hours of work and ... compensate the employees for the burden of a long work week." Rather, the 8 and 12-hour shifts gave the employees more scheduling flexibility, allows them to spend less time commuting to work and ensures that PVHMC does not retain an incentive to ask the nurses to work longer hours.

CONTENTS

Seminar .... page 1
Base Pay Rates .... page 1
IMAGE .... page 2
Labor Code 132a .... page 2
Business Trips .... page 3
FMLA .... page 3
To Lunch or Not .... page 4

Tel (408) 998-3400 SIMS & LAYTON *Fax* (408) 297-1104
84 West Santa Clara St. • Suite 660 • San Jose, California 95113
Email Attorneys@SimsAndLayton.com • www.SimsAndLayton.com

IMAGE

NEW FEDERAL PROGRAM EDUCATES EMPLOYERS ABOUT UNDOCUMENTED WORKERS

One major problem facing many employers is undocumented workers who have secured jobs by fraudulent means, including the presentation of false documents, completion of fraudulent benefit applications and theft of identities. The United States Immigration and Customs Enforcement (ICE), which is responsible for enforcing the nation's immigration and customs laws, recognizes that the highest level of employment integrity can only be achieved through close coordination with industry leaders. To combat unlawful employment, the ICE Mutual Agreement between Government and Employers (IMAGE) program was introduced in 2007. Its purpose is to assist employers in targeted sectors to develop a more secure and stable workforce and to enhance fraudulent document awareness through education and training.

Companies who voluntarily participate in the IMAGE program, and follow the prescribed steps of IMAGE could lessen the likelihood that their companies be found in violation of laws. IMAGE places an emphasis on self-policing. It can enhance your corporate image by associating it with hiring practices (deeming your company IMAGE-certified) reducing opportunities to inadvertently hire unauthorized workers. IMAGE participation may also be considered a mitigating factor in the determination of a civil penalty (fine) amount, if applied.

As part of IMAGE, ICE and US Citizenship and Immigration Services (USCIS) will provide education and training on proper hiring procedures, fraudulent document detection, use of the E-verify employment eligibility verification program and anti-discrimination procedures. ICE will identify schemes used to circumvent hiring and employment processes. ICE will work collaboratively with employers whenever it discovers minor and isolated potential misconduct. ICE will attempt to minimize disruption of business operations resulting from a company's self-disclosure of possible violations and will keep the related information confidential to the extent permitted by law and regulation.

Employers seeking to participate in IMAGE must agree to:

- Complete a self-assessment questionnaire;
- Enroll in E-Verify (program where employers can verify that the newly hired employees are eligible to work in the US; the program is available in all 50 states and free to employers);
- Enroll in the Social Security Number Verification Service;
- Adhere to IMAGE best Employment Practices;
- Undergo an I-9 Audit conducted by ICE; and
- Review and sign an official IMAGE partnership agreement with ICE.

Contact ***Sims & Layton*** should you have any questions regarding the program or participation.

LABOR CODE 132a

COURT MAKES IT MORE DIFFICULT FOR EMPLOYEE TO SUCCEED ON LABOR CODE 132a CLAIM

Any employer who has made an adverse employment decision against an employee who suffered an on-the-job injury will be familiar with the Labor Code Section 132a claim. Section 132a prohibits employers from discriminating against any employee who has filed a workers' compensation claim or for related activity. These 132a claims are often filed along with an employee's workers' compensation claim. Any time an employer takes an adverse action against an industrially injured employee, the employer should expect a 132a claim.

Courts have been clear however that an employee who files the 132a claim cannot be successful unless the employee proves that the adverse action was taken against him because of his industrial injury. A California Appellate court in ***Gelson's Markets Inc. v. WCAB*** further clarified that in order to prevail, it is not enough for the employee to show that he or she suffered some negative consequence as a result of an industrial injury. The employee must establish that the employer treated the injured employee differently than the employer would treat a nonindustrially injured employee in the same circumstances.

In ***Gelson's***, the employee suffered a neck injury while on the job. The injury resulted in the employee having surgery and being off work for over a year. Following surgery, the employee provided a doctor's note stating that he was released to return to work. The release however, was ambiguous, which caused the employer to call the doctor for clarification. The doctor admitted that he did not believe the employee should return to work but should instead remain temporarily totally disabled. The employee however, wanted to return to work and wanted a release, so the doctor provided a release based on the employee's personal opinion that the employee could do his job. As a result of the doctor's statements and admissions, the employer did not allow the employee to return to work. The worker's compensation litigation continued, eventually resulting in a qualified medical examiner concluding that the employee could return to work. The employee returned to work approximately one and one-half years after the employee's original "release" from his treating doctor.

