

# BERLINER COHEN

## 2008 Employer Update

### I. Legislative Update<sup>1</sup>

#### A. Minimum Wage Increase

The federal minimum wage will be increased to \$5.85 per hour effective July 24, 2007. The rate will go to \$6.55 on July 24, 2008, and then to \$7.25 on July 24, 2009. In California, however, the minimum wage will climb to \$8.00 per hour on January 1, 2008. Employers must pay employees who work in San Francisco at least \$9.36 per hour under that City and County's minimum wage law.

#### B. Paycheck Information

Effective January 1, 2008, California employers must include no more than the last four digits of employees' Social Security numbers or any other personal identification numbers on the paycheck. California Labor Code §226.

#### C. Leave for Spouses of Deployed Soldiers

Effective in 2007, AB 392 requires employers with 25 or more employees to grant up to 10 days of unpaid leave to qualified employees when their soldier spouse is on leave from deployment to a combat zone during a period of military conflict. Qualified employees are those who work an average of 20 or more hours per week for the employer and are married to a member of the U.S. Armed Forces, National Guard or reserves. The employee must take leave only when the soldier-spouse is on leave, and must provide notice of the planned absence within two business days of receiving official notice that the soldier-spouse will be on leave.

#### D. New I-9 Forms

Beginning December 26, 2007, all employers are required to use the revised I-9 form for each new employee hired in the United States. The new form can be accessed online at <http://www.uscis.gov/files/form/i-9.pdf>. The most significant change is the elimination of five documents from the "List of Acceptable Documents" and the addition of one new document.

---

<sup>1</sup> These materials 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.

## **E. Eligibility to Work in the U.S.**

An amended Department of Homeland Security (“DHS”) regulation (8 CFR Part 274a) increases employer responsibility to investigate a “No-Match Letter” issued by the Social Security Administration (“SSA”) that an employee’s name and social security number do not match the SSA’s records or a written notice from the DHS that there is a discrepancy in the documents presented to complete the Form I-9. **On the eve of the original effective date, the AFL-CIO obtained a court order delaying the implementation of this regulation until after a court hearing in San Francisco. On October 10, 2007, Judge Charles Breyer granted a preliminary injunction because of “serious questions” about the DHS’s new rules, and noted the greater compliance costs for employers and the termination risks for employees. On December 14, 2007, the federal court granted the DHS’s motion for an order staying the proceedings pending new rule making, and set a status conference for March 28, 2008. The DHS has stated that it will issue a revised rule to address the court’s concerns, and urges employers to follow the procedures provided in the current rule as they provide a safe harbor. The DHS has also stated it will appeal to the Ninth Circuit.**

The regulation in dispute contains step-by-step actions that the DHS will consider a reasonable response to receiving a “No-Match Letter” and which, if taken, will protect the employer against claims that it constructively knew it was employing an alien who is not authorized to work in the United States. If, however, the discrepancy in the employer’s documentation is not resolved after investigation, the regulations leave the employer with little choice but to terminate the employee.

As currently written, the regulation applies if an employer receives an “Employer Correction Request,” commonly referred to as a “No-Match Letter,” from the SSA informing the employer that an employee’s name and/or social security number does not match the official records, or if an employer receives written notice from the DHS that the immigration status document or employment authorization document presented in completing Form I-9 was assigned to another person, or that there is no agency record that the document was assigned to anyone. If you receive such a notice from the SSA or the DHS, you should take the following steps:

1. Promptly check your records to determine whether the discrepancy results from a typographical, transcription or other clerical error in your records or your communication to the SSA or DHS. If such an error exists, you should correct your records, notify the relevant agencies, and verify with the relevant agencies that the information in your files now matches the agency’s records. You should make a written record of the manner, date, and time of the verification with the relevant agencies and keep it in your files. Your actions will be considered reasonably prompt if you act within 30 days of receipt of the No-Match Letter.

2. If you do not find a clerical error, you should promptly request that the employee in question confirm that your records are correct.

If the employee confirms that your records are not correct, you should correct your records, notify the relevant agencies, and verify that the corrected records match those of the relevant agency.

