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By **Anthony J. Oncidi***

California Employment Law Blog

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California Supreme Court Resolves Day-Of-Rest Questions

Mendoza v. Nordstrom, Inc., 2 Cal. 5th 1074 (2017)

In response to three questions asked of it by the United States Court of Appeals for the Ninth Circuit, the California Supreme Court opined as follows:

1. A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited.

2. The exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If on any one day an employee works more than six hours, a day of rest must be provided during that workweek, subject to whatever other exceptions might apply.

3. An employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest.

Employer's Attorney May Be Liable For Retaliation Under FLSA

Arias v. Raimondo, 2017 WL 2676771 (9th Cir. 2017)

José Arnulfo Arias worked as a milker for Angelo Dairy. The dairy did not complete and file a Form I-9 when it hired Arias. According to the appellate court, "[i]nstead of complying with federal law, the Angelos wielded it as a weapon to confine Arias in their employ" by threatening to report Arias to the federal immigration authorities when, for

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example, he considered accepting employment with another dairy. In 2006, Arias filed a state court lawsuit against the dairy on behalf of himself and other similarly situated employees, alleging a variety of workplace violations, including failure to provide overtime pay and meal and rest periods. Ten weeks before the trial was scheduled to begin, the employer's attorney (Anthony Raimondo) enlisted the services of the United States Immigration and Customs Enforcement ("ICE") to take Arias into custody at a scheduled deposition and then remove him from the United States. There was evidence of "Raimondo's pattern and practice of similar conduct in other cases." In this federal court lawsuit against Raimondo personally, Arias alleges that the dairy's lawyer, acting as its agent, retaliated against Arias in violation of the anti-retaliation provision of the Fair Labor Standards Act. Raimondo's sole legal defense is that because he was never Arias's employer, he is immune from liability under the FLSA. Although the district court dismissed Arias's complaint, the Court of Appeals reversed, holding that the FLSA's anti-retaliation provision applies to "any person," including a "legal representative" such as Raimondo. *See also Cal. Labor Code § 1019, et seq.,* and *Cal. Bus. & Prof. Code § 6103.7* (recently enacted California restrictions on "unfair-immigration related practices").

Trial Court Abused Its Discretion In Refusing To Compel Employer To Produce Data Sought By EEOC

EEOC v. McLane Co., 857 F.3d 813 (9th Cir. 2017)

Damiana Ochoa filed a charge with the EEOC alleging sex discrimination (based on pregnancy) in violation of Title VII, when, after she tried to return to her job following maternity leave, her employer (McLane Co.) informed her that she could not come back to the position she had held for eight years as a cigarette selector unless she passed a physical strength test. Ochoa took the test three times but failed to pass and, as a result, her employment was terminated. McLane disclosed that it administers the test to all new applicants and to employees returning from a leave that lasts more than 30 days. Although McLane voluntarily provided general information about the test and the individuals who had been required to take it (gender, job class, reason for taking the test and the score received), it refused to disclose "pedigree information" for each test taker (name, social security number, last known address, telephone number and the reasons why particular employees were terminated after taking the test).

In this EEOC subpoena enforcement action, the district court refused to compel production of the pedigree information, but the United States Court of Appeals for the Ninth Circuit (in an earlier opinion) reversed that order following a *de novo* review of the lower court's order. The United States Supreme Court then vacated and remanded the judgment of the Ninth Circuit, holding that the district court's decision to quash or enforce an EEOC subpoena should be reviewed under the more deferential abuse of discretion standard. In this latest opinion, the Ninth Circuit held that the district court had indeed abused its discretion when it denied enforcement of the EEOC's subpoena and once again vacated the district court's order, remanding the matter back to the district court.

Attorney Work Product Belongs To Law Firm, Not Former Attorney Employee

Tucker Ellis LLP v. Superior Court, 2017 WL 2665188 (Cal. Ct. App. 2017)

Evan C. Nelson, who is a California attorney specializing in asbestos defense, was employed as a trial attorney by Tucker Ellis in the firm's Mass Tort & Product Liability Practice Group. The firm promoted Ellis to the position of "non-capital partner" approximately two years before he left Tucker Ellis to join a competing law firm. After Nelson left Tucker Ellis, the firm received a subpoena for, among other things, attorney work product emails authored by Nelson during his employment with Tucker Ellis. Tucker Ellis produced the Nelson emails in response to the subpoena, which spurred Nelson to send a "clawback" letter to Tucker Ellis and the subpoenaing party, asserting the emails contained privileged attorney work product and demanding they be sequestered and returned to Nelson. Tucker Ellis did not respond to Nelson's letter. Nelson sued Tucker Ellis for negligent and intentional interference with contract, invasion of privacy, conversion, among other things, and asserted that the emails were made available on the Internet and disseminated to over 50 asbestos plaintiffs' attorneys, which interfered with Nelson's ability to work effectively with experts in the asbestos field and ultimately resulted in his being terminated from his new law firm and unable to find new employment.

In this writ proceeding (which followed a series of adverse rulings against Tucker Ellis), the Court of Appeal held that the law firm and not Nelson is the holder of the attorney work product privilege codified at Cal. Code Civ. Proc. § 2018.030 and that, therefore, Tucker Ellis had no legal duty to secure Nelson's permission before disclosing the emails to others: "…[T]he purpose of the attorney work product privilege will be better served by allowing the firm itself – with current knowledge of ongoing litigation and client issues and in the context of the firm's ongoing attorney-client relationships – to speak with one voice regarding the assertion of the privilege."

