

2010 California Employer Update

Presented by
Roberta S. Hayashi
Lisa L. Gorecki

January 28, 2010

Hot Topics

- Flexibility for Employers in Tough Economic Times
- Wage and Hour Issues
- Proper Classification of Employees/Contractors
- Disability Discrimination
- Pregnancy Discrimination
- Valid Releases
- Non-compete Agreements
- Workplace Privacy

Employer Flexibility in a Difficult Economy

Labor Commissioner granting employers flexibility due to difficult economic circumstances:

- Alternative Workweeks
- Reductions in salary and time worked without jeopardizing exempt status
- Recouping overpayment of wages

Alternative Workweeks

Alternative Workweek:

- AB 5 and DLSE opinion letter authorizes temporary alternative workweek schedule.

Exempt Workweek Reduction:

- According to a new DLSE opinion letter, California employers may temporarily reduce the salaries of their exempt employees with a correlating reduction in work schedules *because of* economic conditions, without undermining exempt status.

PTO Allocation

DLSE Opinion Letter:

- An employee's exempt status is not affected by the application of accrued leave to partial or full day absences from the workplace.
- Provided that the employee receives payment of guaranteed salary and the employer has well-defined plan allowing for deduction of accrued leave.

Recouping Wages from Paychecks

DLSE Opinion Letter:

- Labor Code §221 does not prohibit employer from deducting wage overpayments from paycheck with employee's written authorization (except final paycheck).

City of Oakland v. Hassey (2008):

- City's deduction of training costs from final paycheck reduced wages to below minimum wage and violated Federal Fair Labor Standards Act.

Employee Classification

Improperly classified workers can result in huge liability for back wages and unpaid overtime.

Campbell v. PriceWaterhouseCoopers:

- Unlicensed accounting associates are non-exempt employees because their work requires more than general supervision (duties test).

Employee/Independent Contractor Classification

- Classification as an independent contractor is a factually intensive question.
 - The IRS, EDD, Workers' Compensation and DLSE use different tests for independent contractor classification.
 - *Chin v. Namvar* and *Sanders Construction Co. v. Casteneda*
 - The federal and state governments have identified significant employment tax gaps due to misclassification.
 - The IRS announced it will audit 6,000 employers beginning February 2010.
 - The IRS shares the results of its audits with the EDD.
 - Misclassification of employees as independent contractors and the resulting failure to pay employment taxes can lead to criminal charges.
- See Berliner Cohen website for article on classifying workers:
http://www.berliner.com/files/Legal_Pitfalls_Worker_Classification_Handbook-2008.pdf

Wage & Hour Developments: Individual Liability for Managers

Boucher v. Shaw

- Managers might have individual liability for unpaid wages under FLSA.
- Courts must look at “economic realities” of business – are managers actually “employers” under FLSA.

Contrast: *Reynolds v. Bement* and *Bradstreet v. Wong*

- Managers are not individually liable for unpaid wages under Labor Code unless evidence of personal gain from nonpayment.

Vacation

Owen v. Macy's

- Vacation did not begin to accrue until 6 months worked.
- The employer is free to determine when employee begins to accrue vacation.
- A waiting period is acceptable.
- Courts will uphold how policy is written, not how employees would prefer it to be written.

Meal Periods & Rest Breaks

Brinker Restaurant Corp. v. Superior Court

- Court of Appeals decided employers must provide breaks and not deter employees from taking, but need not “police” employees to ensure breaks taken
- Review granted by California Supreme Court
- Labor Commissioner following *Brinker* in the meantime
- California Supreme Court will decide *Brinker* in 2010.

Meal Breaks: Hazardous Waste Drivers

DLSE Opinion Letter

- Federal regulations restrict employees engaged in transportation of hazardous materials from leaving trucks unattended or exceeding certain visual distance.
- On-duty meal period acceptable when:
 - Nature of work prevents employee from being relieved of all duties;
 - Written agreement to on-the-job paid meal period;
 - Written agreement states employee may revoke the agreement in writing at any time.

Tip Pooling

- Labor Code §351 prohibits employer or employer's agent from taking tips or wages left for employees.
- Employer may not include tips in calculating minimum wage.
- California Supreme Court will decide whether employees have a private right of action under §351.
- Persons who do not provide “direct table service” may share in mandatory tip pool if not managers.
- Shift supervisors who participate in service may share in tips left for entire service team (*Chau v. Starbucks*).

Class Action Suits & Releases

Chindarah v. Pick-Up Stix, Inc.:

- Although statutory right to overtime pay unwaivable, an employee may release claim for past overtime wages as part of a settlement of dispute over those wages.

Watkins v. Wachovia Corp.:

- An employer cannot avoid class claims and large attorneys' fees awards by "picking off" lead plaintiff or class representative by settling his claim and then attempting to obtain dismissal of the case.

Releases

- Requiring the release of non-waivable claims could invalidate entire agreement.
- Releases in class action lawsuits require special attention.
- Employee release is not binding on the DFEH's right to audit or file charges against an employer.
- Have counsel review your form of release and separation agreements.

Workplace Privacy

Hernandez v. Hillsides, Inc.:

- Home for abused children installed camera after learning someone was viewing pornography online
- Employer did not tell employees of hidden camera
- Employees were never videotaped; camera only activated after-hours
- Court balanced expectation of privacy with Hillside's duty to protect children and avoid liability.

U.S. Supreme Court to decide *Quon* case this year.

Noncompete Agreements

Edwards v. Arthur Andersen,

FLIR Systems, Inc. v. Parrish:

- \$1.4 million attorneys' fees award for former employees sued for soliciting customers
- No evidence that employees used employer database to contact customers

The Retirement Group v. Galante:

- Like non-compete clauses, blanket non-solicitation clauses unenforceable under B&P §16600, except where trade secrets used to solicit

Disability: Interactive Process

Indergard v. Georgia-Pacific Corp.:

- Exam required before employee's return to work may be "medical evaluation" under ADA if it is actually medical or psychological assessment.

Stephens v. City of Pasadena Fire Department:

- City required fitness-for-duty exam based on firefighter's perceived psychological condition and found him disabled when he refused to participate; he received verdict of \$1.1 million.

Disability: Interactive Process

Scotch v. The Art Institute of California:

- Employee not “qualified individual” under FEHA because employer lacked knowledge of employee’s HIV-positive status at time he was denied promotion.
- Employee could not prevail on claim for failure to engage in interactive process unless he could identify a reasonable accommodation that would have been possible at the time the interactive process occurred.

Disability Discrimination

Young v. Exxon Mobil Corp.:

- Employer learned of employee's manic depression and obsessive-compulsive disorder when disciplining employee months after hire.
- Employee fired for closing 24-hour station against company policy and for reasons unrelated to disability.
- No harassment found, despite occasional comments by co-workers calling her "psycho-retard" or physically blocking her.
- "Anti-discrimination laws do not create a general civility code. Conduct that is merely rude, abrasive, unkind or insensitive does not come within the scope of the law."

Disability Discrimination

EEOC v. Go Daddy Software, Inc.

- Employee complained about conversation with manager six months after it took place
- Employee's position eliminated in a reorganization and he failed to apply for other jobs in the company
- Jury found retaliation but no underlying discrimination
- Unreported complaints are just as relevant as reported ones to issue of whether employee believed he had reported a violation of anti-harassment law

Disability Discrimination and GINA

The Genetic Information Nondiscrimination Act (GINA), effective November 21, 2009:

- Prohibits employers of 15+ from discriminating on the basis of genetic information, limits acquisition and disclosure of genetic information
- Most common trigger – receipt of information on diagnosis of employee or family member in connection with request for leave or accommodation
- Interplay with FMLA, ADA, CMIA, anti-discrimination provisions under new health care reform laws

Pregnancy Discrimination

Sasco v. Johnson:

- Employer admitted during litigation that female employee was fired after announcing pregnancy because owner of company felt it was unsafe for her to continue working on a boat while pregnant.
- Awarded back pay, \$85K emotional distress, and \$25K administrative fine for contrived layoff defense to hide discriminatory intent

Pregnancy Discrimination

Johnson v. United Cerebral Palsy/Spastic Children's Foundation:

- Plaintiff was permitted to use declarations from other former employees who were terminated shortly after announcing their pregnancies.
- Declarations were relevant, not prejudicial, therefore admissible.
- Comes after U.S. Supreme Court refused to issue a bright-line rule on “me-too” evidence in *Sprint v. Mendelsohn* in 2008

Stock Option Plans

Schachter v. Citigroup:

- Incentive compensation is a form of wages but may be subject to specified conditions and not earned until such conditions are fulfilled.
- Forfeiture of vested stock options by early quit or termination was not unlawful conversion of wages.

The Unruh Civil Rights Act

- Protects against discrimination by all business establishments in California, regardless of size or number of employees
- Does *not* afford any separate right to an employee but gives a third party the same rights an employee has under FEHA, including protection against harassment
- Many insurance policies have a small rider for Unruh Claims. The amount is seldom enough to cover a claim; however, the reimbursement of defense costs can be a significant benefit.
- **BEST PRACTICE:** If a FEHA claim is filed, evaluate whether the facts support an Unruh claim filed by a third party.

At-Will Employment

Stillwell v. The Salvation Army:

- Former employee sued alleging breach of implied contract to terminate him only for cause.
- Employer's failure to follow procedure identified in agreement created a question of whether ineffective.
- In absence of executed contract, at-will provisions in handbook remain important but do not necessarily “foreclose the possibility” of implied agreement to terminate only for cause.

Review Policies and Practices

- Employment Agreements
- Employee Handbooks
- Meal Periods and Rest Breaks
- Time Cards
- Documentation on Alternative Workweek
- Privacy Policies
- Releases

Contact

Roberta S. Hayashi

roberta.hayashi@berliner.com

408.286.5800

Lisa L. Gorecki

lisa.gorecki@berliner.com

209.385.0700

Roberta S. Hayashi



Ms. Hayashi has over twenty-five years experience representing and advising Silicon Valley employers in employment and business litigation. She has trial experience in wrongful termination, discrimination, and misappropriation of trade secrets and proprietary information actions in both state and federal court. In June 2003, she was named one of the "Top 50 Women Litigators" in California by *The Daily Journal*, and recently named as a 2009 Woman of Influence by the *Silicon Valley/San Jose Business Journal*.

