Proskauer

California Employment Law Notes

November 2008

California Overtime Requirements Apply To Work Performed By Non-Resident Employees

Sullivan v. Oracle Corp., 2008 WL 4811911 (9th Cir. 2008)

Three Oracle instructors (all non-residents of California) filed this class action to recover allegedly unpaid overtime under California law for work they performed while in California.

Two of the instructors were residents of Colorado and one was a resident of Arizona; all of them worked in their home states and, from time to time, in California. The district court granted Oracle's motion for summary judgment, but the Ninth Circuit reversed in part, holding that the California overtime requirements (which are stricter than the overtime requirements of Arizona and Colorado) apply to work performed in California by residents of other states. However, the Court of Appeals affirmed dismissal of the claim made by two of the plaintiffs who asserted a violation of California's Unfair Competition Law (Bus. & Prof. Code § 17200) for alleged violations of the federal Fair Labor Standards Act ("FLSA") outside California on the ground that Section 17200 does not have extraterritorial application.

Claims For Unpaid Meal Periods And Inaccurate Paystubs Were Properly Dismissed

Brinkley v. Public Storage, Inc., 2008 WL 4716800 (Cal. Ct. App. 2008)

Fred Brinkley, a property manager for Public Storage, asserted class action and individual claims for violations of Labor Code § 226 (requiring accuracy of paystubs) and § 226.7 (meal and rest period requirements). The trial court granted summary adjudication in favor of the employer on these claims, which the Court of Appeal affirmed. With respect to the alleged paystub violations, the Court held that although there was an erroneous rate of pay (for mileage) included on the paystubs, the error was corrected and none of the employees suffered any injury as a result of the error. With respect to the allegedly unpaid meal periods, the employer had not violated Section 226.7 because it was able to establish it had made meal periods available to employees. The Court rejected Brinkley's assertion that an employer must ensure (and not just make available) the required meal and rest periods.

Cf. Lee v. Dynamex, Inc., 166 Cal. App. 4th 1325 (2008) (order denying class certification is reversed because trial court improperly denied plaintiff's motion to compel employer to identify and provide contact information for potential putative class members).

Employee Entitled To New Trial After Court Improperly Ruled He Was Terminable At Will

Stillwell v. The Salvation Army, 167 Cal. App. 4th 360 (2008)

Arthur Stillwell sued The Salvation Army ("TSA") for breach of an implied agreement to terminate his employment only for good cause. The jury found that TSA breached an implied agreement with Stillwell and awarded him more than $155,000 – but it also determined that Stillwell had executed an enforceable agreement that rendered his employment terminable at will. Both parties conceded on appeal that the jury's verdicts were inconsistent. The Court of Appeal held the trial court had erred in choosing as a matter of law one of the jury's inconsistent verdicts over the other and ordered, instead, that a new trial be held.

Independent Contractor's Wrongful Termination Lawsuit Was Properly Dismissed

Varisco v. Gateway Science & Eng'g, Inc., 166 Cal. App. 4th 1099 (2008)

Gateway engaged Al Varisco to provide construction inspection services on two projects it was doing for the Los Angeles Unified School District ("LAUSD"). Gateway retained Varisco pursuant to a letter agreement whereby he was to be paid $75 per hour for the inspection services, which he performed directly for the LAUSD. Varisco received a 1099 reflecting his compensation and was responsible for providing his own equipment, hardhat, and work boots. He only visited Gateway's offices to pick up his paycheck, and he received no direction from Gateway on how to perform his duties. Gateway terminated the relationship when Varisco refused to sign a new contract after he learned he was going to be responsible for paying his own automobile and workers' compensation insurance. The Court of Appeal affirmed summary judgment in favor of Gateway after determining that Varisco was an independent contractor and not an employee of Gateway, thus barring his wrongful termination of employment claims as a matter of law. *Cf. Chin v. Namvar,* 166 Cal. App. 4th 994 (2008) (worker who misrepresented himself as a licensed contractor could not rely on Labor Code presumption that he was an employee and not an independent contractor).