Punitive Damages Claim Against Employer Is Dismissed Absent Action By "Managing Agent"

CRST, Inc. v. Superior Court, 11 Cal. App. 5th 1255 (2017)

Hector Contreras was employed as a truck driver by CRST when the truck he was driving collided with the car of Matthew and Michael Lennig. In this writ proceeding, CRST sought summary adjudication of the Lennigs' prayer for punitive damages. The Court of Appeal issued a writ of mandate directing the trial court to vacate its order denying CRST's motion for summary adjudication and entering a new order granting summary adjudication in favor of CRST on the punitive damages issue. The Court held there is no evidence that the CRST fleet manager (Marge Davis) was a "managing agent" within the meaning of the punitive damages statute (Cal. Civ. Code § 3294(b)) because she had no authority to change or establish corporate policy.

Trial Court Erred By Failing To Certify Class Action For Unpaid Rest Periods

Bartoni v. American Med. Response W., 11 Cal. App. 5th 1084 (2017)

Current and former employees of an ambulance service company sued their employer for unpaid meal and rest periods. The complaint alleges claims on behalf of a putative class as well as non-class claims under the Private Attorneys General Act of 2004 ("PAGA"). The trial court denied plaintiffs' class certification motion, but in this opinion the Court of Appeal determined the trial court had erred and issued a peremptory writ of mandate commanding the trial court to vacate that portion of its order denying class certification as to the on-duty rest period claims. The appellate court denied AMR's motion to dismiss the appeal and exercised its discretion to treat the appeal as a writ petition. While the Court affirmed denial of class certification of the on-duty meal period claims ("an on-call meal period is [not] necessarily 'on-duty' for purposes of the wage and hour laws"), it found error in the trial court's similar determination with respect to on-call rest periods based upon the recent California Supreme Court opinion in *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257 (2016), which post-dated the trial court's order in the case. *Cf. Microsoft Corp. v. Baker*, 582 U.S. ___, 137 S. Ct. 1702 (2017) (federal courts of appeals lack jurisdiction to review an order denying class certification or striking class allegations after the named plaintiffs have voluntarily dismissed their claims with prejudice).

Foreign National Who Worked For Travel Tour Company Was An Employee, Not An Intern Or Exempt Manager

Kao v. Joy Holiday, 2017 WL 2590653 (Cal. Ct. App. 2017)

Ming-Hsiang Kao was employed by Joy Holiday (a travel tour company) initially performing IT-related duties and then eventually as its office manager. While he was still in Taiwan, Kao worked with Jessy Lin (one of the owners of Joy Holiday) as a tour organizer. Kao later arrived in California on a tourist visa and moved into the home of Lin and her husband Harry Chen. (Kao was paid a salary of $1,700 per month, representing a gross amount of $2,500 less an $800 rent deduction.) After he received an H-1B visa, Kao was put on the company payroll and worked as the "office manager" of Joy Holiday where he booked hotels and coordinated bus tours. The trial court determined that Kao worked roughly 50 hours per week. Kao was later demoted to "non-manager status," moved into his own apartment and eventually was terminated after working for Joy Holiday for approximately two years. Kao filed suit for breach of contract and violation of various wage/hour statutes. Defendants contended that Kao was not an employee while he was awaiting his H-1B visa and, thereafter, he was an administrative exempt employee. Although the trial court rejected Kao's statutory wage claims, the Court of Appeal reversed, holding that Kao was an employee (not a non-employee trainee or intern) before he received the visa and, thereafter, he was not paid a sufficient salary to be classified as an exempt administrative employee – the offsets for rent were not part of Kao's salary. Accordingly, the Court held that Kao is entitled to unpaid wages and overtime, penalties for Joy Holiday's failure to provide itemized wage statements and waiting-time penalties.

Mortgage Underwriters Are Not Exempt From FLSA Overtime Requirements

McKeen-Chaplin v. Provident Sav. Bank, 2017 WL 2855084 (9th Cir. 2017)

Mortgage underwriters at Provident Savings Bank review mortgage loan applications using guidelines established by Provident and investors in the secondary mortgage loan market, including Fannie Mae, Freddie Mac and the FHA. In this lawsuit for unpaid overtime arising under the federal Fair Labor Standards Act (the "FLSA"), the United States Court of Appeals for the Ninth Circuit reversed the summary judgment that was entered in favor of Provident and ordered, instead, that summary judgment be entered in favor of McKeen-Chaplin, concluding that "where a bank sells mortgage loans and resells the funded loans on the secondary market as a primary font of business, mortgage underwriters who implement guidelines designed by corporate management, and who must ask permission when deviating from protocol, are most accurately considered employees responsible for production, not administrators [exempt from overtime] who manage, guide, and administer the business."

Employee Is Not Entitled To Attorney's Fees For Breach Of Contract Claim

Shames v. Utility Consumers' Action Network, 2017 WL 2807920 (Cal. Ct. App. 2017)

Michael Shames filed this lawsuit against the Utility Consumers' Action Network ("UCAN"), alleging various causes of action stemming from the termination of his employment. Although his amended complaint alleged UCAN's breach of contract for its failure to pay him multiple bonus payments, Shames did not seek attorney's fees under that cause of action. (Shames had sought attorney's fees under two other causes of action on which he did not prevail.) The trial court granted Shames $2,000 in attorney's fees, but it denied him the fees he incurred "for the entire litigation" because he failed to seek fees under the specific causes of action on which he had prevailed: "[Labor Code] section 218.5… clearly places a very specific requirement on a party who seeks an award of attorney fees in such an action – i.e., to demonstrate that one of the parties to the action requested those fees 'upon the initiation of the action.'" The Court of Appeal affirmed.

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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