If the employee tells you that your records are correct, you should ask the employee to pursue the matter personally with the relevant agency, such as by visiting a local SSA office, bringing original documents or certified copies required by SSA, which might include documents that prove age, identity, citizenship or alien status, or other relevant documents, such as a proof of name change. You should make such a request of the employee within 30 days of receipt of the No-Match Letter, and document your request.

In either of the scenarios described in this section 2, a discrepancy will be considered resolved only if the employer verifies with the appropriate agency that the employee's name matches the number assigned to that name in the SSA's records, or that the DHS records indicate that the immigration status document or employment authorization document was, in fact, assigned to the employee. You should make a record of the manner, date and time of verification.

3. If the discrepancy is not resolved within 90 days of receipt of the No-Match Letter, and if the employee's identity and work authorization cannot be verified using a reasonable verification procedure, such as that described above, then you must choose between terminating the employee, or risking a DHS finding that you had constructive knowledge that the employee was an unauthorized alien. Under the DHS regulation currently in dispute, continuing to employ an unauthorized alien after you have such knowledge violates Section 274A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1324a(a)(1) ("it is unlawful for a person or other entity, after hiring an alien for employment... to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.").

For purposes of verifying employment authorization or identity or both, you cannot rely upon a document which contains the social security number or alien number that is the subject of the No-Match Letter, nor a receipt for an application for a replacement of such document, nor any document without a photograph.

The DHS regulation specifically prohibits reliance on a foreign accent or an employee's foreign appearance, to infer that an employee may be unlawfully working in the United States. You must apply these procedures uniformly to all employees who have unresolved No-Match Letters. The regulation provides that employers who follow the safe-harbor procedures set forth in the regulation uniformly and without regard to race, perceived national origin or citizenship status, will not be found liable for unlawful discrimination.

If you complete the procedure described in Section 2 above and the employee is verified, then even if the employee is not actually authorized to work in the United States, you can avoid a claim that you had *constructive* knowledge of his or her unauthorized status based on receipt of the No-Match Letter. However, the "safe harbor" provisions do not preclude the DHS from finding that you *actually* knew that the employee was an

unauthorized alien. If you had actual knowledge that one of your employees (or an employee of an independent contractor or subcontractor performing work for you) was an unauthorized alien, you cannot avoid liability by following the procedures described above.

#### **F. EEOC Guidelines on Caretakers and Title VII**

##### **EEOC Enforcement Guideline: “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.”**

In May 2007, the Equal Employment Opportunity Commission (“EEOC”) released an Enforcement Guideline entitled “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities” in which the EEOC identifies circumstances where employers potentially discriminate against workers with caregiving responsibilities in violation of existing laws such as Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with Disabilities Act (“ADA”). Although the EEOC states that it is not creating a new protected category for workers with caregiving responsibilities, the Enforcement Guidance includes information and examples regarding: unlawful disparate treatment of caregivers; pregnancy discrimination; discrimination against male caregivers; discrimination against women of color; unlawful caregiver stereotyping under the ADA; and hostile work environment.

According to the Enforcement Guidance, employers may run afoul of Title VII and/or ADA regulations when an employee caring for others such as children, parents, a spouse or a disabled family member is treated differently because of his or her gender or any other protected characteristic. Further, an employer that makes a decision based on gender or other stereotypes (such as denying a promotion to a working mother that could significantly increase her hours because the employer believes that she should spend more time with her family; making assumptions about a pregnant worker’s commitment to her job or her ability to perform certain physical tasks; or making assumptions about a worker’s ability to perform job duties while also providing care to another individual with a disability) violates Title VII and/or the ADA, even if it is benevolent in nature. Finally, the Enforcement Guidance reminds employers that they can be liable for a hostile work environment if an employee with caregiving responsibilities is subjected to severe or pervasive harassment and that they cannot retaliate against employees who engage in statutorily protected activities.

#### **G. AB 1825 Sexual Harassment Training**

The EEOC finalized sexual harassment training regulations on July 18, 2007. Effective August 17, 2007, these regulations can be found at 2 CCR 7288.0. All supervisors located in California at companies employing 50 or more employees who received sexual harassment training no later than December 31, 2005 must have completed training again by December 31, 2007.