She is a frequent speaker on employment law and legal ethics. She is a faculty member at Lincoln Law School on employment law, past president of the Santa Clara County Bar Association and the Law Foundation of Silicon Valley, and a member of the Santa Clara County Superior Court, Alternative Dispute Resolution Committee and Bench/Bar/Media/Police Committee.

Lisa L. Gorecki



Ms. Gorecki is a member of the Firm's Business Litigation Group and Employment Law Group with a focus on contract claims and labor and employment issues. Ms. Gorecki provides representation and advice and counsel on a wide range of employment matters and also represents businesses and individuals in construction disputes, condemnation proceedings, collections, and landlord-tenant disputes.

BERLINER • COHEN
ATTORNEYS AT LAW

2010 California Employer Update



2010 California Employer Update

TABLE OF CONTENTS

	Page
STATUTORY/LEGISLATIVE UPDATES.....	1
Federal Laws.....	1
Genetic Information Nondiscrimination Act.....	3
DOD Bill Expands Federal COBRA.....	4
State Laws.....	5
Cal-COBRA Premium Assistance.....	5
Alternative Workweek Schedules.....	5
Electronic Discovery Act/Document Retention.....	5
Updated Wage Withholding Tables.....	5
Hate Crimes: Nooses.....	6
Civil Air Defense Patrol Permitted Leave.....	6
Confidentiality of Medical Information.....	6
Workers’ Compensation/Pre-Designation of Physician.....	6
Workers’ Compensation/Treatment Authorization.....	6
ADMINISTRATIVE DEVELOPMENTS.....	7
Division of Labor Standards Enforcement (“DLSE”) Opinion Letters.....	7
Temporary Reduction in Workweek and Salary for Exempt Employees.....	7
Approval of Alternative Workweek Schedule.....	7
Deductions from Accrued or Banked Vacation and Sick Leave.....	8
Meal Periods for Hazardous Waste Drivers.....	9
Recouping Wage Overpayments.....	9
CASE LAW.....	10
Harassment.....	10
Unruh Civil Rights Act.....	10
Discrimination.....	11
Pregnancy.....	11
Retaliation.....	12
Disability.....	12
Age.....	14
Non-compete Agreements.....	14
Arbitration.....	15
Stock Option Plans.....	15
At-Will Employment.....	16
Workplace Privacy.....	16

Releases of Wage and Hour Claims; Class Actions	16
Wage and Hour Issues	17
Class Action Requirements.....	17
Individual Liability for Managers.....	17
Employee Classification	17
Vacation	18
Overtime	18
On-Call Time	19
Employer Liability for Employee Injury when “Coming and Going”	19
Arbitrating Wage Claims	19
Waiting Time Penalties.....	20
Tip Pooling.....	20
Meal Periods and Rest Breaks	21



2010 California Employer Update

STATUTORY/LEGISLATIVE UPDATES¹

Pending Legislation

Health Care Reform Bills – Provisions Affecting Employers

The Obama administration has been engaged for many months in the process of reforming the United States’ health care system. Both houses of Congress have heard, debated, and passed health care reform bills which will significantly impact American employers. Differences between the House and Senate bills are being debated in conference to try to arrive at a final version of the health care reform bill. Below is a side-by-side comparison of those provisions of the two bills affecting employers.

House of Representatives Bill (The Affordable Health Care for America Act)	Senate Bill (The Patient Protection and Affordable Care Act)
Requires employers to either provide health coverage or make a payroll contribution. An offering employer must offer all employees the option of selecting individual or family health coverage.	Requires employers with more than 200 employees to automatically enroll new full-time employees in coverage.
Requires offering employer to contribute a minimum of 72.5% of premium for individual coverage and 65% of premium for family coverage (spouse and qualifying children).	If employer offers plan under which the share of the total allowed costs of benefits is less than 60% of such costs, or the premium exceeds 9.8% of the employee’s income, that employee is eligible for a premium tax credit.
Requires offering employer to provide for automatic enrollment of employees into health plan with lowest applicable employee premium.	Requires employers of more than 50 who do not offer coverage and have at least one full-time employee receiving the premium assistance tax credit, to make a payment of \$750 per employee.

¹ The materials presented here provide a selective, informational summary only and do not cover all aspects of all legislation or cases that affect the employment relationship. They do not include all information necessary to evaluate any specific case. They are not intended as legal advice or as legal treatises and should not be relied on as such.

<p>Establishes payroll tax for employers who choose not to offer coverage. Contribution is generally 8% of wages paid to employees. Phases up from 0-8% between an annual payroll of \$500,000 and \$750,000, at which point employers are subject to the full 8% contribution requirement. Small employers with annual payrolls at or below \$500,000 are exempt from the contribution requirement.</p>	<p>Requires large employers to report whether it offers full-time employees and their dependents opportunity to enroll in minimum essential coverage and employer's share of total allowed costs under the plan. Requires employers to report number and names of full-time employees receiving coverage.</p>
<p>Provides rules under which an ERISA-governed employer makes an election to offer health care coverage in lieu of the payroll tax that applies to a non-offering employer.</p>	<p>Prohibits discharge, discrimination or retaliation against employee receiving premium tax credit.</p>
<p>Provides for an excise tax that applies to an offering employer who fails to follow the rules governing an offer of coverage.</p>	<p>Prohibits employers from limiting eligibility for coverage based on wages or salaries of full-time employees.</p>
<p>Commissions the Secretaries of Labor, Treasury and Health & Human Services to conduct a study to examine whether an employer hardship exemption should be added to the law.</p>	<p>Sliding scale tax credits provided to small employers with fewer than 25 employees and average annual wages of less than \$40,000 who purchase health insurance for employees, and who contributes at least 50% of the total premium cost or benchmark premium.</p>
<p>Provides for a tax credit equal to 50% of the amount paid by a small employer for employee health coverage. This credit phases out in the case of an employer of 10-25 employees and/or employer with average wages of \$20,000-\$40,000/year. An employer may elect to use the tax credit for a maximum of 2 taxable years.</p>	<p>Full tax credit provided to employers with 10 or fewer employees and average annual wages of less than \$20,000, and who contributes at least 50% of the total premium cost or benchmark premium.</p>
<p>HIPAA privacy and security standards will apply under the Act.</p>	<p>In 2011-2013, qualifying employers eligible for tax credits of up to 25% of contribution (35% for tax-exempt small businesses). In 2014 and beyond, eligible employers can receive tax credit for 2 years of up to 50% of total contribution (35% for tax-exempt small businesses).</p>

Full text of the bills, as well as summaries, are available for viewing or download at <http://www.opencongress.org/bill/111-h3962/show> and http://dpc.senate.gov/dpcdoc-sen_health_care_bill.cfm.

Federal Laws

Genetic Information Nondiscrimination Act

On November 21, 2009, the Genetic Information Nondiscrimination Act (GINA) became effective. GINA applies to employers of 15 or more employees, and makes it illegal to discriminate against applicants or employees on the basis of genetic information. The law also limits an employer's acquisition and disclosure of such genetic information.

Genetic Information can include (1) an applicant's or employee's genetic tests, such as analysis of DNA or chromosomes that detects genotypes, mutations or chromosomal changes; (2) the genetic tests of an applicant's or employee's family members; or (3) the manifestation of a disease or disorder in an applicant's or employee's family members.

Genetic Information does not include medical information about an applicant's or employee's manifested disease, disorder or pathological condition. Such information may, however, be protected under other laws such as the Americans with Disabilities Act (ADA) or the California Medical Information Act (CMIA).

GINA prohibits:

- Intentional discrimination on the basis of an applicant's or employee's Genetic Information in any aspect of employment;
- Harassment due to or based on an employee's Genetic Information;
- Retaliation against an applicant or employee for opposing discrimination due to or based on Genetic Information;
- Acquisition of Genetic Information with respect to an employee or an employee's family member, unless an exception applies.

There are many ways employers may unintentionally acquire Genetic Information. GINA does not prohibit the acquisition of Genetic Information in the following situations:

- Where an employer inadvertently acquires Genetic Information, such as overhearing an employee talking about a family member's illness;
- Where an employee requests time off to care for a family member with a serious health condition, and discloses Genetic Information while going through the family medical leave certification process;
- Where an employee discloses Genetic Information as part of a wellness program offered by the employer, where participation is voluntary (and other conditions are met);
- Where an employee discloses Genetic Information through a program that monitors the biological effects of toxic substances in the workplaces (provided defined conditions are met).

Employers must keep any Genetic Information they receive or acquire in a separate, confidential medical file. This information must not be kept in the employee's regular personnel file. It is unlawful for an employer to disclose any Genetic Information about applicants or employees except under very limited circumstances.

Applicants or employees must file administrative charges with the Equal Employment Opportunity Commission before pursuing civil litigation. GINA makes available the remedies and enforcement procedures prescribed under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.

DOD Bill Expands Federal COBRA

The American Recovery and Reinvestment Act (ARRA) expanded an employer's obligations under COBRA. ARRA put into place a subsidy program under which employers who are covered by COBRA were to (1) identify employees involuntarily terminated during the period of September 1, 2008 and December 31, 2009; (2) reduce the COBRA premium for eligible individuals and their eligible dependents by 65%; (3) extend the COBRA election period for eligible employees who did not enroll in COBRA prior to February 17, 2009, and notify these employees that they can now enroll in COBRA at reduced rates; and (4) update their COBRA notification and election forms.

On December 19, 2009, Congress passed the Fiscal Year 2010 Department of Defense (DOD) Appropriations Act (the "DOD Bill"), and President Obama signed it into law the same day.

The DOD Bill extends and expands the COBRA subsidy program that was enacted under ARRA as follows:

- The period during which employers must subsidize 65% of COBRA premiums is expanded from nine to fifteen (15) months.
- The eligibility period, originally set to expire on December 31, 2009, has been extended to February 28, 2010.
- Those eligible individuals whose subsidy period expired on November 30, 2009 now have a retroactive period of sixty (60) days to receive payment of premiums.
- Employers are to provide a special notice outlining these changes within sixty (60) days to all eligible individuals who applied for COBRA on or after October 31, 2009, or those who were terminated after October 31, 2009.
- The DOD Bill clarifies ARRA's COBRA subsidy program to note that eligibility and notice are based upon the timing of the qualifying event.

