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EMPLOYER ALERT

Ten Cases from the Past Year that May Change Your Company's Employment Practices in 2011

The past year ushered in a host of cases that expand the scope of employer liability in numerous areas. Whether your company is big or small, these recent decisions compel a reexamination of the company's employment law practices for compliance with the ever-changing landscape of California employment law.

1. **Employer may be liable for disability and age discrimination where, among other things, employee's performance reviews undermine employer's stated basis for terminating employee.**

   Sandell v. Taylor-Listug, Inc., 188 Cal. App. 4th 297 (2010)

Facts: The defendant guitar manufacturer hired the plaintiff as its VP of sales at the age of 57. Soon thereafter, the plaintiff suffered a stroke. After his return to work, he required a cane to walk, and his speech was noticeably slower than it had been prior to the stroke. A few days after the plaintiff's 60th birthday—and a couple of years after the stroke—the defendant terminated the plaintiff's employment, maintaining that it was dissatisfied with his job performance. The plaintiff sued, alleging disability and age discrimination. The defendant obtained summary judgment on both claims, but the Court of Appeal reversed, finding sufficient evidence of discriminatory intent for the case to be heard by a jury. In reviewing the evidence submitted by the plaintiff in support of his claims, the court focused partly on the plaintiff's performance reviews. Although the defendant maintained the plaintiff was terminated for poor performance, many of the reviews were generally favorable, and the court dismissed the critical portions as based merely on "subjective" criteria.

What it means for employers: Accurate, detailed, and regularly-completed performance reviews are an effective means of managing employees' performance and can help employers defend against wrongful termination claims. As the *Sandell* case highlights, however, performance reviews can undermine an employer's defense if they do not accurately reflect problems an employer has with an employee's performance. Moreover, the *Sandell* case suggests that subjective criticisms of an employee can provide additional evidence of discrimination if such criticisms are made by the manager accused of discrimination. Employers should consider their performance review practices. If company managers do not complete reviews regularly and accurately, with detailed objective criticisms, the company may be better off not using performance reviews at all.

2. Employer does not have to allow employee to use paid sick time to care for ill family members where employer's policy provides employees an uncapped number of paid sick days.

McCarther v. Pacific Tel. Grp., 48 Cal. 4th 104 (2010)

Facts: The plaintiffs sued the defendant employers for violation of Labor Code section 233, commonly referred to as the "Kin Care" statute. The Kin Care statute requires employers who provide paid sick leave to allow employees to use some of that paid sick leave to attend to the illness of a child, parent, spouse, or domestic partner. The defendants' sick-leave policy was dictated by a collective bargaining agreement, which provided workers with an uncapped number of paid sick days per year, so long as the absences did not exceed five consecutive days. The policy did not provide for any "banking" of sick days. The defendants refused to pay the plaintiffs for time they took off to care for their ill children. Although the Court of Appeal found the statute applied to the defendants' policy, the California Supreme Court reversed. The court found the statute only applied to employers who provide a measurable, banked amount of paid sick leave, which was not the case here.

What it means for employers: Employers should carefully review their sick-leave policies to determine the best means for achieving corporate goals regarding attendance. While policies that do not provide a cap on paid sick leave can leave employers exposed to potential abuse by employees, if drafted properly, such policies could limit the total amount of sick time paid to an employee, as the employee will only be able to use paid sick leave for his or her own illnesses. Employers wishing to capitalize on the ruling in *McCarther* should take care in drafting their sick-leave policies to ensure they meet all of the criteria set forth in *McCarther*.

3. Employer liable for penalties for failing to provide "suitable seating" to employees.

Bright v. 99¢ Only Stores, 189 Cal. App. 4th 1472 (2010); *Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal. App. 4th 210 (2010)

Facts: In both *Bright v. 99¢ Only Stores* and *Home Depot U.S.A., Inc. v. Superior Court*, the plaintiff cashiers sued their retail employers for Private Attorney General Act ("PAGA") penalties for their employers' failure to provide "suitable seating." The IWC Wage Orders require employers to provide all employees with "suitable seats when the nature of the work reasonably permits the use of seats." PAGA penalizes employers $100 for each aggrieved employee per pay period for the initial violation, and $200 per pay period for each subsequent violation. In both cases, the trial court sustained the defendant's demurrer, and in both cases the Court of Appeal reversed, finding the PAGA penalties provided by Labor Code section 2699 were applicable to a violation of the IWC Wage Order "suitable-seating" requirement.