## **II. Case Law Update**

### **A. Meal & Rest Breaks**

*Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4<sup>th</sup> 1094. Murphy was a Kenneth Cole store manager who asserted wage claims for unpaid overtime and waiting time penalties, and also claimed that he was owed a premium for every meal and rest break he was required to work through during his tenure at the store. The California Supreme Court resolved a split in lower courts regarding whether the meal and rest break premium (one hour's pay at the regular rate for each missed meal or rest break) constitutes a "wage" or a "penalty." The distinction is important because if the premium is a penalty, the employee's recovery is limited to one year; while if it is a wage, the employee may seek three years' worth of premiums and also seek civil penalties under the Private Attorney General Act ("PAGA"). The California Supreme Court held that such premiums are a wage and subject to the longer statute of limitations.

**Case to Watch in 2008:** *Brinker Restaurant Corp. v. Superior Court* (4<sup>th</sup> DCA 2007) (No. D04931). The Fourth District Court of Appeal is reconsidering and will resissue its decision in this case involving a class action against the operator of several chain restaurants such as Chili's Grill & Bar and Maggiano's Little Italy. In its original decision, the Court had held that the employer's practice of requiring employees to take "early lunches" just an hour after starting work and then requiring them to work the rest of their shift (often more than five hours) was permissible, so long as the employee is given a second meal break if the employee works at least ten hours. The employees had argued that a meal break was required for each five-hour block of time, regardless of how many hours are worked in the day (a "rolling five-hour" period).

### **B. Mileage Expense Reimbursement**

*Gattuso v. Harte-Hands Shoppers, Inc.* (2007) 42 Cal.4<sup>th</sup> 554 (No. S139555). The California Supreme Court held that an employer can satisfy its statutory obligation to reimburse mileage and travel expenses in any one of three ways:

- 1) the actual expense method (reimbursement of amounts spent for fuel, maintenance, repairs, insurance, etc. attributed to business use);
- 2) mileage reimbursement at the IRS rate (currently 50.5 cents per mile), plus additional actual operating expenses to the extent they exceed reimbursement under this method; or
- 3) lump-sum method based upon a fixed mileage or car allowance, a per diem or increased salary or commission.

In order to rely on the lump-sum method, the court held that the employer must show that the amount paid fully reimburses the employee for actual expenses, grossed up to consider any tax consequences to the employee; that the employer will make up any shortfall between the lump-sum and actual expenses; the employer provides some method or formula for determining the amount being paid (e.g. \$100/week); and that the itemized wage

statement segregates the lump-sum reimbursement from wages, salary or other compensation.

### **C. Employee Classification**

*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal. App. 4<sup>th</sup> 1363. In *Eicher*, the court ruled that an employee who is engaged in the core day-to-day business of an employer, who has no personal effect on the policy or general business operations of the employer, or its customers, was not an exempt employee for the purposes of overtime pay.

**Case to watch in 2008:** *Harris v. Superior Court (Liberty Mutual)* (2007) 154 Cal.App.4<sup>th</sup> 164 (No. B195121). The Court of Appeals ruled that Liberty Mutual's insurance claims adjusters were engaged predominantly in day-to-day production work, and therefore should have been considered non-exempt. Their duties included investigating and estimating claims, making coverage determinations, negotiating settlements and identifying fraud. The California Supreme Court granted review.

*Estrada v. FedEx Ground Package Systems, Inc.* (2007) 154 Cal.App.4<sup>th</sup> 1 (No. B189031). The Second District Court of Appeals held that FedEx drivers were employees, expressly deciding to ignore a written agreement identifying them as independent contractors. The court looked at the actual conduct of the parties, particularly that the drivers were totally integrated into the FedEx operation, performed work essential to its core business and had to strictly conform to company standards. Although the drivers bought their own trucks, FedEx provided funds and recommended vendors.

### **D. Employee Privacy and Civil Rights**

*U.S. v. Ziegler* (9<sup>th</sup> Cir. Mont. 2007) 474 F.3d 1184. In *Ziegler*, a Federal Court of Appeal ruled that employees have a very limited expectation of privacy in their private – even locked – workplaces. In a divided opinion, the court held that law enforcement agencies may search employee's workspaces merely upon receiving consent of officer of the company – not the consent of the employee himself. Additionally, a policy in the employee manual stating that employee computers are subject to monitoring may be sufficient to permit entry into an employee office to copy a hard drive for use in a criminal prosecution.