The DOD Bill also expands unemployment benefits. Specifically:

- The end date by which individuals may apply for Federal Emergency Unemployment Compensation (EUC) is extended to February 28, 2010 (from the original end date of December 31, 2009).
- The period during which individuals may claim and be paid EUC is extended from May 31, 2010 to July 31, 2010.
- The period during which individuals may qualify for the Federal Additional Compensation (FAC), the \$25 weekly benefit amount added to state and federal unemployment compensation, is extended from the current end date of January 1, 2010 to February 28, 2010, with weekly payment provided during the phase-out period for weeks ending June 30, 2010 to August 31, 2010.

Small employers in California are impacted by these changes, too. In May 2009, California's legislature enacted AB 23, which extended ARRA to employers with fewer than 20 employees, who are not covered by COBRA, but Cal-COBRA.

State Laws

Cal-COBRA Premium Assistance

AB 23: On May 13, 2009, the Governor signed a bill which extends the federal COBRA premium subsidy (introduced by the American Reinvestment and Recovery Act (ARRA) of 2009), available to "assistance eligible individuals" (i.e., employees involuntarily terminated between September 1, 2008 and December 31, 2009). While the federal subsidy program under COBRA covers employers with more than 20 employees, the California law requires that employees with fewer than 20 employees give notice of ARRA's benefits. This California bill requires health care plans and insurers to notify "qualified beneficiaries" about the premium assistance available under ARRA to subsidize Cal-COBRA coverage.

Alternative Workweek Schedules

AB X 25: Effective May 21, 2009, the California Legislature passed and the Governor signed a bill amending the Labor Code Section 511 affecting alternative workweek arrangements. Section 511 permits employers to propose and employees to approve alternative workweek schedules (such as a four-day, ten-hour workweek). Prior law specified that employee approval required a secret ballot election of at least 2/3 of the affected employees in a "work unit," but failed to define "work unit." The amended section 511 specifies that a "work unit" includes "a division, a department, a job classification, a separate physical location or a recognizable subdivision." It also specifies that it may include an individual employee if that employee otherwise satisfies the criteria of a "reasonably identifiable work unit." The bill also authorizes employees, with their employer's consent, to move on a weekly basis from one work schedule to another on the adopted menu of work schedule options.

Electronic Discovery Act/Document Retention

AB 5: This bill amended California's Civil Discovery Act to establish procedures for the discovery of "electronically stored information." A party seeking production of electronically stored information may specify the format to be produced, but if no particular format is requested, the responding party may produce the information in the manner it is ordinarily kept or in a reasonably usable format. California law now permits discovery by means of copying, testing, or sampling, in addition to inspection. In addition, trial courts may award monetary sanctions against parties and attorneys who fail to comply with the new provisions. The new law does not permit monetary sanctions where electronically stored information was lost, damaged, or overwritten as a result of the routine, good faith operation of an electronic information system.

Updated Wage Withholding Tables

AB 17: This new law requires employers to use increased wage withholding tables. The new withholding tables took effect on November 1, 2009. For wages paid after November 1, 2009, the bill increases the applicable withholding rates on employee wages by 10%. The bill also increases the withholding rates on supplemental wages, stock options and bonus payments.

Hate Crimes: Nooses

AB 412: California's Hate Crimes Law prohibits the display of certain symbols with the intent to terrorize other persons. For example, the law bans the display of swastikas and burning crosses. Effective January 1, 2010, AB 412 expands the Hate Crimes Law to prohibit the hanging of a noose, knowing it to be a symbol representing a threat to life, in certain places, including a place of employment, for the purpose of terrorizing an occupant of that place. Violation of this law could result in imprisonment and civil fines up to \$5,000 for the first offense.

Civil Air Defense Patrol Permitted Leave

AB 485: California law now requires employers of more than 15 employees to provide not less than 10 days' leave per year, in addition to any leave benefits otherwise available, to those employees who are volunteer members of the California Wing of the Civil Air Patrol, and who have been duly directed and authorized to respond to an emergency operational mission. Leave is only available if the employee has been employed for at least 90 days immediately preceding the commencement of leave. The employee is required to give the employer as much notice as possible of the intended dates upon which the leave is to begin and end. Upon expiration of the leave, the employer is required to restore the employee to the position he or she held when the leave began or a position with equivalent seniority status, employee benefits, pay, and other terms and conditions of employment, unless the employee is not restored because of conditions unrelated to the exercise of the leave rights by the employee.

Confidentiality of Medical Information

AB 681: Existing law prohibits providers of health care, health care service plans, and contractors from releasing medical information to persons authorized by law to receive that information if the information specifically relates to a patient's participation in outpatient treatment with a psychotherapist, unless the requester of the information submits a specified written request for the information to the patient and to the provider of health care, health care service plan, or contractor. However, existing law excepts from those provisions specified disclosures that are made for the purpose of diagnosis or treatment of a patient. This bill amends Civil Code §56.104 to also except from these provisions disclosures that are made to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims.

Workers' Compensation/Pre-Designation of Physician

AB 186: Existing workers' compensation law generally requires employers to secure the payment of workers' compensation, including medical treatment, for injuries incurred by employees that arise out of or in the course of employment. Former Labor Code section 4600 provided that, through December 31, 2009, an employee has the right to be treated by his or her personal physician from the date of injury if specified requirements are met, including a requirement that the physician agree to be pre-designated. The amended Section 4600 deletes the December 31, 2009 repeal date.

Workers' Compensation/Treatment Authorization

AB 361: Existing workers' compensation law authorizes an employer or insurer to establish or modify a medical provider network for the provision of medical treatment to injured employees,

and to enter into contracts for the provision of medical services to injured employees with a health care organization that has been certified by the administrative director for this purpose. This bill added Section 4610.3 to the Labor Code, which provides that an employer who authorizes medical treatment with a medical provider network or health care organization shall not rescind or modify the authorization for the portion of medical treatment that has already been provided, for any reason, even if the employer subsequently determines that the physician who treated the employee was not eligible to treat. The employer may transfer treatment of an injured employee into a medical provider network or organization, or establish that a provider of authorized medical treatment is the primary care physician for specified purposes.

ADMINISTRATIVE DEVELOPMENTS

Division of Labor Standards Enforcement (“DLSE”) Opinion Letters

Temporary Reduction in Workweek and Salary for Exempt Employees

2009.08.19: Reversing its 2002 opinion on the subject, the DLSE issued an opinion letter stating that employers may temporarily reduce the salaries of their exempt employees along with a matching reduction in work schedules during periods where the employer operates shortened workweeks due to economic conditions, without the presumption that such a change destroys the exempt status of those employees.

In the new opinion letter, the DLSE stated that federal regulations and relevant federal court decisions have determined that reducing salaries of exempt employees during periods the employer used shorter workweeks due to economic conditions does not necessarily violate the salary basis test for exemption. Nor does the Labor Code or the Industrial Welfare Commission’s wage order provisions prohibit employers from simultaneously reducing work schedules and salaries of exempt employees.

As a result, California employers may, for example, temporarily reduce employee salaries by 20 percent and implement a temporary 4-day workweek, without calling into question the exempt status of the employees. However, the reductions must be due to economic conditions, be temporary in nature, employers must not use the salary and correlating scheduled reduction to circumvent the requirement that the employees be paid their full salary in any week in which they perform work, and the reductions must be applied prospectively, not retroactively.

The full text of the opinion letter can be found at www.dir.ca.gov/dlse/opinions/2009-08-19.pdf.

Approval of Alternative Workweek Schedule

2009.03.23: This Labor Commissioner opinion letter authorizes employers to adopt alternative workweek schedules for summer months, provided that they comply with all regulations otherwise applicable to the adoption of such schedules (i.e., election procedures, notice requirements, etc.). In the facts presented to the Labor Commissioner, it was permissible for a manufacturing employer to adopt a summer schedule of four 9-hour days and one 4-hour day, without incurring overtime for non-exempt employees working this schedule, and to maintain a normal schedule of five 8-hour days for the rest of the year.

This opinion letter clarified the issue of whether alternative work week schedules during only a particular time of year would satisfy the requirement that the schedules be “regularly recurring,” or whether employers would have to maintain such schedules for the entire year.

The DLSE also noted that to if the alternative workweek schedule remains the same each year after it has been properly adopted by the employer under Labor Code §511, the employer does not need to conduct further elections in following years.

The full text of the opinion letter may be found at http://www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm.

Deductions from Accrued or Banked Vacation and Sick Leave

2009.11.23: Elaborating on the California court’s dicta in the 2005 *Conley v. PG&E* case, this DLSE Opinion Letter addresses the issue of when an employer may deduct from an exempt employee’s vacation and/or sick leave for partial or full day absences due to either illness or personal reasons without destroying his/her exempt status. The DLSE states that in reviewing any deductions from leave balances, it first determines whether the company had a bona fide plan, practice or policy and if such deduction is made in accordance with the plan, practice or policy.

Assuming that an employer’s policy expressly permits the application of accrued vacation and sick time for absences from work, the DLSE has detailed the rules and regulations regarding what can be used and when. First, the employer is always obligated to compensate an exempt employee with his/her salary for any day during which the employee performs work. Although an employer may not deduct from an employee’s salary for a partial day absence, the employer may deduct from the employee’s leave balances for a partial day absence. An employer may deduct from an employee’s leave balances or from an employee’s pay when the employee is absent for one or more full days and such deductions will not have an adverse effect on the employee’s status as exempt.

Where an employee is absent from work for a full day and he/she has a sufficient leave balance, the employer may, in accordance with its plan, practice or policy, deduct the time from the applicable accrued leave.

Where an employee is absent from work for a portion of a day for personal reasons, the employer may deduct (in accordance with the employer’s policy, plan or practice) from the employee’s vacation leave balance, to the extent that there is a balance; however, once the vacation leave balance is exhausted, the employer may not deduct pay for the hours during which the employee was absent. Where an employee is absent from work for a portion of the day due to illness, the employer may deduct (in accordance with the employer’s policy, plan or practice) from the employee’s sick leave balance (and once sick leave has been exhausted from the employee’s vacation leave balance), but may not deduct from the employee’s salary. The important thing to remember is that an employer must ensure that the exempt employee, who works a partial day, is compensated for a full day of work. Such compensation can be made through a combination of deductions from leave balance(s) and paid leave.