The employee filed a 132a claim seeking lost wages for the time period his employer did not allow him to work. The Workers' Compensation Appeals Board (WCAB) agreed with the employee, awarding him one and one-half year's worth of back wages AND a $10,000 statutory penalty.

The appellate court overruled the WCAB and found that the WCAB applied the wrong legal standard. The employee, in order to be successful, needed to show that the employer treated the injured employee differently than the employer would treat a nonindustrially injured employee in the same circumstance. The appellate court reasoned that "the employee made no showing that [the employer] treated him disadvantageously because of the industrial nature of his injury, as compared to how [the employer] treated a nonindustrially injured employee." The court annulled the previous WCAB award in the employee's favor.

The ***Gelson's Market*** case is a positive case for employers, making it harder for employees to prove discrimination under 132a and thereby lessening the risk associated with taking necessary adverse action against an industrially injured employee.

BUSINESS TRIPS

EMPLOYERS MAY BE LIABLE FOR INJURIES BY EMPLOYEES ON BUSINESS TRIPS

The Appellate Court in ***Jeewarat v. Warner Brothers Entertainment, Inc.*** (2009) found that an employer can be held liable for damages caused by its employee's car accident after an out of town business trip under the "special errand" doctrine. Under the "Special Errand" doctrine, an employer is held vicariously liable for accidents occurring while an employee is engaged in a special errand for the employer, including the employee's commute to and from the special errand.

Marc Brandon worked for Warner Bros. Entertainment, Inc. as Vice President of Anti-Piracy Internet Operations. Warner Bros. did not provide him with a car or car allowance, and he was not reimbursed for mileage. In August 2006, he attended a three-day business conference in Sunnyvale California. Warner Bros. approved Brandon's trip and paid for his airfare, hotel and airport parking. On August 11, 2006, Brandon left the conference early and flew back to the Burbank Airport, where he retrieved his car. He did not intend to go to his office but rather intended to go home. On his way home, he drove around to the studio complex where his office was located without stopping and took his normal route home for approximately two to three miles, until he was involved in a car collision with another car. One or both cars struck and injured three individuals, one of them Plaintiff Jeewarat. Plaintiff Jeewarat filed a complaint seeking damages from both Brandon and Warner Brothers under the "special errand" theory.

Warner Brothers argued it could not be held liable since Brandon was not acting within the scope of his employment at the time of the accident. Brandon, Warner Bros. argues, was commuting from work to home when the accident occurred and therefore acting under the "going and coming rule". Under the "going and coming rule," an employee is not regarded as acting within the scope of employment while going to or coming from the workplace, because the employee ordinarily is not rendering services to the employer while traveling. The court rejected Warner Bros.' argument.

In siding with the Plaintiff, the court looked at a number of issues. First, it reasoned that "the fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." The court concluded that Brandon's three-day business trip to Sunnyvale was a "special errand" and that his "special errand"did NOT end when the employee drove past his office and resumed his regular commuting route around the time he usually left the office. The undisputed evidence showed that the employee was traveling from the airport to his home with no intention of going to his office. Because a special errand continues for the entire trip, it would not end until the employee arrived home, regardless of whether the employee coincidentally chose a route that passed by the workplace.

This decision should remind employers of their potential liability for accidents committed by their employees during business trips. While such liability is difficult to avoid, it is worth reminding employees about safe driving practices and behavior on company trips.

FMLA

FMLA MILITARY AMENDMENT

In late October, President Obama signed into law a bill that increases protections for families of military personnel who wish to take leave from work under the Family and Medical Leave Act of 1993 (FMLA). The new amendments expand on changes implemented less than a year ago requiring that certain employers provide unpaid leave for qualifying family members of military personnel.

Leave for an exigency: An employee may take leave because of a qualifying exigency arising out of the fact that the spouse, son, daughter or parent of the employee is on covered active duty. Such exigencies include the need to arrange for alternative childcare, to attend an official military ceremony, and to attend counseling. Prior to the new amendments, this kind of leave was available only to employees whose family members were in the Reserves or the National Guard. The new amendments have expanded the FMLA to include employees whose family members are in the regular Armed Forces. The amendment further specifies that the military family member must be deployed or deploying to a foreign country for the employee to qualify for leave.

Leave for serious Injury or Illness: An employee may take leave to care for a service member with a serious injury or illness incurred by the service member in the line of duty while on active duty. Before the amendment, the ill or injured service member had to be a current member of the Armed Forces (including the National Guard and Reserves). The amendments have now expanded coverage to employees whose family members are veterans, so long as the veteran was a member of the Armed Forces in the preceding five years. The definition of serious injury or illness was also expanded to include conditions that predate a service member's active duty and that was aggravated by active duty.

