



2008 Employment Law Developments

Hire

Employment Agreements

1. **CRST Van Expedited, Inc. v. Werner Enterprises, Inc., 479 F.3d 1099 (2007)**

Ninth Circuit case applying California law.

Plaintiff entered into employment contracts with employees for a one year period of employment. *Held:* If a competitor's employees have agreed to a specified term of employment, and those contracts are determined to negate the at-will employment relationship, recruitment of those employees may result in damages for intentional interference with contract, misappropriation of trade secrets and related claims. No independent wrongful act is required for contract interference claims.

Arbitration Agreements

2. **Gentry v. Superior Court, 42 Cal.4th 443 (2007)**

Plaintiff filed a class action lawsuit against employer. The employer moved to compel arbitration based on an arbitration agreement that included a class action waiver, which required employees to arbitrate claims on an individual basis. *Held:* Class arbitration waivers in employment agreements are not enforceable if the court determines that class arbitration would be significantly more effective in vindicating rights.

3. **Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007)**

Employer adopted an arbitration program in August 2002, and notified its employees that the program would be rolled out three months later. Though employees were advised to ask about the arbitration program, they were not allowed to opt out. The program required submission to mediation and then arbitration within one year. *Held:* The arbitration agreement was unconscionable and unenforceable.

Immigration Issues

4. **"No Match" Rule**

A judge blocked enforcement of the Department of Homeland Security's Social Security "No Match" Rule. The injunction will remain in effect pending the outcome of a lawsuit brought by the AFL-CIO and the ACLU.

5. **New I-9 form**

The IRS introduced a new I-9 form that will be effective until June 2008. The form expands the list of acceptable employment authorization documents to include employment authorization documents issued by the U.S. Citizenship & Immigration Services (USCIS). The form removes a number of acceptable documents, including a Certificate of U.S. Citizenship, Certificate of Naturalization, Refugee Travel Document and Alien Registration Receipt Card.

Record-keeping and Retention of Records

6. **New EEO-1 Form**

The EEO-1 form has two distinct changes from years past: 1) the "Officials and Managers" category is now divided into two separate categories; and 2) "Native Hawaiian or Other Pacific Islander" and "Two or More Races (Not Hispanic/Latino)" have been added to the racial classification list.

Manage

Discrimination/Harassment/Whistle Blower Policies

7. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S.Ct. 2162 (2007)

Plaintiff filed a sex discrimination claim under Title VII, alleging that her evaluations were poor because of her sex, that her salary was not increased as much because of the poor evaluations, and that, as a result, her pay throughout her employment was significantly less than her male colleagues. *Held:* Because the later effects of past discrimination do not restart the clock for filing an EEOC charge, plaintiff's claim was untimely.

8. Green v. State of California, 42 Cal.4th 254 (2007)

Plaintiff filed suit alleging disability discrimination and failure to accommodate. *Held:* To establish a prima facie case under the FEHA for employment discrimination based on disability, the plaintiff bears the burden of proving that he or she is capable of performing the essential duties of the job.

9. Health Care and Whistleblower Protection - AB 632

Prohibits a health facility from discriminating or retaliating against any patient, employee, member of the facility's medical staff or any other health care worker of the facility because that person has 1) presented a grievance, complaint or report to an entity or agency responsible for accrediting or evaluating the facility or to any other governmental agency; or 2) has initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services or condition at the facility.

An employee discriminated against in violation of this bill shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the employer, or to any remedy deemed warranted by the court, as well as lost income and legal costs.

10. Noyes v. Kelly Services, 488 F.3d 1163 (9th Cir. 2007)

Employee alleged reverse discrimination, claiming she was not promoted because she was not the same religion as her manager and the employee selected for promotion. *Held:* The employee was not required to show that she was a member of the protected class in order to make out prima facie case of reverse religious discrimination.

Technology Policies

11. The Guard Publishing Company d/b/a The Register-Guard, 351 N.L.R.B. 70 (2007)

Employees challenged employer's policy prohibiting the use of its email system for solicitation on behalf of any outside organization, including use for union organizing. *Held:* Employers have the right to regulate and restrict employee use of company property, including email.

Safety/OSHA

12. Cell Phone Usage While Driving

Passed last year and effective July 2008, the law requires anyone in California who wishes to talk on a cell phone while driving to use a "hands free" device. The penalties for noncompliance include a \$20 base fine for the first offense and \$50 for each subsequent offense.