The full text of the opinion letter may be found at www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm.

Meal Periods for Hazardous Waste Drivers

2009.06.09: In this opinion letter, the DLSE discussed the application of California's meal period requirements to those employees who are engaged in the transportation of hazardous explosive materials. The issue was whether truck drivers, who are prohibited by federal regulations from leaving the trucks unattended, would be so restricted that any meal period could not be considered an off-duty meal period. The DLSE concluded that the restrictions imposed upon the drivers during deliveries – not leaving the truck unattended and staying within certain visual distance of the truck at all times – were such that the employee would not be considered sufficiently relieved of all duties to have an off-duty meal period.

The DLSE concluded that the application of the federal regulations may, in some circumstances, satisfy the requirements for an on-duty meal period: (1) the nature of the work prevents an employee from being relieved of all duty; (2) the employer and employee have agreed in writing to an on-the-job paid meal period; and (3) the written agreement states that the employee may, in writing, revoke the agreement at any time.

The full text of the DLSE opinion letter may be found at www.dir.ca.gov/dlse/opinionletters.

Recouping Wage Overpayments

2008.11.25.-1: The DLSE held that Labor Code section 221 does not prohibit periodic deductions for overpayment of wages provided the employee has expressly authorized in writing these deductions and the employee still receives no less than the minimum wage for all hours worked in the pay period. In these circumstances, the employer is not reducing the standard wage but is simply implementing an agreed-upon overpayment recovery system for a readily ascertainable amount (i.e., the hours not worked). However, the employee must give written authorization for these deductions, and merely submitting a time sheet reflecting fewer hours worked does not constitute such authorization. Further, an employee still may not deduct prior overpayments from a final paycheck, even if the employee authorizes deductions from other paychecks.

CASE LAW

Harassment

Unruh Civil Rights Act

Hughes v. Pair (2009) 46 Cal.4th 1035. This case involved California Civil Code section 51.9, a provision of the Unruh Civil Rights Act, which prohibits sexual harassment in certain business relationships outside the workplace. Similar to California's Fair Employment and Housing Act (FEHA) and the federal Title VII prohibiting sexual harassment, section 51.9 limits liability to conduct which is "pervasive or severe." Suzan Hughes had been married to Mark Hughes. They divorced, and Mark was to pay Suzan Hughes \$400,000 in spousal support each year for 10 years. Mark Hughes died 2 years later, leaving millions in trust for the sole benefit of his son with Suzan. Appointed as trustees were three individuals, including Pair. Suzan Hughes made a request on the child's behalf that the trust release funds for a two-month rental of a beach house in Malibu. The trustees unanimously rejected the request but granted funds for a one-month rental. Pair telephoned Suzan Hughes to convey the trustees' decision. Shortly thereafter, Suzan Hughes sued Pair, alleging that in that telephone conversation, and later that evening, he made sexually inappropriate comments to her. The trial court dismissed Hughes' claim, and a divided panel of the Court of Appeal affirmed. The California Supreme Court agreed, finding that although a trustee is governed by the Unruh Act as a person who provides professional services, the terms "pervasive or severe" should have the same meaning outside the workplace as they do inside the workplace, and finding that Pair's statements were not sufficiently severe or pervasive as to give rise to a claim for sexual harassment under Civil Code §51.9.

The Unruh Civil Rights Act prohibits discrimination by all business establishments in California, including persons who provide professional services, housing and public accommodations, on the basis of age, ancestry, color, disability, national origin, race, religion, sex and sexual orientation. This act applies to business establishments regardless of size or the number of people employed.

Although the California Supreme Court has long held that the Act "has no application to employment discrimination" cases, (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 77; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500), some plaintiffs' attorneys are including Unruh Act claims in their employment cases where the facts support claims under both statutory schemes. For example, if an employee alleged that his employer failed to accommodate his need to use a wheelchair when configuring cubicles in the office, and other employees are to meet or greet customers in their cubicles, the employee may have a claim for disability discrimination under FEHA, and a customer or potential customer may have a claim under the Unruh Act. Employers should consider, whenever a claim is made under the Fair Employment and Housing Act, whether a third party would also be able to make a similar claim.

Many employers may not immediately realize that most comprehensive insurance policies carry a small rider for Unruh Act claims. The coverage is usually minimal, for example, \$10,000. However, the benefit is quite significant, as the attorney fees for the defense of such a claim can be extensive. Therefore, companies should review their insurance policies to see if this coverage is included.

Discrimination

Pregnancy

AT&T Corp. v. Hulteen (2009) 129 S.Ct. 1962. Prior to passage of the federal Pregnancy Discrimination Act (PDA), AT&T had based its pension calculations on a seniority system that relied on years of service minus uncredited leave time, giving less retirement credit for pregnancy absences than for medical leave generally. After Congress passed the PDA, making it clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions, AT&T replaced its old plan with a new plan which provided the same service credit for pregnancy leave as for other disabilities prospectively, but did not make any retroactive adjustments for pre-PDA pregnancy leaves. Several employees who received less service credit for pre-PDA pregnancy leaves than they would have for general disability leave, and accordingly smaller pensions, filed charges with the Equal Employment Opportunity Commission (EEOC). The United States Supreme Court held that the PDA did not apply retroactively. (Hulteen was a 6-1-2 opinion. Justice Souter delivered the opinion, in which Justices Roberts, Stevens, Scalia, Kennedy, Thomas and Alito joined. Justice Stevens wrote a concurring opinion. Justice Ginsburg filed a dissenting opinion in which Justice Breyer joined.)

Sasco Electric v. Fair Employment and Housing Commission (2009) 176 Cal.App.4th 532. A female employee was fired days after announcing her pregnancy. She filed a charge with the DFEH. The administrative judge ordered back pay, \$85,000 in emotional distress damages, and a \$25,000 administrative fine. The Court of Appeals affirmed. The employer's admissions that the employee was laid off because the company president felt it was unsafe for her to be working on a boat and traveling to foreign countries while pregnant provided sufficient evidence of discriminatory intent. The administrative fine was appropriate because the employer's officers contrived a lay-off defense to hide their discriminatory intent.

Johnson v. United Cerebral Palsy/Spastic Children's Foundation (2009) 173 Cal.App.4th 740. Plaintiff claimed she was terminated because she was pregnant. The employer presented evidence to the court that it had a legitimate reason for firing plaintiff, because she had falsified her time records. Plaintiff presented evidence that she had not falsified her time records, that she was fired soon after she disclosed she was pregnant, and that defendant had fired other women after they disclosed they were pregnant. The employer objected to these declarations, which are "me too" evidence. The Court of Appeal concluded that the declarations were admissible and constituted substantial evidence. The declarations from other former employees stated they were fired after they became pregnant, they know of someone who was fired because she was pregnant, they resigned because a supervisor made their work stressful after they notified her they were trying to become pregnant, or they knew of occasions when employees who were dishonest were not fired. These employees worked at the same facility where plaintiff worked, and they were supervised by the same people who supervised plaintiff. (This ruling follows the United States Supreme Court's refusal to issue a bright-line rule on "me too" evidence in *Sprint v. Mendelsohn* in 2008).

Retaliation

Crawford v. Metro Government of Nashville (2009) 129 S.Ct. 846. During an employer's internal investigation alleged harassment, employees who were questioned as witnesses corroborated ongoing harassment by the accused but did not file their own separate complaints. They were terminated thereafter and alleged that their terminations were in retaliation for cooperating in the investigation and therefore violated Title VII. The employer said the former employees could not avail themselves of Title VII's protections because they had not made complaints of harassment. The United States Supreme Court reaffirmed that Title VII's retaliation provision protects employees who oppose an unlawful practice and employees who participate in investigations – not just employees who make complaints.

Equal Employment Opportunity Commission v. Go Daddy Software, Inc. (9th Cir. 2009) 581 F.3d 951. The EEOC filed a suit alleging discrimination and retaliation under Title VII on behalf of a Muslim employee who had been terminated. Six months after a conversation took place, and after he had been promoted, the employee complained to human resources about a conversation in which his supervisor had overheard him speaking to a customer in French, then asked him where he was from, what languages he spoke and what religion he practiced. The employee said he was a Moroccan Muslim who spoke Arabic, English and French. He also testified that the manager, when talking to other employees in the employee's presence, said, "The Muslims need to die." In a reorganization, Go Daddy eliminated thirteen jobs, including that of the aggrieved employee, who could have applied for one of four newly-created positions, but chose not to do so. The jury awarded \$400,000 to the employee on his retaliation claim, though it found no underlying discrimination. Go Daddy appealed, arguing that because the employee had only complained on one or two occasions regarding isolated comments, he could not reasonably believe he had reported a Title VII violation. The Ninth Circuit held that an employee does not have to complain every time about every comment or incident; unreported comments are as relevant as reported comments to the inquiry of whether the employee had a reasonable belief that a violation of Title VII had occurred.

Disability

Scotch v. The Art Institute of California (2009) 173 Cal.App.4th 986. A former teacher sued under the Fair Employment and Housing Act (FEHA) for disability discrimination based on his HIV-positive status, failure to provide a reasonable accommodation and failure to engage in the interactive process. The Court of Appeal affirmed a ruling in favor of the employer, finding that the employee was not a "qualified individual" under FEHA because he lacked the necessary credentials for the position he sought, and the employer lacked knowledge of his HIV status at the time the decision was made. The employer's proposed accommodation (allowing him to finish the program in 3 years instead of 2) was reasonable. The employee could not prevail on a claim for failure to engage in the interactive process unless he could identify a reasonable accommodation that would have been possible at the time the interactive process occurred.