*Dible v. City of Chandler*, 502 F.3d 1040 (9<sup>th</sup> Cir. Ariz. 2007). Court held that a police officer's First Amendment rights to freedom of speech, privacy and association were not violated when his employment was terminated because of his off-duty conduct in maintaining and participating in a sexually explicit website with his wife. The court granted summary judgment for the City, and referred to the right to privacy and association claims as "virtually oxymoronic."

## **E. Time for Filing Discrimination Claims**

*McDonald v. Antelope Valley Community College Dist.*, (2007)151 Cal.App.4<sup>th</sup> 961. The Court of Appeals found that equitable tolling of the statute of limitations is potentially available to a plaintiff who files an administrative complaint under FEHA more than one year after an act of unlawful discrimination; and liberal construction of the section 12960(d) one-year statute of limitations is inconsistent with an absolute bar on the application of equitable tolling rules. The court also held that where the last discriminatory act alleged occurred on December 7, 1999, and there was no evidence of any discriminatory acts taking place after October 11, 2001, the December 7, 1999 conduct was outside the scope of plaintiff's October 11, 2002 DFEH complaint, because there was no continuing violation.

*Ledbetter v. Goodyear, Inc.*, 127 S.Ct. 2162 (2007). Ledbetter worked for Goodyear in Alabama for more than 20 years. Shortly before retiring, she filed a sex discrimination charge with the EEOC, claiming that over the years, she was given poor performance evaluations because she was a woman, and her pay was not increased as much as it would have been had she been fairly evaluated. She claimed that the past decisions affected her pay level so much that near the end of her tenure, she was paid significantly less than her male colleagues in violation of Title VII. Goodyear asked the court to dismiss the claims under Title VII's requirement that a complainant file a bias charge within 180 days (or 300 days in California) of the alleged discriminatory act. Goodyear argued that Ledbetter's claim was stale as to all pay decisions made more than 180 days before she filed her EEOC charge. Ledbetter argued that a new EEOC filing period was triggered each time she received a paycheck that paid her less than her male colleagues because each paycheck implemented a prior discriminatory decision made years before. She claimed she had 180 days from the date of her last paycheck to file the EEOC charge. The jury ruled in Ledbetter's favor, awarding her \$223,000 in back pay and more than \$3 million in punitive damages.

However, the Supreme Court ruled that Ledbetter's EEOC charge was untimely. The high court held that the EEOC charge period is triggered when a discrete, illegal practice occurs. A new violation does not occur, and a new charge period does not commence, because of a subsequent nondiscriminatory act that entails adverse effects resulting from past discrimination. "Current effects alone cannot breathe life into prior, uncharged discrimination."

### **Legislation After Ledbetter:**

On July 31, 2007 the House of Representatives passed H.R. 2831 EH, also known as the "Lily Ledbetter Fair Pay Act of 2007." This legislation states that "The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended." The proposed law would amend the Civil Rights Act of 1964 to state that an unlawful employment practice occurs, with respect to discrimination in compensation in violation of Title VII, (1) when a discriminatory compensation decision or other practice is adopted; (2) when an individual becomes subject to a discriminatory compensation decision or other practice; or (3) when an individual is affected by application of a discriminatory

compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Similar amendments would be made to the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act of 1990 (ADA). The effective date of all amendments would be May 28, 2007. The proposed act has been placed on calendar in the Senate.

#### **F. Defining “Adverse Employment Actions”**

*Jones v. Calif. Dept. of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367. This is one of the most recent in a number of California court of appeals decisions which address what constitutes an “adverse employment action” sufficient to support a claim of discrimination or retaliation in the wake of the California Supreme Court decision in *Yankowitz v. L’Oreal* (2005) and the U.S. Supreme Court decision in *Burlington Northern v. White* (2006). The court affirmed summary judgment for the employer where the plaintiff, an African-American female correctional officer who supervised inmates on a work crew, failed to establish the existence of triable issues of material fact supporting her claims for harassment, discrimination and retaliation under FEHA. Jones claimed that she was “treated with open hostility, disrespect and cruelty,” by male officers who also failed to respond to her calls for assistance, criticized her without reason, made false accusations about her to inmates, including misleading the inmates into believing she was responsible for a failure to timely pay the inmates, treating her inmates disparately and more harshly than other crews, and being ordered to work in an area infested with rodents when she inquired why male officers were allowed to change their work schedules. Where male officers were also given “memoranda of expectation” to improve job performance, Jones could not show a nexus between the conduct she complained of and discrimination on the basis of her race or gender. The court also found the conduct did not rise to a level sufficient to alter the “terms, conditions and privileges of employment.”