What it means for employers: While it is clear from *Bright* and *Home Depot* that employers will be on the hook for failing to provide "suitable seating," the cases do not, unfortunately, shed any light on what type of seating employers must provide to comply with the IWC Wage Orders. This may be particularly worrisome for employers

who have workers whose jobs require a significant amount of standing. More alarming, however, is the pathway the *Bright* and *Home Depot* cases have cleared for claims for PAGA penalties for violations of any of the basic working-condition requirements of the IWC Wage Orders—e.g., changing rooms, resting facilities, locker rooms, workplace temperature, etc. Plaintiffs will argue the *Bright*/*Home Depot* courts' rationale extends to all such violations. Employers should review their compliance with not only the suitable-seating requirements of the wage orders but also all of the working-conditions requirements of the wage orders to ensure compliance and avoid litigation.

4. **Whether worker is considered employee or independent contractor is determined by California law, not agreement in contract.**

   Narayan v. EGL, 616 F.3d 895 (9th Cir. 2010)

Facts: The defendant transportation company, headquartered in Texas, attempted to avoid compliance with California wage-and-hour laws by having its California drivers execute a contract agreeing to work as "independent contractors." The contract further provided that Texas law would govern any disputes regarding its terms. The plaintiff drivers sued for violation of California wage-and-hour laws, including unpaid overtime, expenses, and meal and rest periods. The trial court granted the defendant summary judgment based on the attestations in the agreements that the workers were independent contractors. The Ninth Circuit reversed. The Ninth Circuit found Texas law applied only to disputes over the terms of the contract and not to the plaintiffs' claims, which were based on violations of California statutory law. The court, therefore, analyzed whether the workers were independent contractors or employees under California common law, which applies a multi-factored test. Finding the majority of the factors weighed in favor of the existence of an employment relationship, the court ruled the plaintiffs could pursue their wage-and-hour claims against the defendant.

What it means for employers: Independent contactor agreements provide little assistance to employers hoping to avoid compliance with laws in California that are designed to protect California workers. While the existence of such an agreement is one factor the courts may consider in their analysis of whether a worker is an independent contractor or an employee, it is not a determining factor. The *Narayan* case makes clear that courts will determine employee/independent contractor status based on a factual inquiry into a multitude factors regarding the nature of the working relationship between the parties. Before classifying any worker as an independent contractor, employers should carefully analyze all of the relevant factors set forth in *Narayan*, as well as the California Supreme Court's decision in *Borello & Sons, Inc. v. Dep't of Indust. Relations*, 48 Cal. 3d 341 (1989), on which the *Narayan* court heavily relied.

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5. **Employee properly classified as exempt executive and administrative employee not subject to overtime laws.**

   In Re United Parcel Serv. Wage and Hour Cases, 190 Cal. App. 4th 1001 (2010)

Facts: The plaintiff, a manager of various operations at UPS, brought suit against UPS for unpaid overtime and other wage-and-hour violations. UPS maintained the plaintiff was

properly classified as an exempt executive and administrative employee and therefore not entitled to overtime payments or other benefits afforded nonexempt employees. The trial court agreed and granted UPS's summary judgment motion. The Court of Appeal affirmed. In reaching its conclusion, the Court of Appeal relied heavily on the job descriptions offered by UPS, which the plaintiff admitted accurately reflected his duties. The plaintiff also admitted to performing a host of others duties supporting his classification as an exempt executive and administrative employee. The court rejected the plaintiff's argument that his authority was so constrained by UPS's detailed guidelines, procedures and "decision trees" as to render him without the independent judgment and discretion necessary for both exemptions. The court concluded: "where government regulations or internal employer policies or procedures simply *channel* the exercise of discretion and judgment, as opposed to *eliminating* it entirely or otherwise constraining it to a degree where any discretion is largely inconsequential, the executive exemption may still apply."