Indergard v. Georgia-Pacific Corp. (9th Cir. 2009) 582 F.3d 1049. Kris Indergard sued her employer, Georgia-Pacific Corporation, under the Americans with Disabilities Act (ADA), alleging that the employer had subjected her to an improper medical examination. The trial court concluded that the "physical capacity evaluation," to which Indergard had been subjected, was not a medical examination, the Ninth Circuit Court of Appeals reversed. The appellate court

applied seven factors from the Equal Employment Opportunity Commission (“EEOC”) Enforcement Guidance on Disability Related Inquiries and Medical Examinations. The EEOC’s factors are whether the test (1) is administered by a health care professional; (2) is interpreted by a health care professional; (3) is designed to reveal an impairment of physical or mental health; (4) is invasive; (5) measures an employee’s performance of a task or measures his/her physiological responses to performing the task; (6) is normally given in a medical setting; and (7) uses medical equipment. The court concluded that at least four of the above factors were present in the “physical capacity evaluation,” to which the company subjected Indergard, and that such evaluation was actually an impermissible medical examination in violation of the ADA.

Young v. Exxon Mobil Corp. (2008) 168 Cal.App.4th 1467. A gas station employee who shut down a 24-hour service station against company policy was terminated. She filed a charge of discrimination with the Department of Fair Employment and Housing (DFEH) alleging she was fired, harassed and retaliated against based on a mental disability. Exxon was not aware of her disability when she was hired, but learned of her manic depression and obsessive-compulsive disorder when disciplining her several months later. The trial court granted Exxon’s motion for summary judgment, finding that Exxon showed legitimate, non-discriminatory and non-retaliatory reasons for the termination of her employment (her shut-down of the gas station for reasons unrelated to her disability). Young failed to present evidence that Exxon’s actions were pretextual. She failed to present evidence of severe or pervasive harassment. The Court stated that “anti-discrimination laws do not create a general civility code,” and “conduct that is merely rude, abrasive, unkind or insensitive does not come within the scope of the law.”

Ricci v. DeStefano (2009) 129 S. Ct. 2658. The City of New Haven, Connecticut used objective examinations to identify those firefighters best qualified for promotion. When the results of such an exam showed that white candidates had outperformed minority candidates, a rancorous public debate ensued. The City threw out the results based on a racial disparity. White and Hispanic firefighters who passed the exam but were denied a chance at promotions by the City’s refusal to certify the test results sued, alleging that discarding the test results discriminated against them based on their race in violation of Title VII. The City responded that if it had certified the test results, it would have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The United States Supreme Court held that discarding the test results violated Title VII, because the rejection of the test results was based on race, the discarding of the results had a racially adverse impact, and fear of litigation alone could not justify the City’s reliance on race to the detriment of individuals who passed the exams and qualified for promotions.

Wilson v. County of Orange (2009) 169 Cal.App.4th 1185. The court held that the County employer provided reasonable accommodations for an emergency dispatcher with an autoimmune disorder that placed her at risk of blood clots, requiring avoidance of stress. County provided one year of temporary restrictions before reaching agreement on permanent restrictions for a dispatcher. Although the interactive process for the permanent restrictions did not commence until nine months after the temporary restrictions had been implemented the court found that as a matter of law, there was no claim for failure to provide an “interactive process”, stating that it is an “informal process” and “ritualized discussions are not necessarily required.” Further, the court relied upon prior cases holding that an employer cannot be held liable for

failing to engage in an interactive process where the employee is in fact offered a reasonable accommodation.

Age

Gross v. FBL Financial Services, Inc. (2009) 129 S. Ct. 2343. The United States Supreme Court was asked to decide whether a plaintiff had to present direct evidence of discrimination in order to obtain a mixed-motive instruction in an age discrimination case that was filed under the Age Discrimination in Employment Act (ADEA). The Supreme Court found that the burden of persuasion necessary to establish employer liability was the same in alleged mixed-motive cases as in any other ADEA action. A plaintiff suing for disparate treatment under the ADEA had to prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. The burden of persuasion did not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff produced some evidence that age was one motivating factor in the adverse employment action.

Non-compete Agreements

Edwards v. Arthur Andersen (2008) 44 Cal.4th 937. Although the *Edwards* case was decided in 2008 and presented in previous Berliner Cohen Employer Updates, it is included again here because of its continuing significance. In *Edwards*, the California Supreme Court departed from prior decisions in the federal courts by determining that a provision in an employment agreement that even “partially” or “narrowly” restricts an employee from serving customers or competing with a former employer, was invalid and prohibited by California law. The Court also stated that an agreement which requires an employee to waive “any and all rights,” but which does not expressly carve out an employee’s indemnity rights, is acceptable because the indemnity rights are nonwaivable statutory claims.

Under the plain meaning of B&P Code §16000, an employer cannot restrain a former employee from engaging in his or her profession, trade or business except under certain limited circumstances. The Court rejected Andersen’s argument that only contracts that *totally* prohibit an employee from engaging in his or her profession are illegal, and that an employer should be permitted to place some limitation on an employee’s ability to practice his or her vocation, as long as it is reasonable – otherwise known as the “narrow restraint” exception to B&P Code §16000. In *Edwards*, the Court rejected the “narrow restraint” exception and stated a zero-tolerance policy on any sort of restraint on a former employee’s ability to pursue his livelihood.

The California Supreme Court has clearly stated that non-competition agreements are invalid unless they fall under specific statutory exceptions. These include agreements to protect trade secrets, or in connection with the sale or dissolution of corporations (§16601) or limited liability corporations (§16602.5). Employers should review the language of contracts such as employment agreements, non-solicitation agreements, and non-disclosure agreements to be sure they comply with the law.

FLIR Systems, Inc. v. Parrish (2009) 174 Cal. App.4th 1270. Former employees of FLIR entered into negotiations with a third party to acquire licensing, technology, and manufacturing facilities to start a competing business. The employers claimed that the former employees would not be able to manufacture the product as planned without misappropriating trade secrets. Upon

learning of the lawsuit, the third party terminated the negotiations, and the competing business never came into existence. The employers, however, continued to seek a permanent injunction against the former employees. The Court of Appeal upheld the ruling that the action was filed and maintained in bad faith because there was no evidence of damages, misappropriation, threatened misappropriation, or imminent harm. An attorneys' fee award of \$1.4 million was also affirmed.

The Retirement Group v. Galante (2009) 176 Cal.App.4th 1226. Defendants were investment advisors who worked as registered representatives of TRG before they joined a competing company. The advisors contacted some of TRG's customers to inquire whether the customers wished to follow them. For many of the customers contacted, the advisors obtained the names and contact information from databases owned and operated by independent third parties. At least one advisor had customer names and contact information on a personal list he maintained. The court concluded that the prohibition against soliciting the firm's current customers violated the protections of Business & Professions Code section 16600 against contractually restraining a former employee from engaging in business, and could not be upheld. TRG could not prove that the advisors had used any information obtained from its customer database.

Arbitration

Roman v. Superior Court (2009) 172 Cal.App.4th 1462. In a discrimination claim filed by a former employee under the Fair Employment and Housing Act (FEHA), the California Court of Appeal enforced an arbitration agreement contained in the plaintiff's employment application, which stated, "I agree... that all disputes that might arise out of my employment with the company will be arbitrated." The Court found that the arbitration clause was set forth in a succinct, easily-understood paragraph contained in the four-page application, and that the provision was called to the applicant's attention by requiring that the applicant initial the paragraph, acknowledging the provision. The Court found that the arbitration was not unfairly one-sided simply because it said "I agree." Rather, the provision was broadly worded to encompass all employment-related disputes, and did not contain any language suggesting that the employer retained the ability to pursue potential claims in court rather than arbitration.

Stock Option Plans

Schachter v. Citigroup, Inc. (2009) 47 Cal.4th 610. Schachter, a former stockbroker for Citigroup, Inc., filed a class action lawsuit against the company based upon the forfeiture clause of a voluntary incentive compensation plan. The plan allowed employees to receive restricted shares at a reduced price in lieu of a portion of the employee's annual compensation. The shares had a two year vesting period, during which time they would be forfeited if the employee resigned or was terminated for cause. Schachter asserted that such forfeiture provision violated the Labor Code, specifically sections 201, 202, and 219, which require prompt payment of all earned wages when an employee resigns or is terminated and prohibits an employee from returning wages to an employer. He also asserted that forfeiture of the shares constituted an unlawful conversion of wages.

In November 2009, the California Supreme Court affirmed the judgment of the Court of Appeal, holding that the forfeiture provision did not violate the Labor Code because Schachter received all wages for which he had bargained and, consequently, had earned upon termination. Incentive

compensation is a form of wages; however, it can be made subject to specified conditions and is not earned until such conditions are fulfilled.

At-Will Employment

Stillwell v. The Salvation Army (2008) 167 Cal.App.4th 360. A former long-term employee sued the employer alleging breach of implied contract to terminate him only for cause. The employer argued the employee was at-will, citing the initial employment agreement containing an at-will provision and general handbook policies. The employee said the employment agreement did not foreclose a possible “for cause” implied contract, because the employer failed to obtain the signature of the officer specifically identified in the agreement, and thus the agreement was rendered ineffective. The Court of Appeal concluded that properly executed at-will agreements will preclude implied contracts for continued employment, but the employer’s failure to follow the procedure specifically identified in the agreement created a question of fact for the jury. In the absence of an executed contract, handbooks containing at-will provisions remain important, but do not necessarily “foreclose the possibility” of an implied agreement to terminate only for cause.

Workplace Privacy

Hernandez v. Hillsides, Inc. (2009) 47 Cal.4th 272. Plaintiff employees sued the employer, a private nonprofit residential facility for neglected and abused children, alleging that the employer violated their rights of privacy by installing a hidden camera in their office. The hidden camera was installed after the director of the facility learned that late at night, after plaintiffs had left the premises, an unknown person had repeatedly used a computer in the plaintiffs’ office to access the Internet and view pornographic websites. The camera was only activated after hours and plaintiffs were never actually videotaped. The California Supreme Court ruled for the employer, stating that while plaintiffs have a reasonable expectation that they will not be filmed without their knowledge, in this case the employer had a responsibility to ensure the safety of the children and avoid liability.

