Employer Advisory Council of Orange County, Inc.

The Advisor

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WHAT'S INSIDE

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From the Editor

by
Jim Hart, Littler Mendelson

Hello fellow Advisor readers and EAC members. As you may or may not know, my name is Jim Hart, and I have been the editor for the Advisor for several years now. In that position, I regularly consult with the Board and members to make sure that the EAC's publications remain insightful and helpful to EAC readers. It is with these goals in mind that the Board gathered to discuss the direction and format of the Advisor at the Board's most recent yearly offsite meeting. We discussed the current format and how we could best achieve our overall goals and to also make sure that the Advisor is timely and brief yet informative for its readers.

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We Have to Pay for What? A California court of Appeal Issues Expansive Expense Reimbursement Ruling

by
Kristen Diane Kimberlin, Littler Mendelson

A California Court of Appeal recently issued a short decision in *Cochran v. Schwan's Home Services, Inc.*, B247160 (Aug. 12, 2014) that took an expansive view of an employer's obligation to reimburse employees for business expenses. In light of this decision, employers should conduct a careful and wide-ranging review of their reimbursement policies and take a hard look at what actually happens "in the field."

The plaintiff, who worked as a customer service manager, sued his employer to recover expenses for the work-related use of his personal cell phone. The plaintiff asked the court to certify his

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President's Message

by Stewart Lerner, Lerner & Associates

I must begin this message with a bittersweet announcement. Nicole Orwin, our EDD coordinator, has received a well-deserved promotion and will be relocating in Sacramento. For the past three years, Nicole has been the smiling face of EDD at each of our workshops, bringing the latest in EDD publications and materials and answering member questions.

She has also been an important member of our executive team, providing valuable input at our Board and annual Offsite Planning meetings, coordinating our mailings from Sacramento, and providing valuable marketing assistance throughout the year. Nicole has been a wonderful addition to our organization and, although we are happy for her and wish her well, she will be sorely missed.

EDD will be conducting an intensive interview and selection process to select a replacement for Nicole. I am confident that this will result in the assignment of another highly qualified staff member.

However, this is the only the first of many changes I need to report to you. At our Offsite Meeting held on July 12, we reviewed our operations over the past several years and decided it was time that we did some things in a different, and hopefully, better way. Let me begin with The Advisor newsletter.

This will be the last issue you will receive in its current format. Based on input from our members, shorter bulletins and "Alerts" on current changes have been more valuable to you than longer (and sometimes very legalistic) articles. One thing we plan to do is to increase the number of "Alerts" that we will be sending you so that you will get important information promptly and well in advance of most legal newsletters. Please see the article by our Advisor editor, Jim Hart, for more information on these changes. Jim has done a great job as our editor and I am confident he will be continuing that excellent work in overseeing the monthly information we will be providing.

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President's Message … *from p.2*

We will also be updating and improving our website and will be providing more information and reports in a special Members Only section.

Probably, the most significant change we will be making will be in the format of many of our workshops. In recent years, the trend in workshops and conferences has gone from longer full-morning presentations on one topic to combining several shorter topics covered in 60 to 90 minutes. We received excellent feedback on this approach when we hosted the statewide CEAC conference in May and presented 12 separate 1-hour programs.

There are some topics that still fit well into the full morning format and they will continue to be presented in that manner. However, the use of shorter topics will also allow us to present two or three related topics in one morning session. The bottom line is that you will see an interesting mix in your programs for 2015.

In addition, we will be featuring some outstanding new speakers to go along with the talented group of attorneys who have received the best ratings from our membership.

As always, we want to thank each of you for your ongoing support for our organization. We believe we provide the best possible training and support for the employer community at the lowest prices available. Keep watching for emails and continue to check our website for exciting future programs and activities.

From the Editor… *from p.1*

After much deliberation and discussion, I am pleased to announce several changes to the Advisor. Starting in October, the EAC will issue short monthly emails with three to four new items, in place of the current format. We envision the following benefits for you the reader.

- ❑ Timely – by increasing the rate of publication from several times per year to every month, we believe EAC members will be better positioned to move quickly to review current practices and to make any changes that are necessary.
- ❑ Brief – We understand how busy our members are, and we are aware that many members may not have a half an hour or more to set aside to read through the Advisor in its current format. Rather than including five or more longer scholarly articles on various employment law topics, as is currently done in the Advisor, the new email format will include only three to four bullet points with several sentences of explanation apiece.
- ❑ Informative – We envision the format to be more functional. At the end of each item, we will include a "takeaways" section that directs the readers to any homework or follow up tasks to consider. On occasion, we will also include links to longer articles in case the reader is interested in a more in depth discussion of the development. On occasion, we may also include additional items, including messages from our president or other officers.