Postings

13. New Posters/Pamphlets

There are several new or revised posters and pamphlets that employers should ensure they have in their workplaces, including the updated DFEH harassment poster (DFEH-162), the new minimum wage poster that accurately reflects 2008's new rates, and updated EDD pamphlets on paid family leave and state disability insurance.

Workers' Compensation Issues

14. Workers' Compensation Temporary Disability Benefits – AB 338

This law extends the time an employee may receive aggregate disability payments as a result of a workers' compensation injury from two to five years.

15. Workers' Comp – SB 869

Authorizes the Labor Commission to systematically identify unlawfully insured employers and prioritize targets for the workers' compensation program in consideration of available resources.

Alternate Workweek

16. Alternate Workweeks for Pharmacists – AB 812

All pharmacists who work in the mercantile industry and are employed pursuant to Wage Order 7 will be allowed to adopt the alternative workweek schedules allowed by Wage Order 4. This is important because Wage Order 7 requires alternative workweek schedules that provide for two consecutive days off within a workweek. Wage Order 4 does not impose this requirement. Wage Order 4 also permits 3/12 schedules without daily overtime. Wage Order 7 does not.

Employee Absence/Leave Issues

17. Faust v. California Portland Cement Co., 150 Cal.App.4th 864 (2007)

Employee with back conditions and psychiatric issues was terminated for unauthorized leave. *Held:* Employer's failure to establish it complied with its notice obligations under CFRA precluded summary judgment and dismissal of the case.

18. Military Spouse Leave – AB 392

Employees who work at least 20 hours per week and who are spouses of a member of the military must be provided up to 10 days of unpaid leave when the spouse is on leave from active duty during a period of military conflict in the U.S. Armed Forces, Reserves or National Guard. Employees must give two days' notice and provide appropriate written documentation. Employers with 25 or more employees must comply with this new law.

Though the law does not expressly say so, the term "spouse" includes a registered domestic partner.

The bill became effective October 2007.

Exempt/Non-Exempt

19. Hourly Rate for the "Computer Exemption" – SB 929

This law reduces the hourly rate computer employees must earn in 2008 to be exempt from California's overtime requirements to \$36 per hour (\$74,880 per year) from 2007's rate of \$49.77 per hour (\$103,521.60 per year). This rate will adjust each year based on the California Consumer Price Index for Urban Wage Earners and Clerical Workers

Family and Medical Leave Act (FMLA)

20. 2008 National Defense Authorization Act

The act amends FMLA, extending leave to families of servicemembers. Specifically, the act provides for a) up to six months of leave for family members caring for military veterans injured while on active duty in the U.S. Armed Forces and b) 12 weeks of leave to family members of servicemembers called up to active duty under certain circumstances

Compensate

Exempt/Non-Exempt

21. **Eicher v. Advanced Business Integrators, Inc., 151 Cal.App.4th 1363 (2007)**
Plaintiff sued to obtain unpaid overtime compensation. Plaintiff was hired as a salaried consultant. Employer closely monitored plaintiff's hours, requiring him to account for at least 40 hours per week, and deducted from plaintiff's pay for partial-day absences where plaintiff had no accrued PTO. Employer claimed plaintiff was an exempt employee under the administrative exemption. *Held:* Administrative exemption did not apply because plaintiff was engaged in the core day-to-day activities of the business without any effect on policy or general business operations. The court looked at the consultant's actual duties, which included providing customer service and training on the software.

Payroll

22. **Changes to Itemized Pay Statements – SB 1618**
Employers are prohibited from including any more than the last four digits of an employee's social security number or an existing employee identification number on the employee's itemized pay stub. All employers must comply with this requirement by January 1, 2008.
23. **Notice of Earned Income Credit Rights – AB 650**
Employers must notify employees that they may be eligible for the federal earned income tax credit within one week of the date the employer provides an annual wage summary (W-2 or 1099). Employers cannot substitute a poster for individual notice. Employers must provide notice to the employee in person or by mail at the employee's last known address.

Minimum Wage

24. **Minimum Wage Changes**
Increase from \$7.50 to \$8.00 on January 1, 2008 as a result of legislation passed last year.

