THE RECORDER
ESSENTIAL CALIFORNIA LEGAL CONTENT

Key Employment Cases of the Year

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Part one of a two-part series regarding significant recent developments in California employment law.

The past year resulted in a number of cases that change the landscape of employment law in California. The state's employment laws are notoriously complicated, and these new decisions do not make managing a workforce any easier for employers. The following analysis is intended to help counsel for California companies navigate this altered geography.

1. California's overtime laws extend to nonresident employees performing work in the state for California-based employers. Sullivan v. Oracle, 11 C.D.O.S. 8243, and Sullivan v. Oracle, 11 C.D.O.S. 14910.

Facts: Oracle Corp. employees who trained the company's customers to use Oracle products sued for unpaid overtime based on Oracle's alleged misclassification of the employees as exempt. The class of California-based workers settled, but a carve-out was made for employees who worked in California, but resided out of state. Those plaintiffs brought suit in a new purported class action. They alleged that, although they resided out of state, they were entitled to the protection of California's overtime laws for work performed in California. They alleged additional claims for violations of California Business and Professions Code §17200 for work both inside and outside of California.

The case ultimately resulted in the Ninth Circuit U.S. Court of Appeals requesting the California Supreme Court rule on the heart of the legal issues before it. The Supreme Court held that the state's overtime laws applied to all work performed within the state's borders for California-based employers, regardless of the employee's

residence. The court further found that a violation of the overtime laws under these circumstances would give rise to a §17200 claim. The court, however, found §17200 did not apply to Fair Labor Standards Act overtime violations for work performed in other states by nonresident employees, regardless of the fact the employer was based in California. The Ninth Circuit subsequently adopted the California Supreme Court's ruling.

What it means for in-house counsel: California-based employers who require nonexempt employees to travel to California for work (including meetings or training sessions) must apply California's daily overtime rules to those workers for the time during which they work in California. Given that certain types of travel time are considered compensable work time, employers should ensure that they capture compensable travel time in their daily overtime calculations. The Sullivan decision did not address whether other protections of the Labor Code or wage orders should be afforded to nonresident workers. Plaintiff-employees will likely argue that the reasoning of the decision applies to those laws and regulations as well. Until the law is more settled on these finer points, companies would be wise to proceed cautiously when managing and compensating out-of-state employees who work in California.

2. Fixed payments per item sold can constitute "commissions" for purposes of the commissioned employee exemption. Areso v. CarMax, 11 C.D.O.S. 6050 (2011).

Facts: CarMax paid its sales employees a fixed sum for each car they sold or leased. CarMax considered the payments commission wages, even though the amounts paid to the employees were not based on a percentage of the sales revenue CarMax received. The plaintiff sued on behalf of a purported class alleging claims for unpaid overtime. CarMax countered that the plaintiff, who had received more than one-half of her wages in "commission pay" and whose earnings exceeded 1 1/2 times the minimum wage, was an exempt commissioned employee. The trial court granted summary judgment to CarMax, and the court of appeal affirmed. In reaching its conclusion, the court rejected the plaintiff's argument that commission pay must be based on a percentage of sales revenue. The court found instead that, pursuant to Labor Code §204.1, commission wages could be those wages that are based proportionately on the "amount" of property or services sold. The court found CarMax's "uniform payment for each vehicle sold ... constitutes wages based proportionately on the amount of vehicles sold."

What it means for in-house counsel: The decision in CarMax was one of the more surprising decisions from 2011 because it flatly rejected long-standing guidance on the same subject from the California Division of Labor Standards Enforcement and characterized as dicta language from California courts that supported the DLSE's interpretation. The DLSE previously has advised that only wages based on a percentage of sales revenue could be construed as commissions. The CarMax decision potentially expands the number of employees who may be considered

exempt under California law. Counsel considering reclassification based on the ruling should note the difference between the commissioned employee exemption under California and federal law and should take into consideration the limited industries and circumstances in which the exemption applies.

3. Employers may terminate or discipline employees who make false claims of sexual harassment. Joaquin v. City of Los Angeles, 12 C.D.O.S. 950.

Facts: The city of Los Angeles terminated police officer Joaquin after internal affairs, and subsequently, the Board of Rights (in a de novo proceeding) found his complaint of sexual harassment against a sergeant to be unfounded. Joaquin sued, alleging the city unlawfully retaliated against him by terminating him for reporting sexual harassment. A jury ruled in Joaquin's favor, but the court of appeal reversed. The court found the verdict was not supported by substantial evidence of retaliatory intent on the part of the decision makers, namely the Board of Rights. In reaching its decision, the court relied heavily on the fact that any possible retaliatory intent of the sergeant accused of harassment did not affect the decisions of internal affairs or the Board of Rights in terminating Joaquin's employment.