What it means for employers: Wage-and-hour suits remain hugely popular and often entangle the unwary employer. The *UPS* case illustrates how critical it is that employers classify employees as exempt from the overtime laws based solely on the criteria for the exemptions set forth in the wage orders and federal law and how helpful detailed, accurate, and well-drafted job descriptions can be in defending against wage-and-hour claims. Employers should regularly review job descriptions to ensure they are consistent with an employee's duties, and, if the employee is classified as exempt, the duties in the job description and those performed by the employee should be consistent with the exemption.

6. **Failing to provide employee with copy of AAA Arbitration Rules renders arbitration agreement procedurally unconscionable and unenforceable.**

   Trivedi v. Curexo Tech. Corp., 189 Cal. App. 4th 387 (2010)

Facts: The plaintiff in *Trevedi* filed a complaint against his former employer for, among other things, race and national origin discrimination. The defendant employer moved to compel arbitration, based on an arbitration clause in the plaintiff's employment contract. The trial court denied the motion, and the Court of Appeal affirmed. In reviewing the "fundamental fairness" requirements of *Armendariz*, the Court of Appeal found the arbitration provision both procedurally and substantively unconscionable. To support the finding of procedural unconscionability, the court relied on just two facts: (1) the agreement was presented to the plaintiff on a "take it or leave it basis" (as is the very nature of all mandatory pre-dispute arbitration agreements) and (2) although the agreement referenced and incorporated AAA's employment dispute resolution rules, the plaintiff was not given a copy of them. The court found the agreement substantively unconscionable because it provided a mandatory attorneys' fee award to the prevailing party, which "put the plaintiff at greater risk" than if he had retained the right to bring the discrimination claim in court. The court also found the provision allowing a party to seek injunctive relief in court unfairly favored the defendant, who was the party most likely to benefit from such a provision.

What it means for employers: In general, the *Trevedi* case shows that employers continue to face an uphill battle in enforcing mandatory pre-dispute arbitration agreements. More disturbing, however, is the court's finding that mandatory pre-dispute arbitration agreements that adopt rules from a particular arbitral forum (such as JAMS or the American Arbitration Association) are procedurally unconscionable if the plaintiff is not given a copy of those rules. While many employers have traditionally incorporated the employment dispute rules of AAA or JAMS into their mandatory pre-dispute arbitration agreements, few employers provide copies of those rules to their employees. *Trevedi* provides impetus for employers to reconsider the pros and cons of incorporating arbitral forum rules into their mandatory pre-dispute arbitration agreements. Given how rapidly the law on mandatory pre-dispute arbitration agreements is evolving post-*Armendariz*, it is the prudent for the company to have such agreements reviewed regularly by counsel to ensure they remain enforceable under current law.

7. Emails between employee and her attorney are not privileged when sent via employer's email.

Holmes v. Petrovich, 2011 WL 117230 (Cal. Ct. App. Jan. 13, 2011)

Facts: The plaintiff communicated with her attorney about potential legal action against her employer and supervisor using her employer's email system. She subsequently sued both, and the emails were admitted into evidence at trial, over the plaintiff's objection that the emails were attorney-client privileged communications. The defendants used the emails to counter the plaintiff's allegations that she suffered severe emotional distress. The Court of Appeal found no error in the admission of the emails. The Court of Appeal ruled that no privilege attaches to email communications between an employee and her employer where: (1) "the electronic means used for the communications belongs to the defendant; (2) the defendant has advised the plaintiff that communications using electronic means are not private, may be monitored, and may be used only for business purposes; and (3) the plaintiff is aware of and agrees to these conditions." The Court of Appeal likened the plaintiff's email communications with her attorney under these circumstances to "consulting with her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him."