*Malais v. Los Angeles City Fire Department* (2007) 150 Cal.App.4th 350. The court of appeals held that a fire captain’s personal preference does not, in and of itself, make a transfer to special duty over his preference for “platoon work”, an “adverse employment action.”

#### **G. Sexual Harassment**

*Sanders v. Madison Square Garden*, 2007 U.S. Dist. LEXIS 65309 (“Isaiah Thomas Case”). Anucha Browne Sanders sought \$10 million in punitive damages, alleging she was sexually harassed by Knicks coach Isaiah Thomas and the owners of the team, and that she was wrongfully terminated from her job as VP for marketing. Thomas was found to have engaged in harassment but not ordered to pay any damages (Thomas admitted to using foul language but claimed he never directed it at Sanders; Sanders testified that Thomas routinely addressed her as “ho” and “bitch” in outbursts over marketing commitments, and later declared his love and suggested an “off-site” liaison). Madison Square Garden and CEO James Dolan were also found liable for harassing Sanders and ordered to pay \$11.6 million in

punitive damages, in addition to \$6 million for condoning a hostile work environment and \$2.6 million for retaliation. Madison Square Gardens has said it will appeal the judgment.

## **H. Disability Discrimination**

*Green v. State of California* (2007) 42 Cal.4<sup>th</sup> 254. In *Green*, the California Supreme Court in a 4-3 decision, overturned a \$2.6 million verdict in a disability discrimination case. At issue was whether it was the employer's burden to prove that the employee is incapable of performing his or her essential job functions and therefore not a "qualified individual" entitled to protection under state and federal disability laws, or whether it is the employee's burden to prove he or she is able to perform. The California Supreme Court sided with the employer and held that both the Americans with Disabilities Act and the California Fair Employment and Housing Act require that plaintiffs prove that they are "qualified individuals" under the statute, or, in other words, that they have the ability to perform a job's essential functions before they can prevail in a lawsuit for discrimination. The employer in this case relied on a 10-year-old medical report prepared in connection with the employee's hepatitis, for which he had since been treated, to determine that he was unable to do the job that he had been performing. If, on remand, the employee meets his burden, the employer may well have liability.

*Walton v. U.S. Marshals Service* (2007) 492 F.3d 998. In *Walton*, the Ninth Circuit rejected a security officer's claim that the defendant regarded her hearing impairment as substantially limiting her work and discharged her on that basis. The court considered both the defendant's subjective perceptions about plaintiff's impairment and evidence regarding whether the impairment was substantially limiting.

**Case to watch in 2008:** *Ross v. Raging Wire Telecommunications*. On November 6, 2007, the California Supreme Court heard argument on whether a California employer can terminate an employee who had a doctor's note permitting the medicinal use of marijuana, after the employee failed a pre-promotion drug test. The employee had worked without problem as a computer analyst for at least two years after receiving the doctor's note.

## **I. Age Discrimination - Retaliation**

*Poland v. Chertoff*, 494 F.3d 1174 (9<sup>th</sup> Cir. 2007) (Nos. 05-35508, 05-35779). The Ninth Circuit held that an employee can maintain a claim that his transfer was in retaliation for his complaints of age discrimination based on "cat's paw" liability. Poland had complained that the agent to whom he reported had made age-related comments to and about the plaintiff ("too old for career advancement," "old farts," and "get with the times"). The agent subsequently contended that the plaintiff was argumentative and disrespectful. The employer opened an inquiry into plaintiff's conduct, during which it interviewed only witnesses identified by the agent, who were selected without consulting with the Plaintiff, and in reliance on the inquiry, transferred the plaintiff. The court held that that if the purportedly "independent" investigation that led to the adverse action would not have occurred but for the biased employee or was influenced by that employee, the bias will be imputed to the employer.