We sincerely hope that this change will be a benefit to you. Ultimately, you are the final judge. Please give us feedback. If you prefer the old format, then let us know. The EAC is as much your organization as ours. If you have any additional or different ideas, we would love to hear them.

Thank you,
Jim Hart
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We Have to Pay for What? A California court of Appeal Issues Expansive Expense Reimbursement Ruling *… from page 1*

case as a class action. The trial judge denied class certification on the ground that individualized inquiries about the class members' cell phone plans would overwhelm common issues. In effect, the trial court determined that no "expense" was incurred, and no reimbursement owed, unless the employee had to pay something out of pocket, above and beyond the expense to maintain the cell phone for personal use. The appellate court disagreed, finding that an employer is obligated to reimburse an "expense," even if the employee has incurred no additional cost associated with the business use of the phone. Because this error was the basis for the trial court's decision to deny certification, the court reversed that decision and sent the case back to the trial court.

The Obligation to Reimburse Business Expenses

California Labor Code section 2802 obligates employers to reimburse employees for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, …" The *Cochran* decision posed, and answered, the "threshold question" presented on appeal as follows:

Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? The answer is that reimbursement is always required. Otherwise the employer would receive a windfall because it would be passing its operating expenses onto the employee.

Based on this interpretation of section 2802, the *Cochran* court found the trial court erred when it determined that the obligation to reimburse would depend on (1) whether the employee had a plan allowing unlimited use; and (2) whether the employee or a family member paid the bill. Instead, it held that when an employee

"must" use his personal cell phone for work-related calls, the employer must reimburse him and that the "reimbursement owed is a reasonable percentage of the cell phone bills."

The court's language strongly suggests that an employer must reimburse an employee any time the employee is required to provide a benefit to the employer that could fall into the category of "operating expenses." This is true whether the benefit is provided directly by the employee (his own cell phone which he pays for himself) or by a third party (a family member who pays the bill).

Indeed, the court pointed out that its broad interpretation of section 2802 not only prevents employers from passing on operating expenses, but also "prevents them from digging into the private lives of their employees to unearth how they handle their finances vis-à-vis family, friends and creditors," making clear its dismissal of the theory that "who paid the bills" is of any consequence.

The case most heavily relied upon by the *Cochran* court was its own prior decision in a case involving reimbursement for business use of an employee's car.[1] In calculating the appropriate amount of reimbursement in that case, the court recognized that the employee was not just buying gas for the car, but the car itself, which had to be insured, and was subject to wear and tear, resulting in diminished value.

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Cell Phone Article… from page 4

Arguably, the principles derived from prior cases may not work well when applied to reimbursement for the use of other kinds of employee property. A cell phone is not analogous to a car. The employee's car is, in a real sense, a consumable asset; his cell phone much less so. The "asset" of home access to the Internet, to support use of a tablet or computer, is not in the least diminished by its use, although data usage caps may apply. The different quality of the various personal assets that may be used for a business purpose may call for a more nuanced approach to sensibly fulfill the purpose of section 2802: to forbid employers the "windfall" of passing on their operating costs to their employees. It seems certain that *Cochran* will generate its share of litigation.

The Class Action Ruling

Notably, the *Cochran* appellate court did *not* order the trial court to certify the class. Rather, it ordered the trial court to reconsider the motion, to apply the rulings on the proper interpretation of section 2802, and apply the principles recently announced by the California Supreme Court in *Duran* regarding statistical sampling.[2] It specifically provided that the plaintiff could revise his motion and the defendant could respond. Perhaps the parties and the trial court will take the opportunity to examine whether common questions are outweighed by individual issues needed to prove whether use of personal cell phones for work calls was a "must" (i.e., required by the employer), or just the employee's choice.

The decision suggests that the court may have recognized the need to develop the factual record and/or the trial court's analysis of the very open question of when an employee's use of a personal cell phone becomes a "must." While the court announced sweeping principles that come into play when an employee "must" use a personal cell phone (or other items) for the employer's benefit, it offered neither information nor analysis about what evidence will be enough to prove that the use of a personal asset for business purposes is a "must."

Moreover, the court noted that, in making decisions about reimbursement of expenses, employers may consider "not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices." (Emphasis added.)