Employers should look out for a revised FMLA poster as well as regulations by the Secretary of Labor that further explains these amendments. In the meantime, employers should change their policies and forms to reflect the changes and act in good faith in providing leave under these new circumstances.

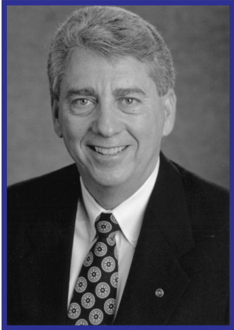
SIMS & LAYTON
ATTORNEYS AT LAW
LawNotes

The information provided in this issue of "LawNotes" is general in nature. Articles should be viewed only as a summary of the law and not as a substitute for legal consultation in a particular case. Legal counsel should be sought on any specific issue. Your comments and questions are always welcome.

© Copyright 2009, Sims & Layton

TO LUNCH OR NOT TO LUNCH: THAT IS THE QUESTION!

By Phil Sims



California Labor Code 512(a) currently provides, in part, the following:

"An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee."

Additionally, should the 30 minute meal period be denied to an employee or the employee is unable to take the 30 minute meal period due to a conflict with work obligations, California Labor Code 225.7 states:

"If an employer fails to provide an employee a meal period . . . in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal period . . . is not provided."

During the past few years, many individual and class action lawsuits have been filed alleging employer violations. The California Division of Labor Standards Enforcement has issued regulations that employers must follow for meal periods and rest periods. However, because various Court of Appeal decisions have reached different conclusions, it has been very difficult to understand what the meal period break actually means.

The basic legal concern relates to whether an employer needs to make sure the employee actually takes a 30 minute break or that the 30 minute break is available if the employee wants to take the break. Court litigation has resulted in numerous decisions which vary based on the facts so there is no clear standard. The California Labor Commissioner gave direction to all California employers in July of 2008 that the employer need only make the time available.

A number of our clients have had claims filed against them through the Labor Commissioner's office by the client's employee alleging that the employee was not able to take a full 30-minute meal break. The employee also claims that she/he had not had an opportunity to take a full 30-minute meal break for over a year. Yet, until a claim was filed by an employee, the employer never had any comments or information from the employee claiming the lack of the 30 minute meal periods.

On October 23, 2008, the California Labor Commissioner's office had to change its policy based on the fact that the California Supreme Court, earlier in October of 2008, had accepted an appeal from the losing party in the matter of ***Brinker Restaurant Corp v. Superior Court of San Diego County (Hohnbaum)***. The Appeals Court had followed the Labor Commissioner's policy. However, once the California Supreme Court accepted the losing party's appeal in the ***Brinker*** case, the Appeals Court's decision became moot while on appeal even though the decision supported the Labor Commissioner's Memorandum. The Labor Commissioner could no longer rely on its prior policy that held the employer needs only make the time available for the employee to take a 30-minute meal break and there would be no employer violation if the employee did not take the break.

The Labor Commissioner memo issued on October 23, 2008 states:

"Taken together, the language of the statute and regulations, and the cases interpreting them demonstrate compelling support for the position that employers must provide meal periods to employees ***but*** (emphasis added) do not have an additional obligation to ensure that such meal periods are actually taken."

However, there is one California Court of appeals decision, ***Cicairos v. Summit Logistics, Inc.***, that determined employers have "an affirmative obligation to ensure that workers are actually relieved of all duty" for the meal and break periods.

As an interesting aside, in the ***Brinker*** decision of the Court of Appeals, the Court cites the fact that Brinker submitted declarations from 235 employees who stated they were allowed rest breaks; 336 employees declared they were regularly provided 30-minute meal breaks; and, 433 statements obtained by the Department of California Labor Standards Enforcement agency that meal breaks were made available to Brinker employees.

As of the date of writing of this article, the California Supreme Court has not closed the time for trial briefs for the parties or third parties who wish to file legal briefs on either side of the case. Even after the trial briefs are filed, the Supreme Court must schedule dates and times for oral arguments on the case. The policy has been that the Supreme Court must issue a decision within 90 days of the final oral argument but the 90-day period can be extended if the judges want further legal arguments after the matter is submitted. The request for new information also reopens the 90-day period.

In the event the California Supreme Court does find an employer's obligation is only to provide the opportunity for a 30-minute meal period and/or 10- minute work break for the employee and not to be sure it is actually taken, the California Legislature can and may enact future legislation that does "ensure" that the meal periods/breaks are actually allowed and are taken.

Tel (408) 998-3400 **SIMS & LAYTON** *Fax* (408) 297-1104
84 West Santa Clara St. • Suite 660 • San Jose, California 95113
Email **Attorneys@SimsAndLayton.com • www.SimsAndLayton.com**