*Case to watch for 2008: Sprint/United Management Co. v. Mendelsohn* U.S. Supreme Court (No. 06-1221) 127 S.Ct. 2937. The U.S. Supreme Court to decide whether testimony of non-party co-worker witnesses who were employed in different departments, had different managers and terminated at different times, but claimed they were also the victims of age discrimination, may be admitted as “me too” evidence in support of plaintiff’s claim that her selection for lay-off was the result of age bias.

**J. Non-Solicitation/No-hire Agreements**

*VL Systems, Inc. v Unisen, Inc.* (2007) 152 Cal App. 4<sup>th</sup> 708. Relying on California Business & Professions Code § 16600, the court invalidated a broad no-hire provision in a computer consulting services agreement. VL Systems, Inc. (“VLS”) is a computer software consulting company that provides technical consulting services to various companies. VLS entered into a short-term consulting contract with Star Trac Strength (“Star Trac”) in 2004. That contract provided that Star Trac would not hire any VLS employees for 12 months after the contract’s termination, or be subject to a penalty for a violation which was the equivalent of a percentage of the salary of the hired VLS employee. After completion of its consulting contract with VLS -- but within the prohibited one year period -- Star Trac hired David Rohnow, a former VLS employee who had never done any work on the Star Trac account during his brief period of employment. After Rohnow’s hire, VLS sent an invoice to Star Trac for the liquidated damage sum of 60% of Rohnow’s salary.

The Court of Appeal reversed the trial court decision in VLS’s favor, holding that a “no-hire/no solicitation clause in a consulting agreement between two companies amounts to a restrictive covenant with respect to a former employee who is not signatory to the agreement, because it restricts his ability to work for a company that would not have hired him if it knew it would have to pay a penalty for such a hire. In this case, Mr. Rohnow was not solicited by Star Trac, which fact distinguished his situation from an “employee-raiding” case, where a former employee violates a contractual non-solicitation agreement with his former employer. Also, Rohnow had not performed any of the services under the consulting contract between VLS and Star Trac. This fact was significant in light of an earlier case where the “no-hire” provision was limited to the employees who actually performed the temporary labor for the contracting party. While limited restrictions that tend to promote, rather than restrain free trade might be acceptable, a blanket restriction on all employees is not.

**K. Enforceability of Profit-Based Incentive Bonus Plans**

*Prachasaisoradej v Ralphs Grocery Company, Inc.* (2007) 42 Cal. 4<sup>th</sup> 217. In a long-awaited decision, the California Supreme Court addressed the enforceability of profit-based incentive compensation plans. The plaintiff in this class-action case was a produce manager in a Ralphs Grocery store. He contended that the employer's supplemental profit-based incentive bonus plan violated California labor laws because bonuses under the plan were calculated after reducing store profits by costs such as workers' compensation, cash shortage and merchandise losses. He contended that such deductions constituted the unlawful recovery of business expenses from an employee's wages.

The California Supreme Court found that employees had no expectation of compensation until after the store profitability had been determined. The incentive plan was calculated based upon a comparison of any given store's profitability to the profitability target set by the employer. Any employee's bonus could range from zero to 150% of the employee's regular wages. The amount of the bonus depended upon how much overall store profitability met, exceeded or lagged behind the targeted goals.

Had the Supreme Court sided with the employee, then all profit-based incentive compensation plans would be suspect, as profit is, by definition, what remains after deducting expenses from revenue. The deductions from the employer's profitability formula were nothing more than ordinary expenses. It is clear that the California Supreme Court was influenced in its decision by the fact that the bonus plan in question was supplemental to, and not part of a commission-type compensation plan.

**L. Class Arbitration Waivers**

*Gentry v. Superior Court (Circuit City, Inc.)* (2007) 42 Cal.4<sup>th</sup> 443. In a continuing line of cases challenging Circuit City's employee arbitration agreements, the California Supreme Court addressed a provision in Circuit City's standard employee arbitration agreement which stated: "The Arbitrator shall not consolidate claims of different [employees] into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action." In this case, Gentry filed a class action lawsuit seeking overtime for all customer service managers. Circuit City contended that Gentry's action was subject to binding arbitration and that this language barred the arbitrator from considering class claims.