Wage and Hour Issues

25. **Murphy v. Kenneth Cole Productions, Inc., 40 Cal. 4th 1094 (2007)**
Plaintiff sued his employer for a variety of wage and hour claims, on behalf of himself and a class of managers. Among his claims was that he and the class were denied meal periods and rest breaks. He sought an hour's pay for each missed meal period and another hour's pay for missed rest breaks. *Held:* Meal and rest period premiums are wages, not penalties. Therefore, employees have three years to bring a claim or lawsuit alleging failure to receive meal and rest breaks.
26. **Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal.4th 554 (2007)**
Employees who used their automobiles for work brought class action against employer, seeking statutory indemnification for their expenses. *Held:* Employers may increase employee compensation by a fixed amount in lieu of reimbursing for work-related expenses so long as employers (1) establish a method to identify which portion of compensation is wages versus expense reimbursement, and (2) fully reimburse employees for actual expenses necessarily incurred where employees successfully challenge the amount.
27. **IRS Raises Mileage Rate for 2008**
IRS raises mileage rate for 2008 to 50.5 cents per mile. The new rate applies to miles driven beginning January 1, 2008.
28. **Prachasaisoradej v. Ralphs Grocery Co., Inc., 42 Cal.4th 217 (2007)**
Plaintiff sued employer, alleging that employer's profit-based bonus incentive compensation plan violated state labor laws. The plan's calculation of net profit included expenses such as breakage due to negligence and workers' compensation costs. *Held:* The bonus plan "was not illegal . . . simply because, pursuant to normal concepts of profitability, ordinary business expenses, such as storewide workers' compensation costs, and storewide cash and merchandise losses, were figured in, along with such other store expenses as the electric bill and the cost of goods sold, to determine the store's profit . . ."

Separate

Government Claims Act

29. City of Stockton v. Superior Court, 171 P.3d 20 (2007)

Developer filed action against city for breach of the development contract. Government Code section 905 requires that "all claims for money or damages against local public entities" be presented to the responsible public entity before a lawsuit is filed. Failure to present a timely claim bars suit against the entity. *Held*: The requirements of Government Code section 905 apply to breach of contract claims, despite the misnomer "Tort Claims Act." The court adopted the practice of calling the statute the "Government Claims Act."

Wrongful Termination

30. Franklin v. Monadnock Co., 151 Cal.App.4th 252 (2007)

Plaintiff claimed he was fired for complaining about co-worker's threats and assault of plaintiff with a screwdriver. *Held*: Employee's allegations were sufficient to state a claim for wrongful termination based on the public policies requiring employers to provide a safe and secure workplace and encouraging employees to report credible threats of violence in the workplace.

Pending Cases

Cases Pending Before the California Supreme Court

Employment Discrimination

31. McDonald v. Antelope Valley Community College Dist.

In an employment discrimination action, is the one year statute of limitations for filing an administrative complaint with the DFEH subject to equitable tolling while the employee pursues an internal administrative remedy, such as a complaint with the community college chancellor filed pursuant to Cal. Code Regs., tit. 5, § 59300 et seq.?

Government Employment

32. Mays v. City of Los Angeles

Does the Public Safety Officers Procedural Bill of Rights Act require that an officer facing discipline be provided with notice of both the alleged offense of which he or she is accused and the potential punishment within one year of discovery of the alleged misconduct?

33. Miklosky v. U.C. Regents

Does the requirement of the Whistleblower Protection Act that an employee of the University of California have "filed a complaint with the [designated] university officer" and that the university have "failed to reach a decision regarding that complaint within [specified] time limits" before an action for damages can be brought merely require the exhaustion of the internal remedy as a condition of bringing the action, or does it bar an action for damages if the university timely renders any decision on the complaint?

Harassment and Damages

34. **Roby v. McKesson HBOC**

1) In an action for employment discrimination and harassment by hostile work environment, must the claim for harassment be established entirely by reference to a supervisor's acts that have no connection with matters of business and personnel management, or may such management-related acts be considered as part of the totality of the circumstances allegedly creating a hostile work environment? 2) May an appellate court determine the maximum constitutionally permissible award of punitive damages when it has reduced the accompanying award of compensatory damages, or should the court remand for a new determination of punitive damages in light of the reduced award of compensatory damages?

Leaves

35. **Lonicki v. Sutter Health Central**

1) Under the provisions of the CFRA that grant an employee the right to a leave of absence when the employee has a serious health condition that makes the employee "unable to perform the functions of the position of that employee," is an employee entitled to a leave of absence where the employee's serious health condition prevents him or her from working for a specific employer, but the employee is able to perform a similar job for a different employer? 2) Did defendant's failure to invoke the statutory procedure for contesting the medical certificate presented by plaintiff preclude it from later contesting the validity of that certificate?