Releases of Wage and Hour Claims; Class Actions

Chindarah v. Pick-Up Stix, Inc. (2009) 171 Cal.App.4th 796. Employees filed a class action complaint for unpaid overtime, penalties, and interest arising from the misclassification of certain job positions as exempt from overtime pay. Some employees accepted a settlement offer from the employer and signed a settlement agreement, which included a general release. Thereafter, an amended complaint was filed challenging the validity of the releases under Labor Code section 206.5. The Court noted that the releases settled a dispute over whether the employer had violated wage and hour laws in the past. The releases did not purport to exonerate the employer from future violations and were not contingent upon the payment of wages concededly due on their executions. The court stated that the statutory right to receive overtime pay embodied in Labor Code section 1194 is non-waivable. But there is no statute prohibiting an employee from releasing his or her claim to past overtime wages as part of a settlement of a bona fide dispute over those wages. The releases barred the employees from proceeding with their lawsuit against the employer.

Watkins v. Wachovia Corp. (2009) 172 Cal.App.4th 1576. Labor Code section 206.5 prohibits employers from coercing settlements by withholding wages concededly due. Wages are not

considered due and unreleaseable under Section 206.5 unless they are required to be paid under Section 206. When a bona fide dispute exists, the disputed amounts are not due, and the bona fide dispute can be voluntarily settled with a release and a payment – even if the payment is for an amount less than the total wages claimed by the employee. However, the employer cannot “pick off” the lead plaintiff or class representative by settling with that individual, and then attempting to obtain dismissal of the class action.

Wage and Hour Issues

Class Action Requirements

Arias v. Superior Court (2009) 46 Cal.4th 969. The Supreme Court of California held that an employee who, on behalf of himself and others, sues an employer under the unfair competition law (Business & Professions Code §17200 et seq.), for Labor Code violations must satisfy class action requirements, but that those requirements need not be met when an employee’s representative action against an employer is seeking civil penalties under the Labor Code Private Attorney General Act of 2004 (“PAGA”) (Labor Code §2698 et seq.). Plaintiff alleged violations of the Labor Code on behalf of himself, and on behalf of other current and former employees of the defendant employer. The court found that a judgment in a representative action brought by an aggrieved employee under PAGA is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.

Individual Liability for Managers

Boucher v. Shaw (9th Cir. 2009) 572 F.3d 1087. Plaintiffs’ employer filed for bankruptcy protection and discharged its employees. The managers were the company’s owners and officers. Plaintiffs attempted to recover their unpaid wages from the individual managers, claiming they had individual liability under the federal Fair Labor Standards Act (FLSA). The Ninth Circuit held that managers might be liable under the FLSA, and that courts must look at the “economic realities” of the business to determine whether managers are actually “employers” under that law’s definition. The *Boucher* holding contrasts with the 2005 California Supreme Court case (*Reynolds v. Bement*), which held that individual managers are not liable for unpaid wages under the California Labor Code (except in very limited circumstances). There is now a conflict between state and federal law on this issue.

Employee Classification

Campbell v. PriceWaterhouseCoopers, LLP (2009) 602 F.Supp.2d 1163. Plaintiffs filed a class action lawsuit against PWC, alleging that PWC misclassified them as exempt employees under California law, failed to pay them overtime, and failed to provide other benefits that an employer must provide to non-exempt employees. Plaintiffs were accounting associates who were not licensed as Certified Public Accountants (CPAs). The unlicensed accounting associates assisted licensed CPAs. Their primary obligation was to verify financial statement items by obtaining and reviewing their underlying documentation. The parties agreed that the question of employee classification was governed by the California Industrial Welfare Commission’s (IWC) Wage Order No. 4-2001, covering “Professional, Technical, Clerical, Mechanical and Similar Occupations,” published at Cal. Code Regs., title 8, §11040. In determining that the unlicensed accounting associates were not properly classified as exempt, the Court focused on two issues:

(1) the degree of supervision over the unlicensed accounting associates; and (2) whether the unlicensed accounting associates perform work directly related to the internal administration of PWC. The court concluded that the unlicensed accounting associates did not qualify as exempt under the professional exemption, the executive exemption, or the administrative exemption. The plaintiff's accounting work was necessarily subject to more than general supervision, and therefore non-exempt.

Vacation

Owen v. Macy's (2009) 175 Cal.App.4th 462. Macy's closed the store where plaintiff worked, and her employment was terminated. Macy's policy regarding vacation was that employees did not begin to accrue vacation until after they had completed six months of employment, that the vacation year ran from May 1 through April 30, and that vacation was earned in the same year that it accrued and vested. Plaintiff claimed that she was unlawfully denied vacation pay, arguing that an employer must offer vacation benefits from the first day of employment. The trial court and the Court of Appeals rejected her contentions, because state law does not dictate the point at which a company must begin to provide vacation benefits. The employer is free to determine when an employee becomes eligible for vacation benefits so long as eligibility and vesting occur simultaneously. Thus, a "waiting period" for vacation benefits to accrue and vest is permissible. Courts will uphold an employer's vacation policy as it is written, not how the employee would prefer it to be written.

Overtime

Marin v. Costco Wholesale Corp. (2008) 169 Cal.App.4th 804. Costco paid a formulaic bonus, based on paid hours, to long-term hourly employees. Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his or her regular hourly rate of pay and overtime compensation. Costco calculated the overtime owed on the bonus by dividing the employee's maximum base bonus by the minimum number of paid hours required to achieve that maximum bonus (1,000) to determine a regular hourly bonus rate, and then by multiplying the number of overtime hours worked during the bonus period by one-half of that regular bonus rate. The class of employees contended that Costco should have calculated the regular bonus rate by dividing the base bonus by the number of straight time hours worked then multiplied the number of overtime hours worked by 1.5 times the regular bonus rate. The Court of Appeal held that the employer's formula for computing overtime did not violate California law because no court decision, statute or regulation governed bonus overtime, the Division of Labor Standards Enforcement (DLSE)'s 2002 Enforcement Policies and Interpretations Manual did not have the force of law, and no opinion letters on point had been issued by the DLSE.

Sullivan v. Oracle Corp. (9th Cir. 2008) 547 F.3d 1177. Employees sued Oracle under section 510 of the California Labor Code, claiming they were wrongfully classified as exempt, and that Oracle failed to pay overtime for work performed throughout the United States. The employees were "instructors" who trained customers to use Oracle software in California, Colorado and Arizona. The Ninth Circuit held that California's Labor Code applies to work performed in California by nonresidents of California. However, California law did not apply to nonresidents of California where the allegedly unlawful behavior occurred outside California. **Note:** on

February 17, 2009, the Ninth Circuit withdrew its published opinion and requested that the California Supreme Court issue a ruling.

On-Call Time

Gomez v. Lincare, Inc. (2009) 173 Cal.App.4th 508. Lincare, Inc. provided respiratory services and medical equipment setup to patients in their homes. Plaintiffs were service representatives for Lincare whose job duties included driving vans containing liquid oxygen and compressed oxygen, which are defined by the federal government as hazardous materials. In addition to their regular eight-hour workdays, plaintiffs regularly worked on call in the evenings and on weekends. Plaintiffs sued Lincare to recover unpaid compensation for the on-call time spent resolving customer questions by phone, and for all the time they were on call, even when not responding to customer calls. Plaintiffs also claimed they were entitled to overtime for all hours worked in excess of eight hours per day or 40 hours per week. The Court of Appeal held that the federal motor carrier exemption exempted the drivers from state overtime laws, but only on the days they actually transported hazardous materials for at least part of the day. The drivers were entitled to overtime incurred on any day during which they performed duties other than driving for the entire workday. Plaintiffs were not entitled to compensation for their on-call time because the on-call restrictions (wearing a beeper, responding to phone calls within 30 minutes, reporting to a patient's home within 2 hours) were not unduly restrictive.

Employer Liability for Employee Injury when “Coming and Going”

Jeewarat v. Warner Bros. Entertainment, Inc. (2009) 177 Cal.App.4th 427. A Warner Bros. employee was returning home from a three-day business conference and was driving along his regular commute route when he was involved in a car accident which injured non-employees. The non-employees sued the employer. Warner Bros. argued that under the “coming and going” rule, it as the employer could not be subject to vicarious liability for accidents occurring during the employee's commute to and from work. The Court of Appeal stated that the employee was engaged in business for the employer during the entire business trip, including time he was driving back to his home after the conference. The Court applied the “special errand doctrine,” which states that when an employee is engaged in a special errand on behalf of the employer, the employee is acting within the course and scope of his employment for the entire time he is engaged in the errand, including travel from the place of employment to the errand and back. In this case, because the employee drove straight home from the airport and did not make any personal stops, he was engaged in a special errand for the employer until the time he reached his home.

Arbitrating Wage Claims

Sonic-Calabasas A, Inc. v. Moreno (2009) 174 Cal.App.4th 546. At issue was whether an admittedly valid agreement to arbitrate between employer and employee could be enforced to dismiss the employee's administrative wage claim against the employer for unpaid vacation. The court held that the employee had waived his right to the administrative proceeding before the Division of Labor Standards Enforcement (DLSE) when he signed the arbitration agreement. An employee has two options for prosecuting wage claims – filing an administrative charge with the DLSE, or civil litigation (which, in this case, meant proceeding via arbitration). **Note:** On September 9, 2009, the California Supreme Court granted Moreno's petition for review.

Waiting Time Penalties

Pineda v. Bank of America, N.A. (2009) 170 Cal.App.4th 388. A former employee sued Bank of America, claiming that the employer's failure to pay his final wages immediately upon termination constituted an unfair business practice under California's unfair competition law, Business & Professions Code §17200 et seq., and sought to recover the waiting time penalties prescribed by California Labor Code §210 as restitution. Both the trial court and the Court of Appeal rejected the employee's claim, stating that penalties under §203 could not be recovered as restitution. There is no automatic right to the penalties – an employee had to first bring an enforcement action and establish that the employer willfully failed to pay final wages. **Note:** On April 22, 2009, the California Supreme Court granted Pineda's petition for review.