The court held that such class arbitration waivers may not be enforced across the board to preclude class arbitrations by employees seeking overtime under Labor Code sections 500 et seq. and 1194. The court determined such class arbitration waivers should not be enforced if a trial court determines, based on a number of factors, that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than would individual arbitration. Those factors include 1) the modest size of the potential individual recovery; 2) the potential for retaliation against members of the class; 3) the fact that absent members of the class may be ill-informed about their rights, and 4) other real-world obstacles that make individual arbitration unfeasible.

Separate from the issue of the class arbitration waiver was whether the arbitration agreement taken as a whole was unconscionable. The agreement in question gave Gentry 30 days to opt out of binding arbitration. The employer argued that such a provision in the agreement prevented it from being procedurally unconscionable. However, the Court held that a finding of procedural unconscionability is not required to invalidate a class arbitration waiver if that waiver by itself implicates unwaivable statutory rights.

*Shroyer v. New Cingular Wireless Services, Inc.* (2007) 498 F.3d 976. The class arbitration waiver in New Cingular Wireless Service, Inc.'s standard contract for cellular phone services was unconscionable under California law, and not preempted by the Federal Arbitration Act, thereby reversing the district court's order compelling arbitration. The court emphasized protecting the statutory rights of consumers victimized by unconscionable terms, even at the expense of invalidating arbitration clauses that are normally upheld in other contexts.

### **M. Arbitration Agreements**

*Murphy v. Check 'N Go of Calif., Inc.* (2007) 156 Cal.App.4<sup>th</sup> 138. Plaintiff was employed by Defendant as a salaried retail manager. In the last year of Plaintiff's employment she signed a "Dispute Resolution Agreement" providing for binding arbitration, authorizing the arbitrator to determine unconscionability issues and containing a class action waiver. Defendant moved to compel arbitration and plaintiff asserted the unconscionability of the agreement.

The Court of Appeal affirmed the trial court's decision denying the motion to compel arbitration. It held that the agreement was procedurally unconscionable as a contract of adhesion (presented on a take it or leave it basis) because Plaintiff received it through interoffice mail, no one explained it to her, she was never told that it was optional or negotiable, and it could be inferred that Plaintiff's consent to the Agreement was a condition of her continued employment with Defendant. The Court of Appeal further held the provision for arbitrator determination of unconscionability to be unenforceable because the parties would not normally expect that an arbitrator would determine the issue of unconscionability. Further, as Defendant would likely never claim that it drafted an unconscionable agreement, the grant of authorization to the arbitrator to determine the issue was found to lack mutuality. Following *Discover Bank v. Superior Court* (2005) 36 Cal.4<sup>th</sup> 148 and *Gentry v. Superior Court* (2007) 42 Cal.4<sup>th</sup> 443 (discussed above), the Court of Appeal held that the class action waiver was also unenforceable.

*Comedy Club, Inc. v. Improv W. Assocs.* (9<sup>th</sup> Cir. 2007) 502 F.3d 1100. Plaintiff entered into an agreement that granted it an exclusive nationwide license to use Defendant's trademarks for comedy clubs. Plaintiff breached the Agreement and then tried to secure its interests in the trademarks by filing a declaratory judgment action. Relying on the contractual arbitration provision in their agreement, Defendant filed a demand for arbitration seeking damages. The trial court ordered the parties to arbitration and 287 days after the court's order and the ensuing arbitration, Plaintiff appealed the trial court's order to arbitrate

as well as its order confirming the arbitration award. Plaintiff asserted the arbitrator did not have the authority to arbitrate equitable claims.

The Ninth Circuit court found that the trial court's order compelling the parties to arbitrate dismissed the Plaintiff's claims and was a final order. Therefore, Plaintiff had at most 180 days in which to take any appeal therefrom. As Plaintiff waited 287 days after the order, its appeal was untimely and the Court of Appeal lacked jurisdiction to hear it.

The Ninth Circuit court further found that the Arbitration Agreement was ambiguous as to whether the arbitrator had authority to arbitrate equitable claims. Therefore, in light of the federal presumption in favor of arbitration, it held that the Arbitration Agreement should be interpreted to grant arbitration coverage over all disputes arising from the Trademark Agreement.