What it means for in-house counsel: Employers are entitled to expect honesty from their employees in all aspects of workplace investigations. Counsel should review their company's personnel policies to ensure the policies emphasize the importance of truthfulness in corporate investigations and prohibit retaliation for complaints raised in good faith. Employers who suspect employees have made claims in bad faith should conduct a separate investigation into that conduct and ensure that any wrongfully accused employee is entirely removed from the process of deciding whether there was dishonesty in the making of the report. Because a complaint of harassment and a concomitant complaint of a false accusation of harassment are inextricably intertwined, counsel should consider hiring outside counsel or an independent investigator to assist in fact-finding in these complicated situations.

4. Sabbatical leave may be considered vacation pay under California law, thereby entitling employees to a payout of unused sabbatical time upon termination. Paton v. Advanced Micro Devices, 11 C.D.O.S. 9945.

Facts: AMD's benefits program included eight weeks of paid sabbatical for employees who worked for the company for seven years or more. According to the policy, sabbatical leave was forfeited if an employee did not use it before his or her employment terminated. Paton worked for AMD for seven years but was unable to schedule time off for his sabbatical. AMD refused to payout his sabbatical leave upon his termination. Paton sued on behalf of himself and a purported class alleging the company's sabbatical leave was a form of vacation that was earned over time and could not be forfeited upon termination. The court of appeal overturned summary judgment granted to AMD, finding the issue of whether AMD's sabbatical leave was a form of vacation could not be decided as a matter of law given the undisputed facts before the trial court. The court found sabbatical leave distinguishable from basic

vacation when the leave "is designed as an incentive for continued and improved performance by the most experienced employees and not merely as a reward for prior period of service." The court identified four fact-intensive factors that should be evaluated in determining whether sabbatical leave can be distinguished from vacation.

What it means for in-house counsel: Counsel for companies with sabbatical programs should carefully evaluate the factors set forth in Paton to assess whether the leave granted under such programs could be construed as vacation. Vacation pay in California is generally earned in proportion to an employee's service, and companies must pay out earned but unused vacation upon termination. Employers who treat sabbatical leave as forfeitable upon termination risk running afoul of the laws regarding vacation pay if the guidance in Paton is not followed.

5. The Fair Labor Standards Act prohibits retaliation against workers who make oral complaints regarding violations of the act. Kasten v. Saint-Gobain Performance Plastics, 11 C.D.O.S. 3419.

Facts: Plaintiff claimed he was unlawfully terminated for complaining that the location of the company's time clock resulted in employees not getting paid for compensable time they spent putting on and taking off work clothes. He testified he orally made this complaint to four different company representatives. He conceded that he never reduced the complaint to writing. Saint-Gobain denied that Kasten made any significant complaint about the time clock location and alleged it terminated him because he failed to properly record his "comings and goings" at work despite repeated warnings. Saint-Gobain moved for summary judgment on the ground that the anti-retaliation provision of the FLSA did not protect oral complaints. Both the district court and the Seventh Circuit agreed with Saint-Gobain. The Supreme Court did not. The court analyzed the text of the FLSA anti-retaliation provision, which prohibits retaliation against employees who have "filed any complaint" regarding violations of the act. The court found the language conceivably broad enough to encompass oral complaints, and that the congressional intent behind the statute would be best served by a broad interpretation. In addition, a broad interpretation was consistent with the "reasonable views" of the Department of Labor and Equal Employment Opportunity Commission, which have taken the position that oral complaints are protected from unlawful retaliation. To ensure fair notice to employers, however, the court found there must some degree of formality to the "filing" of the complaint: "[A] complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statutes and a call for their protection." The court specifically declined to rule on whether the statute protected only those complaints made to the government or whether complaints made internally (to the employer) were also covered.

What it means for in-house counsel: The Supreme Court has continued to expand the scope of employer liability in retaliation cases. In Thompson v. North Amer.

Stainless, the court found even employees who do not engage in protected activity, but who have close relationships with employees who have engaged in protected activity, are protected by the anti-retaliation provisions of Title VII. In light of these cases and this trend, employers need to be particularly careful when assessing the risk of a retaliation claim in response to an adverse employment action. Managers should be trained to treat seriously even informal complaints of unlawful conduct, and companies should ensure that they have a formal practice for documenting and investigating complaints. When adverse action is contemplated against an employee who might raise a claim of retaliation, employers should thoroughly evaluate the evidence that supports the legitimate business reasons for the employment decision before implementing the decision.

Next week: The viability of class action waivers in mandatory pre-dispute arbitration agreements, California Supreme Court guidance on the administrative exemption, reporting time pay for weekend meetings, and reinstatement rights under the California Family Rights Act .

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