THE RECORDER
ESSENTIAL CALIFORNIA LEGAL CONTENT

Back to Article

Employment Cases of Note for In-House Counsel

Lisa Lawson
2011-02-25 09:46:20 AM

Part one of a two-part series regarding recent significant legal decisions that impact how companies manage their workforce.

The past year ushered in a host of cases that expand the scope of employer liability in numerous areas. These recent decisions compel in-house counsel to re-examine their companies' 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.*, 10 C.D.O.S. 11755.

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, 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. While 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 in-house counsel: Accurate, detailed and regularly-completed performance reviews are an effective means of managing employee performance and can help companies defend against wrongful termination claims. As the *Sandell* case highlights, however, performance reviews can undermine a company's defense if they

do not accurately reflect problems the company has with an employee's performance. Moreover, *Sandell* suggests that subjective criticisms of an employee can provide additional evidence of discrimination if such criticisms are made by the manager accused of discrimination. Counsel should review their companies' 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 §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. While 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 in-house counsel: Counsel should review 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 companies 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. Companies 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 therein.

3. Employer is liable for penalties for failing to provide "suitable seating" to employees. *Bright v. 99¢ Only Stores*, 10 C.D.O.S. 14268; *Home Depot U.S.A., Inc. v. Superior Court*, 10 C.D.O.S. 15934.

Facts: In both *Bright* and *Home Depot*, the plaintiff cashiers sued their retail employers for Private Attorney General Act penalties due to their employers' failure to provide "suitable seating." The Industrial Welfare Commission 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 §2699 were applicable to a violation of the IWC Wage Order "suitable-seating" requirement.

What it means for in-house counsel: While it is clear from *Bright* and *Home Depot* that

companies will be on the hook for failing to provide employees "suitable seating," the cases do not, unfortunately, shed any light on what type of seating companies must provide to comply with the IWC Wage Orders. This may be particularly worrisome for companies which have workers whose jobs require a significant amount of standing. More alarming, however, is the pathway the *Bright* and *Home Depot* cases may 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. Plaintiff employees undoubtedly will argue the *Bright/Home Depot* rationale extends to all such violations. Companies 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 a worker is considered an employee or an independent contractor is determined by California law, not a contractual provision. *Narayan v. EGL*, 10 C.D.O.S. 8916.

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 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 multifactored 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 in-house counsel: *Narayan* shows that independent contractor agreements provide little assistance to companies 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. *Narayan* 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, counsel 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.

5. Employee who is properly classified as exempt executive and administrative employee is not subject to overtime laws. *In Re United Parcel Serv. Wage and Hour Cases*, 10 C.D.O.S. 15254.

Facts: The plaintiff, a manager of various operations at UPS, brought suit for unpaid overtime and other wage-and-hour violations. UPS maintained that 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' 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' 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 in-house counsel: Wage-and-hour suits remain hugely popular and often entangle the unwary employer. The UPS case illustrates how critical it is that companies 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, as well as how helpful detailed, accurate and well-drafted job descriptions can be in defending against wage-and-hour claims. Counsel 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.

Next week: mandatory pre-dispute arbitration agreements, employee assignment agreements and electronic communications policies.

Lisa Lawson is a co-founding partner of Pennington Lawson, a women-owned boutique firm formed in 2010 and based in San Francisco. Lawson's specialties include employment counseling and litigation, workplace training and investigations, negotiation of employment and separation agreements, and drafting of employment-related policies and documents. She can be reached through the firm's website: www.PenningtonLawson.com.

In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at vgashpar@alm.com.