*Marcario v. County of Orange* (2007) 155 Cal. App. 4th 397. Plaintiff was a county employee represent by a union. After complaining about county actions unrelated to her employment, Plaintiff alleged that the county retaliated against her in her terms and conditions of employment. Pursuant to the Memorandum of Understanding between Plaintiff's union and the county, Plaintiff submitted her employment-related retaliation complaints to binding arbitration. The arbitrator denied Plaintiff's grievance. Thereafter, Plaintiff filed a complaint alleging causes of action for, among other things, workplace retaliation in violation of the Labor Code. Defendant moved for judgment on the pleadings arguing that the arbitrator's denial of her grievance precluded Plaintiff's attempt to litigate her Labor Code claim.

The Court of Appeal held that there is no presumption of arbitrability for statutory discrimination claims and that the employee's waiver of her rights to proceed in a judicial forum must be clear and unmistakable. The court further held that the arbitration of a grievance pursuant to a collective bargaining agreement cannot preclude an employee's statutory claims unless the CBA specifically so states.

*Collins v. D.R. Horton, Inc.* (9th Cir. 2007) 505 F.3d 874. Plaintiffs and another individual, Hickcox, were employed by Defendant under a written employment contract. After Plaintiffs and Hickcox were terminated, they sued in separate actions alleging, among other things, breach of contract and fraud regarding certain shares of stock. Hickcox's complaint went to trial and a jury found for Hickcox on the breach of contract and fraud claims regarding the stock.

Plaintiffs' claims were submitted to binding arbitration after the conclusion of Hickcox's trial. At arbitration, Plaintiffs moved for summary judgment, asserting that under the doctrine of offensive non-mutual collateral estoppel, Defendant was barred from re-litigating the stock issues that it had already lost to Hickcox. The arbitration panel denied Plaintiffs' motion and denied Plaintiffs' stock claims. Plaintiffs then filed an application in the district court to vacate the arbitration award with regard to the shares of stock claims, which application was denied.

The Ninth Circuit Court of Appeals held that arbitrators are not free to ignore the preclusive effects of prior judgments under *res judicata* or collateral estoppel, but that they are entitled to determine in the first instance whether the requirements for collateral estoppel have been met, and like courts, have broad discretion in determining whether or not to apply offensive non-mutual collateral estoppel. The court affirmed the lower court because there was no manifest disregard for the law on the part of the arbitration panel when it refused to apply the doctrine of non-mutual collateral estoppel.

#### **N. Federal WARN Act**

*Bader v. Northern Line Layers, Inc.* (9<sup>th</sup> Cir. 2007) 503 F.3d 813. The WARN Act requires that employers of 100 or more employees provide sixty days advance notice or pay and benefits in lieu of notice in the event of a plant closing or mass lay-off that affects 50 or more employees at a single site of employment, if those laid-off equal or exceed 33% of the workers at that site. Bader and others were employed at telecommunication construction sites throughout the country. Although the administrative offices were located in Billings, Montana and paychecks were generated from that location, the individual employees and project managers at the various distant sites (in 10 different states) had very little connection with the Billings office. The number of employees per construction site varied from 10-28.

Northern Line's parent company merged its assets into a second subsidiary in January 2003; however, it began a series of layoffs at various remote construction sites as early as August 2002. In the aggregate, each layoff consisted of more than 50 employees. If the remote construction sites constituted a "single site of employment" under the Department of Labor regulations, then all of the employees laid off would be entitled to 60 days notice of the mass layoff or plant closure.

The Ninth Circuit Court held that the notice requirements of the WARN Act did not apply, as the site of employment for the construction workers was found to be their actual worksite, not the company's headquarters in Billings. The actual physical job sites were not geographically contiguous and did not share the same staff or equipment, despite the fact that administrative services were generally performed at the Billings office. The court distinguished the Billings office from the situation of a "home-base" which the employee leaves from and returns to during the typical work period, from which work is originated and supervised, and to which the employee reports. Accordingly, despite the fact that 58 total employees were laid-off, as no single site of employment employed more than the requisite 50 employees, federal WARN did not apply and the company was not required to give 60 days' notice prior to the layoffs.