Wage & Hour Class Action Settlement Is Vacated Because Of Insufficiency Of Record

Kullar v. Foot Locker Retail, Inc., 2008 WL 4561629 (Cal. Ct. App. 2008)

Crystal Echeverria and two other objectors challenged the fairness and adequacy of a settlement of a class action lawsuit involving approximately 18,000 Foot Locker employees who were required to "purchase and wear shoes of a distinctive design or color as a term and condition of their employment" (the "uniform class") as well as employees who were subject to security searches for which they were not compensated (the "security check class"). Following a successful mediation with Mark Rudy, Esq., the parties agreed to a stipulation of settlement, which was submitted to the trial court for approval. After Echeverria filed a separate class action alleging meal break violations and wages due to terminated employees, she filed written objections to the settlement in this case, asserting that there was insufficient investigation and discovery prior to settlement to allow counsel or the trial court to act intelligently in valuing the case. The Court of Appeal reversed the judgment approving the settlement and held "the fact that the settlement was reached during mediation to which Evidence Code § 1119 applies does not eliminate the court's obligation to evaluate the terms of the settlement and to ensure that they are fair, adequate and reasonable."

Disabled Employee May Have Been Able To Perform Essential Functions Of A Different Job

Nadaf-Rahrov v. Neiman Marcus Group, Inc., 166 Cal. App. 4th 952 (2008)

Forough Nadaf-Rahrov worked as a clothes fitter for Neiman Marcus in Dallas before transferring to San Francisco in the mid-1990s. She suffered from recurrent back and joint pain and was diagnosed with carpal tunnel syndrome and osteoarthritis. In November 2003, she commenced a requested family medical leave of absence, which was extended at least four times over the following nine months. By the time Neiman Marcus terminated Nadaf-Rahrov's employment, after several leave extensions, she did not have a release from her doctor to perform her job duties, and she had exhausted her remaining sick and vacation benefits. After her termination, Nadaf-Rahrov sued Neiman Marcus for disability discrimination under the California Fair Employment and Housing Act ("FEHA") and for wrongful termination in violation of public policy. Although the trial court granted the employer's motion for summary judgment, the Court of Appeal reversed, holding that there was a triable issue of fact whether Neiman Marcus could have but did not provide her with a reasonable accommodation in the form of a reassignment to a vacant position. Similarly, the Court held the employer may have caused a breakdown in the interactive process by failing to provide information to the employee about available positions that might have assisted her and her physician in preparing a list of work-related medical restrictions. The Court affirmed dismissal of the employee's claim for retaliation, but reversed dismissal of her claims for national origin and ethic discrimination and ruled that she was entitled to additional discovery responses concerning available positions. *Cf. Mangano v. Verity, Inc.,* 84 Cal. Rptr. 3d 526 (Cal. Ct. App. 2008) (employer that served plaintiff with a Code of Civ. Proc. § 998 settlement offer before obtaining summary judgment of disability discrimination claims was properly awarded its expert witness fees, but it was not entitled to recover its attorneys' fees); *Anthony v. City of Los Angeles,* 166 Cal. App. 4th 1011 (2008) (prevailing plaintiff in FEHA retaliation case was properly awarded expert witness fees).

Non-Compete Agreements Were Unenforceable

Asset Marketing Systems, Inc. v. Gagnon, 542 F.3d 748 (9th Cir. 2008)

Kevin Gagnon, doing business as “Mister Computer,” alleged that his former customer, Asset Marketing Systems (“AMS”), infringed his copyright in six computer programs that he wrote for AMS by continuing to use and modify them without his consent and that AMS misappropriated trade secrets contained in the programs’ source code. After AMS terminated its contract with Gagnon, it hired seven of Gagnon’s 12 employees to provide directly to AMS the same services they previously provided to AMS through Gagnon. The Ninth Circuit affirmed summary judgment in AMS’s favor, holding that the non-compete covenants contained in the employment contracts of Gagnon’s former employees were unenforceable under Cal. Bus. & Prof. Code § 16600.