In the absence of a direct employer mandate to use personal cell phones or furnish other items for the employer's benefit, this standard may well require examination of a wide range of individualized factors in order to determine whether the employer is obligated to reimburse a particular employee for any particular business expense. That could be an alternate reason, not cited by the trial court, for a determination that class certification of the plaintiff's claims was not appropriate.

The Take-away

The principles announced in *Cochran* are not limited to personal cell phones. They may apply, with equal force, to many other "personal" items that stock most modern households. Personal laptops, "tablets," the Internet connections to use them, and even the humble dinosaur of a home land-line phone, could all, at least theoretically, be the subject of claims for reimbursement under these principles.

Employers should very carefully review their policies and practices regarding reimbursement of business expenses. They should determine how their managers and supervisors communicate with employees and what "expectations" are set, not just by written policies, but in practice. Employers should consider making those expectations concrete by putting them in writing. They should make sure their managers, supervisors, and employees all understand the reasons for the policies and the consequences of not following them.

If cell phone communications are required, employers should consider supplying company-owned phones. Doing so will make it clear that use of personal phones is not mandatory. It will also minimize the court's concerns about intrusion into

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Lerner Lines … August 2014

by

Stewart Lerner, Lerner & Associates

Once again, the national economic picture was generally positive. While the 209,000 new jobs were below analysts' expectations, July was the sixth straight month that the economy added more than 200,000 net new jobs. This had not happened since 1997!

Meanwhile, the unemployment rate rose by a tenth of a percentage point to 6.2% in July, still down significantly from 7.3%, a year ago. And the rise was for a good reason. The labor force grew by 239,000 last month as many people who had left the job market (and were not being counted in the unemployment rate) were encouraged enough to return and begin seeking work.

Here in California, the news was also good as the state added 24,000 new positions in June, capping off a year of steady employment gains. The unemployment rate has dropped significantly since June 2013, when it was 9%. This June, it was 7.4%, down 0.2 percentage points from the previous month.

I know you recall that California was among the states hit hardest by the recession and initially recovered slowly. "But now we're in a catch-up mode," according to Esmael Adibi, director of the Center for Economic Research at Chapman University. "We're doing better than the nation and we're going to pick up steam."

In recent issues of this newsletter, I have been reporting on the trend to raise the minimum wage in many areas of the country. In mid-July, the City of San Diego took a major step in that direction as its City Council voted to raise pay to $11.50 per hour by 2017. The increase will be phased in over a three-year period with the first raise to $9.75 per hour effective on January 1, 2015, the second to $10.50 per hour effective on January 1, 2016 and the final raise to $11.50 effective on January 1, 2017. In addition to the wage increases, the ordinance provides for up to five days of paid sick leave per year beginning in 2015.

Because of these significant changes, those of you that have employees working within the San Diego city limits should check with your legal counsel to determine what actions you may need to take to remain in compliance with this new ordinance.

In other news, a recent California appellate court decision has helped to clarify a question which has been confusing employers for years.

Can employers deduct leave time from exempt employees' vacation or PTO leave banks for partial day absences?

This question comes up regularly during the many Wage and Hour seminars I have attended over the years. Based on the available precedent cases and considering the uncertainty and potential risk, attorney advice has always been relatively conservative. It was either (1) To be safe, do NOT deduct time for absences of less than one day, or (2) based on a prior California case, make those deductions ONLY in situations where the employee was absent for four hours or longer.

However, in the recent case of Rhea v. General Atomics, the court provided a more clear answer to the question by stating: "The length of the partial-day absence does not impact whether an employer may require exempt employees to use vacation or leave time for partial-day absences". It went on to conclude that "regardless of whether the absence is at least four hours or a shorter duration, a requirement that exempt employees use Annual Leave time for a partial-day absence does not violate California law".

Bear in mind, however, that while this ruling is extremely helpful, this is an area that remains fraught with peril. The prudent employer may still want to check with counsel to ensure that its policies are properly written and that any deductions made fall within the guidelines of the cited case.

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Lerner Lines... *from page 6*

Another interesting case was recently decided by the State Supreme Court and actually arose out of an unemployment insurance decision. The Court's decision had particular meaning for me because I often get questions during my Unemployment Insurance seminars about the very circumstances involved in this case.

In Paratransit, Inc. v. Unemployment Insurance Appeals Board, an employee refused his employer's repeated orders to sign a written disciplinary notice. The employee disputed the notice's factual allegations and thought he was entitled to consult with his union representative first.

The question that the Court had to decide in this case was NOT whether the employer was within its rights to fire the employee. That fact was never in dispute. The key question was whether the employee's single act of disobedience constituted "misconduct" within the meaning of California's Unemployment Insurance Code.