Tip Pooling

Lu v. Hawaiian Gardens (2009) 170 Cal.App.4th 466. Dealers at the Hawaiian Gardens casino were required by the employer's tip pool policy to segregate 15 to 20 percent of the tips they received at the close of each shift. The casino then deposited the tip pool money in a tip pool bank account for later distribution to designated employees who provide service to customers, such as chip runners, poker tournament coordinators, poker retention coordinators, hosts, customer service representatives, and concierges. The tip pool policy specifically forbids employers, managers, or supervisors to receive money from the tip pool. This case held that the practice of tip pooling is permissible in the casino context, just as it is in the restaurant industry. The Court held, however, that the employees did not have a private right of action under Labor Code section 351, which provides that employers or managers may not take any tips or wages left for an employees. The employees had to look to the Labor Commissioner to sue on their behalf. **Note:** The California Supreme Court is expected to hear oral argument in this case in 2010.

Grodensky v. Artichoke Joe's Casino (2009) 171 Cal.App.4th 1399. Artichoke Joe's Casino implemented a mandatory tip pooling policy for its dealers. Grodensky filed a class action lawsuit and claimed that the casino had violated Labor Code section 351, because shift managers were agents of the employer who should not share in the employees' tips. Artichoke Joe's claimed that Labor Code section 351 did not provide employees with a private right of action. The Court of Appeal held that employees do have a private right of action under Labor Code section 351 (in contrast to the holding in *Lu v. Hawaiian Gardens*), and that requiring the dealers to tip out the shift managers was illegal conduct. **Note:** The issue of whether employees have a private right of action under Labor Code section 351 is pending before the California Supreme Court. The California Supreme Court granted hearing in *Grodensky* but placed it on hold.

Budrow v. Dave & Buster's of California, Inc. (2009) 171 Cal.App.4th 875. Budrow filed a class action lawsuit against Dave & Buster's, claiming that their tipping policy, which required that servers contribute tips equal to one percent of their gross sales, to bartenders and other employees, violated Labor Code section 351, which prohibits an employer or manager from sharing in employee tip pools. Budrow claimed that section 351 limited who may share in tip pools to persons who provide "direct" table service. The Court of Appeal found that Dave & Buster's tip pooling policy did not violate section 351 by including the bartender or individuals who did not provide "direct" table service, because it did not result in managers or employers sharing in the employees' tips.

Etheridge v. Reins International California, Inc. (2009) 171 Cal.App.4th 908. Defendant Reins operated several restaurants in California. Etheridge and other servers brought a complaint on behalf of a class of servers employed by Reins. The plaintiffs challenged the legality of Reins' mandatory tip-pooling arrangement which required servers, as a condition of their employment, to share tips with certain other employees at the restaurant, including those who do not provide "direct table service." The Court of Appeal affirmed the lower court's ruling that even those employees who do not provide direct table service may share in tip pools so long as they are not managers or supervisors.

Chau v. Starbucks (2009) 174 Cal.App.4th 688. The Court of Appeal reversed the lower court's award of a \$86.7 million verdict to Starbucks baristas. Each customer at the stores was served by a customer service team, rather than by an individual employee. The team consisted of one or more entry-level employees and one or more shift supervisors, who rotated jobs throughout the day and spent more of their time performing the same service tasks. The money in the collective tip box was divided among the entry-level employees and the shift supervisors. The Court of Appeals concluded that Starbucks did not violate Labor Code section 351 because even if the shift supervisors were agents of the employer, they were allowed to keep tips that were received for their own services. Section 351 did not prohibit the employer from allowing each shift supervisor from retaining his or her own portion of a collective tip that was intended for the entire team of service employees, including the shift supervisors.

Meal Periods and Rest Breaks

Naranjo v. Spectrum Security Systems, Inc. (2009) 172 Cal.App.4th 654. Naranjo worked as a detention officer for Spectrum, which provided security services in holding facilities and detention centers throughout Los Angeles County, under a contract with the federal Immigration and Customs Enforcement (ICE) agency. The terms of Spectrum's contract with ICE relied on wage and fringe benefit determinations by the Secretary of the U.S. Department of Labor pursuant to the Service Contract Act of 1965 (SCA), 41 U.S.C. §351 *et seq.* Naranjo sued his employer under the California Labor Code for penalties for failure to provide meal or rest breaks (§226.7), for a late payment penalty (§203), and for failure to provide itemized wage statements (§226). The Court of Appeal held that the SCA, which does not provide for a private right of action for the employee, did not preempt the employee's right to pursue claims under the Labor Code. The employer was a federal contractor, and although the federal contract governed the compensation terms, federal law did not bar the employee's Labor Code claims.

Brinker Restaurant Corporation v. Superior Court of San Diego (Hohnbaum) (2008) 165 Cal.App.4th 25. The court reached several conclusions favorable to employers, particularly those in the restaurant and hotel industries, on the issue of meal periods and rest breaks. The court held that employers have some flexibility in scheduling meal periods and rest breaks, and that while employers must provide meal periods, they are not necessarily liable if the employees do not actually take them. For reasons that are particularly beneficial to employers of multiple work-site establishments, the court denied class certification.

Brinker operates 137 restaurants in California, including Chili's Grill and Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. In 2006, Brinker was sued by a purported class of employees for failing to provide meal periods and rest breaks under California Labor Code section 226.7.

The contentions of the parties in this case focused on key issues in California’s meal and rest break law. Plaintiffs claimed that Brinker used an improper system of “early lunching” – requiring employees to take their first meal period shortly after their shifts began, then requiring employees to work an additional five to nine hours without a second meal break. Plaintiffs also claimed they were required to work while off the clock during meal periods, and that Brinker management “shaved” or altered employee time cards. Plaintiffs further argued that employers have an affirmative duty to ensure that employees receive meal periods, and that Brinker could not meet this obligation simply by making meal periods available. Brinker argued that if an employee worked more than five hours but less than ten, Brinker was only required to give that employee one meal period at some time during the shift, and that Brinker was not required to give employees one meal period every five hours, as Plaintiffs were suggesting.

Labor Code section 512(a) plainly provides that a California employer has a duty to make a first 30-minute meal period available to an hourly employee who is permitted to work more than five hours per day unless (1) the total work period per day is six hours or less; and (2) both the employer and the employee agree by mutual consent that the employee waives the meal period. Section 512(a) also states that an employer must make a second 30-minute meal period available to an hourly employee who worked more than 10 hours per day, unless (1) the total hours worked per day is 12 or less; and (2) the first meal period was not waived.

Plaintiffs contended that, where hourly employees take their first meal period approximately one hour into their shift, they are entitled to a second meal period five hours after they returned to work from the first meal period. The court disagreed, and found that employees are entitled to a first meal period for every work period of more than five hours per day, not a meal period for every five hours worked. Further, the wage order contains no restriction on the timing of meal periods, so Brinker was not violating the law by requiring “early lunching” by some of its employees.

Following IWC Wage Order 5-2001, which applies to the public housekeeping industry, and the applicable Regulation 11050(12)(A), the court found that the plain language of the wage order, which requires an employer to permit a 10-minute rest period “per four hours of time worked or major fraction thereof,” does not mean that a rest period must be given every 3.5 hours. Plaintiffs asserted that a rest break was required when employees work any time over the midpoint of each four-hour block of time. The *Brinker* court rejected this interpretation. The appropriate number of breaks is based on total hours worked daily. It is only when an employee is scheduled for a shift longer than 3.5 hours, but less than four hours that he or she is entitled to take a rest break before the four-hour mark.

The *Brinker* court also found that Regulation 11050(12)(A) does not require employers to authorize and permit a first rest break before the first scheduled meal period. The regulation is silent as to the timing of the first rest break, vis-à-vis the first scheduled meal period. The regulation only states that rest breaks, “in so far as is practicable, shall be in the middle of each work period.” The court noted that the language of the regulation is clearly intended to afford the employer some discretion not to have rest periods in the middle of a work period if, because of the nature of the work or the circumstances of a particular employee – such as a restaurant server whose busiest time is likely at mid-shift – it is not “practicable.”

Brinker differs from prior cases involving meal periods and rest breaks. In *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, the court found that an employer's obligation to provide meal breaks was only satisfied if employers ensured that workers are actually relieved of all duties during those times. The obligation was not satisfied by an employer's assumption that employees took their meal periods. However, in *Cicairos* the employees were truck drivers, and the employers had computerized systems tracking each driver's speed, starts and stops, and time spent driving. In short, the employer knew that the drivers were driving while eating, and did not take steps to address the situation. The *Brinker* court noted that employers cannot police thousands of employees working multiple shifts and force them to take meal breaks. An employer's obligation is to make a meal period available to its employees, and not to dissuade, deter, or discourage the employees from taking their meal periods, but not to ensure that employees take them.

In *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, the California Supreme Court found the employer liable for one hour of pay at the employee's regular rate per each meal period and rest break during which Murphy, a retail store manager, was not relieved of his duties. The focus of that case was whether the premiums constituted wages (which carry a three-year statute of limitations), or penalties (which have a one-year statute of limitations). The court found that the premiums were wages and Murphy was entitled to seek three years' worth of premiums. *Brinker* focused on whether the employer has a duty to ensure that its employees take their meal breaks, and stated that while the employer has an affirmative duty to ensure that a meal period is made available, and that the employee is relieved of his or her duties during that time, the employer should not have to pay additional premiums if an employee voluntarily chooses not to take the meal period or to take a shortened one.

The court in *Sav-On Drug Stores, Inc. v. Superior Court of Los Angeles County (Rocher)* (2003) 113 Cal.App.4th 1152, held that issues such as employee classification and unpaid overtime could be properly asserted as class actions because the question was one of common or general interest, and issues of the employer's policies and practices and operational standardization were likely to predominate a class proceeding over any individualized calculation of actual overtime hours owed. In contrast, the *Brinker* court denied class certification, stating that the individualized inquiry that would be required by the nature of the plaintiffs' claims and the circumstances of the parties were not amenable to class treatment. *Brinker* had explained that there was no uniform meal or rest break policy because it was different for servers, hosts and bartenders than for cooks and dishwashers, and the policy differed for lunch and dinner shifts, and between restaurants and locations. The court said these circumstances would result in hundreds of "mini-trials," and the claims were not suitable for class determination.

Brinker is good news for California employers who have been struggling with how to force an employee to take meal periods and rest breaks, or whose operations are such that requiring a mid-shift meal period or rest break is very difficult or impossible. **Note:** On August 29, 2008, the California Supreme Court granted a hearing to review *Brinker*. In July 2008, the DLSE sent a letter to its deputy labor commissioners instructing them to follow the holding in *Brinker*. Further, the DLSE has written to the *Brinker* court urging it to resolve this matter in a published opinion. *Brinker* should be decided in 2010.