Noncompete Agreements

36. **Edwards v. Arthur Andersen, LLP**

1) Is a non-competition agreement between an employer and an employee that prohibits the employee from performing services for former clients invalid under Cal. Bus. & Prof. Code § 16600, unless it falls within the statutory or judicially-created trade secrets exceptions to the statute? 2) Does a contract provision releasing "any and all" claims the employee might have against the employer encompass non-waivable statutory protections, such as the employee indemnity protections of Cal. Lab. Code § 2802?

Privacy

37. **Hernandez v. Hillsides, Inc.**

May employees assert a cause of action for invasion of privacy when their employer installed a hidden surveillance camera in the office to investigate whether someone was using an office computer for improper purposes, only operated the camera after normal working hours, and did not actually capture any video of the employees who worked in the office?

Retaliation

38. **Jones v. Lodge at Torrey Pines P'ship**

May an individual be held personally liable for retaliation under the California Fair Employment and Housing Act?

Termination and Suspension

39. **Ross v. Ragingwire Telecomm.**

When a person who is authorized to use marijuana for medical purposes under the California Compassionate Use Act is discharged from employment on the basis of his or her off-duty use of marijuana, does the employee have either a claim under the FEHA for unlawful discrimination in employment on the basis of disability or a common law tort claim for wrongful termination in violation of public policy?

40. Spielbauer v. County of Santa Clara

If a public employee exercises his or her Fifth Amendment right against self-incrimination in a public employer's investigation of the employee's conduct, must the public employer offer immunity from prosecution before it can dismiss the employee for refusing to answer questions asked in connection with the investigation?

Wage and Hour

41. Martinez v. Combs

Can the officers and directors of a corporate employer personally be held civilly liable for causing the corporation to violate the statutory duty to pay minimum and overtime minimum wages, either on the ground such officers and directors fall within the definition of "employer" in Industrial Welfare Commission Wage Order 9 (Transportation Industry) or on another basis?

Whistleblower Protection Act

42. State Bd. Of Chiropractic Examiners v. Superior Court

Under the Whistleblower Protection Act, can a state employee bring a civil action after suffering an adverse decision by the State Personnel Board without successfully seeking a writ of administrative mandate to set aside that decision.

Pending Cases

Cases Pending Before the United States Supreme Court

43. Federal Express Corporation v. Holowecki

Whether an "intake questionnaire" submitted to the EEOC may suffice for the charge of discrimination that must be submitted pursuant to the ADEA.

44. Sprint/United Management Company v. Mendelsohn

Whether a district court must admit "me, too" evidence or testimony, by non-parties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

45. Chamber of Commerce v. Brown

Whether the state of California's regulation of noncoercive employer speech about union organizing is preempted by federal labor law. (See California Assembly Bill 1889, Ca. Gov't Code §§ 16645.2, 16645.7.)

Significant Vetoes

46. AB 8

Require employers to spend 7.5% of payroll on health care.

47. AB 377

Require farm labor contractors to disclose the names and addresses of entities that secured the employer's services on an employee's itemized pay statement.

48. AB 435

Increase employer exposure to untimely lawsuits and impose unwarranted and unreasonable requirements for maintaining all wage-and-hour paperwork.

- 49. AB 448**
Created a new form of damages to be awarded against employers in administrative minimum wage claims, above and beyond significant penalties in current law.
- 50. AB 504**
Fine for employers who violate certain laws related to union lockouts.
- 51. AB 537**
Expanded protected leave for employees that employers must grant regardless of business necessity.
- 52. AB 1043**
Make choice of law provisions in employment contracts unenforceable.
- 53. AB 1707**
Change the laws regarding the time period for which an employer must maintain employee records.
- 54. AB 1710**
Exposes employers to joint and several liability for workers' compensation with temporary staffing agencies while proposing to require temporary services employers to pay their employees weekly, regardless of when an assignment ends.
- 55. SB 180**
Remove the secret ballot election requirements for union representation and replace it with a "sign-up" process.
- 56. SB 549**
Mandate employers to provide bereavement leave.
- 57. SB 622**
Penalties for misclassifying employees as independent contractors.
- 58. SB 727**
Expand the definition of "family member" for the family temporary insurance program ("paid family leave").
- 59. SB 836**
Add "familial status" as a protected category under FEHA.