What it means for employers: The *Holmes* decision underscores the importance of having a well-crafted electronic communications policy. Employers should carefully explain in such policy what emails are permitted and not permitted on the employer's email system. Such policy should, at a minimum, explicitly inform employees that the email system belongs to the company; the company may monitor any emails sent or received via the company's email system; and employees have no right of privacy with respect to information sent via the company's email system. Employers also should obtain employees' written acknowledgement of and agreement to the policy. While not implicated in the *Holmes* case, blogging and social networking are starting to give rise to a number of problems for employers. Those who have not revised their electronic communications policies since before the advent of Facebook should consider updating their policies in light of

the rapidly developing law regarding blogging and social networking in the workplace.

8. Unlawful for employer to terminate employee in deference to unenforceable non-compete agreement employee entered into with prior employer.

Silguero v. Creteguard, Inc., 187 Cal. App. 4th 60 (2010)

Facts: The sales representative plaintiff signed a confidentiality agreement with a prior employer before working for the defendant. The agreement included an unenforceable non-compete clause that prohibited her from engaging in any sales activity for a period of 18 months following her termination or resignation. That employer terminated the plaintiff, and she quickly found employment as a sales representative with the defendant. When the prior employer learned of her new employment with the defendant, the prior employer sent a letter to the defendant requesting its cooperation in enforcing the non-compete. Shortly thereafter, the defendant informed the plaintiff it was terminating her because, although it believed that "non-compete clauses are not legally enforceable here in California," it desired "to keep the same respect and understanding with colleagues in the same industry." The trial court granted the defendant's demurrer, but the Court of Appeal reversed, holding that the plaintiff had stated a cause of action for wrongful termination in violation of public policy. The court noted: "the interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests" of employers.

Liability extends to employers not wanting to become involved in dispute between an employee and his or her former employer over a non-compete.

What it means for employers: Most California employers are aware that non-competes are generally unenforceable in California and have learned of the liability associated with attempting to enforce them. *Silguero* indicates that liability now extends not just to employers attempting to enforce such unenforceable provisions but also to employers who simply do not want to become involved in a dispute between an employee and her or her former employer over the enforceability of such provisions. *Silguero* potentially puts employers in the unenviable position of having to pay for litigation over restrictive covenants they had no involvement in preparing or enforcing. Employers who receive "cease and desist" letters like the one the defendant received in *Silguero* should carefully review the letters and the agreement at issue before making any decisions that would affect an employee's employment (or applicant's potential employment) with the company.

9. Employer liable for retaliation based on reprisals against fiancé or close associates of complaining worker.

Thompon v. North Amer. Stainless, 2011 WL 197638 (U.S. S.Ct. Jan. 24, 2011)

Facts: In *Thompson*, the plaintiff's fiancé filed a sex discrimination charge with the EEOC. Three weeks later, the plaintiff was fired. The plaintiff filed suit, alleging his termination was in retaliation for his fiancé filing her EEOC charge. The employer obtained summary judgment on the ground that third-party claims—like the plaintiff's—were not permitted under Title VII. The Court of Appeals affirmed *en banc*, and the U.S. Supreme Court reversed. The Court drew heavily from its decision in *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53 (2006), in which the Court found Title VII's anti-retaliation provisions prohibited any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court found it "obvious that a reasonable worker might be dissuaded from engaging in protected