For more information, please contact the Berliner Cohen Employment Group, 408.286.5800, or email to:

Roberta S. Hayashi, roberta.hayashi@berliner.com

Christine H. Long, christine.long@berliner.com

Kara L. Arguello, kara.arguello@berliner.com

Kate Wilson, kate.wilson@berliner.com

Lisa Gorecki, lisa.gorecki@berliner.com



EMPLOYMENT LAW AUDITS

Whether they employ five or five hundred people, employers need to insure that their policies and procedures comply with the law. Many employers use generic personnel policies that were written for larger workplaces, other industries, or even different states. However, California's strict employment laws change annually, vary depending upon the number of employees, and sometimes conflict with Federal law, making it all too easy for a California employer to run afoul of the law unintentionally. Even innocent mistakes can cost an employer tens of thousands of dollars.

At Berliner Cohen, we can conduct an employment law audit specifically for you.

We work with company representatives in charge of operations, human resources, benefits, and payroll issues. Our goal is to advise you about whether your policies and procedures comply with State and Federal laws and regulations; are appropriate for your workplace; and effectively communicate to employees and supervisors the legal requirements of your business.

Berliner Cohen's Audit begins with the company representatives completing a questionnaire regarding the business and gathering documents relating to the employment process, from hiring to termination. One of our experienced employment lawyers will then interview key company representatives who handle the employment decisions. It is during this interview that we will explore unwritten company practices, and discuss the specifics of your current operations and workplace. After we have completed our preliminary review of the company's policies and procedures, we will then discuss with you what improvements and changes should be made to your employment policies and practices.

Berliner Cohen's Audit can assist you in evaluating these key management areas:

- Sexual Harassment and Anti-Discrimination Policies and Training
- Non-Compete Agreements/Proprietary Information Agreements
- Wage & Hour Laws, including meals and rest breaks, overtime and employee withholdings/paycheck stub requirements
- At-Will Employment
- Performance Management and Discipline
- Working with Disabled Employees
- Employee Classification (Employee vs. Independent Contractors; Exempt or Non-Exempt)
- Employee Pay (salary, commission, piece rate)
- Leave Policies
- State and Federal Leave Laws

Employment law audits identify and correct problems before they become litigation. While there is no guarantee that an aggrieved employee will not sue, the company is well served by an employment law audit that roots out problems and establishes the framework for a strong defense.

For more information about employment law audits, employee handbooks or any employment law concerns, please contact Roberta Hayashi or Christine Long at Berliner Cohen, 408.286.5800.



EMPLOYMENT LAW & LITIGATION

Berliner Cohen's employment law attorneys provide expert representation, preventative advice, guidelines and workplace training to all sizes of businesses in diverse industries. The employment attorneys respond effectively and efficiently to the needs of each client, whether it is an individual employer, a start-up enterprise, a corporation or a public entity. The group's attorneys offer preventative advice, counsel and training on a full range of legal issues affecting the workplace, including harassment and discrimination, wrongful discharge, wage and hour issues, unfair competition and trade secrets. When disputes occur, Berliner Cohen's attorneys utilize their many years of experience to represent employers and managers in State and Federal litigation, trials and administrative agency proceedings.

California employers have a difficult job navigating the ever-changing maze of employment laws. Berliner Cohen delivers the tools employers need in order to keep abreast of the changing laws and to implement proven employment practices that can reduce legal risks, expense and burden, whether in an administrative agency investigation or litigation. These services include:

Advice and counsel

The employment group is available to meet its clients' needs for advice at every step in the employment process, from hiring through leaves of absence, reductions in force and termination. The attorneys draft and update employment agreements, offer letters, proprietary information agreements, employee handbooks and policy manuals. Berliner Cohen's employment attorneys have also assisted clients in investigating allegations of harassment and discrimination in the workplace.

Litigation

Berliner Cohen's employment trial attorneys have represented clients in federal and state courts throughout California. The attorneys in the group have compiled an impressive record of obtaining favorable court rulings on motions to dismiss and for summary judgment, jury trial verdicts, and appeals. Berliner Cohen's employment group has successfully represented employers in many types of cases, including discrimination, wrongful termination, individual and class action wage and hour claims, recovery of misappropriated information and funds, and civil rights litigation.

Representative cases

- *Griffith v. Loral Space & Range Systems, Inc.*, U.S. District Court, Eastern District of California
Obtained defense summary judgment on claims of breach of contract; obtained jury verdict on behalf of defendant on remaining claim of race discrimination following a five day jury trial

Employment Law

Page 2

- *Allivato v. New Directions Sign Service and Cindy Chavez*, Santa Clara County Superior Court.
Obtained jury verdict following a five-day trial on behalf of an employer against a former employee for unfair competition and in favor of the employer on a cross-complaint for wrongful termination
- *Abbate v. Espinosa, et al.*, County of Santa Clara (Department of Corrections), Santa Clara County Superior Court.
Obtained judgment of dismissal that was upheld on appeal (unpublished) in favor of County of Santa Clara and three County employees on claims of deprivation of due process and defamation brought by an employee who had been disciplined by the employer for sexual harassment of his female co-employees
- *Curtis v. ESL Inc. and TRW Inc.*, Santa Clara County Superior Court.
Obtained summary judgment (upheld on appeal in an unpublished decision) for employer and manager on employee's claim of defamation
- *Piper v. City of San Jose*, Santa Clara County Superior Court.
Represented group of twelve captains in the San Jose Fire Department who intervened in a "reverse" discrimination case to uphold the validity of the City of San Jose's promotional examination; successfully obtained judgment following close of plaintiff's case after five days of court trial
- *Salvia v. Mariani's Inn and Restaurant*
Represented defendant in a wage and employee classification matter; Plaintiff was classified as an exempt employee and contended that he did not meet the supervisory exemption and therefore was entitled to overtime wages; Defendant introduced evidence upon cross-examination of plaintiff witnesses to refute plaintiff's claim that he was non-exempt; case settled within the first week of trial
- Represented various clients in DLSE claims for unpaid overtime and wages; matters resolved by confidential settlement
- Represented various clients in State and Federal court discrimination, harassment and retaliation cases; matters resolved by confidential settlement
- Represented clients in investigations by California State and Federal agencies, including Cal-OSHA, DFEH, EEOC and U.S. Department of Labor

Training

Berliner Cohen's employment attorneys believe in taking a proactive approach to workplace problems, and frequently help clients avoid problems through measures such as educational seminars and training. Qualified attorneys can provide California state-required sexual harassment training for managers and employees, either at the Firm's offices or at the client's workplace.

Employment Law

Page 3

Updates on Changes to California Law. Changes in California law occur not only annually, but also monthly, as cases are decided and laws are passed. Employers can inadvertently become subject to investigation, penalty or litigation if they are not kept apprised of these changes. Berliner Cohen posts employment law updates on its website and sends email notification to clients.

Employment Law Trainings. Berliner Cohen also provides for employers an annual update seminar on the legal changes affecting employers in January of each year. In addition, the "Breakfast with Berliner" series provides human resources or members of management with information on timely and significant topics and developments in employment law. Recent briefings have focused on worker classification, workplace investigation, compliance with sexual harassment, disability and discrimination laws, meal and rest periods, investigations and avoiding payroll pitfalls. These breakfast briefings are presented by attorneys who have experience litigating these issues and are designed to provide the Human Resource Manager or responsible individual with current information on the laws governing the work place, and how to conduct business in accordance with the law.

Sexual Harassment Prevention Training. California law (AB 1825) mandates that all employers with 50 or more employees provide sexual harassment prevention training for their managers and/or supervisors every two years. As AB 1825 became effective in 2005, most California employers designated 2007, and now 2009 as "training years." Berliner Cohen can provide this training on site (employer's facility). In addition, it hosts throughout the year compliance trainings in its offices, so employers who need to have employees make up a training (i.e. new hire) or who have just a few managers who need to attend need not incur the expense of an on-site training.

Sexual harassment prevention training is important and beneficial for all employers because federal and state laws make effective training part of an employer's defense should a claim be made against the employer. Berliner Cohen's training is designed to provide attendees with tools and skills to avoid harassment in the workplace and to promote high quality work environments, while complying with the requirements of AB1825.

For more information, please contact Roberta Hayashi at roberta.hayashi@berliner.com.

EMPLOYMENT LAW



Roberta S. Hayashi has over twenty-five years experience representing and advising employers in employment and business litigation with extensive state and federal court trial experience in wrongful termination, discrimination, and misappropriation of trade secrets and proprietary information actions. She has received numerous honors: *The Daily Journal's* "Top 50 Women Litigators" in California; the Santa Clara County Bar Association's 2007 Salsman Award; the *Silicon Valley/San Jose Business Journal's* 2009 Women of Influence in Silicon Valley.



Christine H. Long represents and counsels clients on employment issues and disputes, real estate matters, and contract claims. She advises clients ranging from Santa Clara Valley's oldest businesses and families to emerging technology, real estate, hospitality, medical and professional, local service and retail businesses. Ms. Long has litigated disputes covering the entire range of the employment relationship from hiring to post-termination competition.



Kara L. Arguello represents individuals and businesses in employment and general litigation, including wrongful termination, unfair competition, misappropriation of trade secrets, and discrimination. Ms. Arguello has experience litigating and representing employers before the Labor Commissioner on issues including unpaid overtime and vacation. She advises and counsels on employee classification, leaves of absence, wage and hour law, and reduction in force.



Kate Wilson represents companies on employment matters at administrative hearings, fact-finding conferences, and settlement conferences. She assists clients in drafting personnel policies, employee handbooks, settlement agreements, and separation and release agreements. Ms. Wilson provides training in workforce sexual harassment, discrimination and retaliation, and conducts audits of workplace policies and procedures.



Lisa L. Gorecki is a member of Berliner Cohen's business litigation group and employment law group. She focuses on representation and counsel of employers in labor and employment disputes and representation of businesses and individuals in a variety of other areas, including contract, construction, and real property related disputes.