Statute Of Limitations Was Equitably Tolled While Employee Was Pursuing Administrative Remedy

McDonald v. Antelope Valley Cmty. Coll. Dist., 2008 WL 4694301 (Cal. S. Ct. 2008)

Plaintiffs in this case alleged racial harassment, discrimination and retaliation against the District. The trial court granted summary judgment to the employer with regard to Sylvia Brown’s claims on the ground they were barred by the statute of limitations applicable to claims asserted under the California Fair Employment and Housing Act (“FEHA”). The court of appeal and the California Supreme Court in this opinion reversed the dismissal, holding that the statute of limitations was tolled while Brown was voluntarily pursuing internal administrative remedies against the District.

Church Was Shielded From Liability For Statements Made To Congregation About Pastor’s Termination

Gunn v. Mariners Church, Inc., 167 Cal. App. 4th 206 (2008)

Robert Gunn sued the church for defamation, invasion of privacy and intentional infliction of emotional distress after the senior pastor announced to the congregation that the church had terminated Gunn from his pastoral position because he had admitted to (homosexual) acts, which the church considered to be a sin. The trial court granted the church’s motion for summary judgment on the ground that the church’s acts were in furtherance of established church policy regarding termination of employment of a leader within the church, and the Court of Appeal affirmed.

State Law Sanctioning Employers That Hire Illegal Aliens Is Not Preempted By Federal Immigration Law

Chicanos Por La Causa, Inc. v. Napolitano, 2008 WL 4225536 (9th Cir. 2008)

In 2007, Arizona enacted the Legal Arizona Workers Act (the "Act"), which targets employers that hire illegal aliens and provides a principal sanction in the form of a revocation of state licenses to do business in Arizona. Various businesses and civil-rights organizations filed this lawsuit, asserting that the Act is preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), which expressly preempts any state regulation "other than through licensing and similar laws." The district court and the Ninth Circuit held that because the Act is a licensing law within the meaning of IRCA, it was, therefore, not preempted by it. *Cf. Golden Gate Restaurant Ass'n v. San Francisco,* 2008 WL 4401387 (9th Cir. 2008) (San Francisco Health Care Security Ordinance is not preempted by ERISA); *Dumontier v. Schlumberger Tech. Corp.,* 543 F.3d 567 (9th Cir. 2008) (employee claims for sub-cellular damage from exposure to cesium were preempted by the Price-Anderson Act).

Employer Is Obligated To Comply With EEOC Administrative Subpoena

EEOC v. Federal Express Corp., 543 F.3d 531 (9th Cir. 2008)

Tyrone Merritt filed this putative class action on behalf of himself and similarly situated African American and Latino employees, alleging that FedEx's Basic Skills Test had a statistically significant adverse impact on African American and Latino employees. After issuing a right-to-sue notice to Merritt at his counsel's request, the EEOC issued an administrative subpoena requiring FedEx to identify basic information about the computer files that it maintains. FedEx refused to comply with the subpoena, arguing that the EEOC was divested of investigatory authority once the party alleging the discriminatory practice initiates or (as in this case) joins a private action. The Ninth Circuit held: (1) Notwithstanding FedEx's compliance with an administrative subpoena in another case, the EEOC was permitted to seek the same information in the subpoena that was issued in this case; (2) the EEOC retains the authority to issue an administrative subpoena against an employer after a charging party has been issued a right-to-sue notice and instituted a private action; and (3) an administrative subpoena, which does not seek direct evidence of discrimination, but instead seeks general employment files in order to help the EEOC draft future information requests, seeks evidence that is "relevant" to a charge of systemic discrimination.

Related Professionals

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