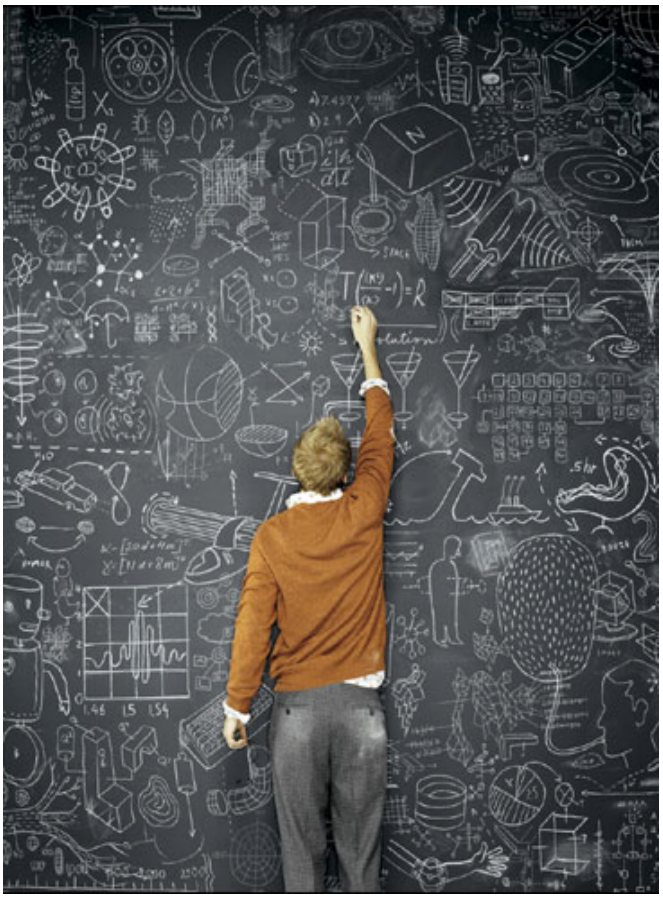
activity if she knew that her fiancé would be fired." The Court declined to articulate the type of relationship the coworker must have with the complainant to be covered by Title VII's anti-retaliation prohibitions: "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

What it means for employers: Statistics suggest that it is easier for plaintiff employees to win a retaliation case than a discrimination case. Savvy employers have always kept their antennae up once an employee makes a complaint or otherwise engages in protected activity, knowing that any adverse action subsequently taken against such an employee could be construed as retaliation. The *Thompson* case indicates that employers now should extend the same caution to those close to the complainant. While the *Thompson* case involves retaliation under Title VII, the holding likely will be extended to other federal laws prohibiting retaliation, as well as the anti-retaliation provisions of California's Fair Employment and Housing Act ("FEHA").

10. Employee may not have assigned rights to his "ideas" in executing typical employee invention assignment agreement.

Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904 (9th Cir. 2010)

Facts: While employed by Mattel in the "Barbie Collectibles" department, Carter Bryant conceived of and began designing the "Bratz" dolls. Although Bryant had entered into an invention assignment agreement with Mattel in connection with his employment, which assigned to Mattel all "inventions" he created during his employment with Mattel, he pitched his Bratz idea to Mattel's competitor, MGA. MGA agreed to hire Bryant as a consultant. After giving notice to Mattel but before leaving its employ, Bryant continued to work with MGA to develop the Bratz dolls. MGA kept Bryant's involvement on the Bratz dolls a secret, but eventually Mattel found out and sued. Mattel argued that Bryant violated his employment agreement by offering MGA his Bratz idea instead of disclosing and assigning it to Mattel. The jury returned a $10 million verdict in favor of Mattel, and based on the jury's findings, the court ordered MGA to return to Mattel the entire Bratz portfolio. The Ninth Circuit reversed, finding error in the trial court's assumption that Bryant assigned to Mattel the "idea" of the Bratz dolls. The Ninth Circuit noted that, although Bryant had assigned to Mattel all of his "inventions" (which were defined included a whole host of intellectual property, including "discoveries, improvements, processes, developments, designs, [and] know-how"), "ideas" were not specifically identified in the assignment agreement and therefore not necessarily assigned to Mattel. The court remanded the case for a trial on that issue and others.



Employee invention assignment agreements should be carefully tailored to each employee's job and his or her anticipated creative inventions.

What it means for employers: California law allows employers to require employees to assign to them nearly all inventions employees create during their employment. The invention assignment agreement Mattel used was fairly typical of such agreements. However, because it was not tailored to the type of creative work the employee was performing, a jury will now decide who owns the intellectual property. A more detailed assignment provision might have avoided this result. Employers who have employees engaged in the development of intellectual property should be sure to have those employees execute a carefully-drafted invention assignment agreement that is tailored to each employee's work and specifically covers all intellectual property an employer anticipates the employee might create. To maximize ownership of employee inventions, employers also should be certain the invention assignment agreement complies with Labor Code requirements.

For additional information about any of the matters discussed in this article, please contact Pennington Lawson Co-Founder, Lisa Lawson:

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