The Court's finding was that "the Claimant's refusal to sign at the moment was not misconduct but, at most, a good faith error in judgment that did not disqualify him from unemployment benefits".

That will do it for this month. If you have questions about items covered in my newsletter or regarding any employee relations issues, please email me or contact my office at 714-671-0202.

IMPORTANT NOTICE: If you wish to receive future issues of the Lerner Lines newsletter on a monthly basis and are not already on that mailing list, please send a request along with your email address to Lerassoc@aol.com.

Cell Phone Article... *from page 5*

employee privacy. If the employer owns the phone and maintains appropriate policies on the use of electronic media, it will also maximize its rights to monitor cell phone usage.

Of course, the same principle applies if an employer requires its employees to have access to a computer or tablet device away from its premises. It is well-established that, subject to proper policies, an employee does not have a reasonable expectation that what he or she creates, stores, receives, or sends from a company-owned computer is private and can be kept from the gaze of the company.

If access to a computer at the employee's home is required on a frequent basis, employers may wish to consider providing an employer-owned mobile "hot spot" available to its employees to avoid a claim that the employer must pay for some ill-defined percentage of the cost of the employee's choice in home Internet access.

Employers should also think about their workplace practices to identify any sort of personal assets that employees may use for their jobs in order to make reasoned decisions about how to manage the issues raised by *Cochran*.

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[1] *Gattuso v. Harte-Hanks Shoppers, Inc.,* 42 Cal. 4th 554 (2007).

[2] *See* Kevin Lilly, *California Supreme Court Stabilizes the Law in California Misclassification Class Action Cases*, Littler ASAP (Jun. 2 2014).

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California Supreme Court Holds Unauthorized Workers Are Not Precluded From Suing Employers For Alleged Violations Of California Employment Laws

by
Carol Gefis & Jonathan Judge, AALRR

On June 26, 2014, the California Supreme Court held that all employees, regardless of immigration status, are entitled to all of the protections, rights and remedies provided under California employment laws and held that California law is not pre-empted by federal immigration law prohibiting employment of unauthorized workers. *Salas v. Sierra Chemical*.

Background

Plaintiff Vicente Salas obtained employment with Defendant Sierra Chemical Company in 2003, providing a false Social Security number and documentation to the employer. During his employment, Salas and several of his co-workers received letters from the Social Security Administration stating that the employee's name and Social Security number did not match. Salas alleged that he and his co-workers were told by their production manager at Sierra not to worry about the letter, and that as long as they did good work they would not be terminated.

Salas was injured on the job and filed for workers' compensation. Sierra told Salas that he could come back to work only when he received a complete medical release. Salas did not provide the release and Sierra did not hear from him again. Salas later sued for disability discrimination based upon his workers' compensation claim. Just before trial, Sierra learned of Salas's use of false documents in the employment application process. Sierra argued that it would not have hired Salas had it known of the false documentation, and that this evidence should bar his claims.

The trial court denied Sierra's motion, and Sierra appealed. The Court of Appeal concluded that Salas's claims were barred by both the doctrines of after-acquired evidence and unclean hands, reasoning that the doctrine of after-acquired evidence barred Salas's causes of action because he had misrepresented to Sierra his eligibility under federal law to work in the United States. It also held that Salas's claims were subject to the doctrine of unclean hands because he had falsely used another person's Social Security number in seeking employment with Sierra. The California Supreme Court granted review.

Federal Law does not preempt California Law in this case

The California Supreme Court first reviewed the issue on the basis of preemption, and whether the federal Immigration Reform and Control Act of 1986 ("IRCA"), which prohibits the employment of unauthorized workers (and requires their termination when discovered), preempts or trumps the application of the antidiscrimination provisions of California's Fair Employment and Housing Act ("FEHA") to workers who are unauthorized aliens.

The Court reviewed the case law and legislation since the enactment of the IRCA and concluded that the FEHA is generally <u>not</u> preempted by federal immigration law. Since the Court found that preemption did not bar the suit, it next turned to the "after acquired evidence" defense raised by Sierra. The "after acquired evidence defense" refers to an employer's discovery, after an allegedly wrongful termination or refusal to hire, of information that would have justified a lawful termination or refusal to hire. The Court determined that the defense may result in a reduction in available remedies, and bars an award of lost pay damages for any period of time after an employer's discovery of the employee's ineligibility to work in the United States, but does not act as an absolute defense or bar to the action.

The Court then turned to the "unclean hands" defense, which applies when a claimant has acted unconscionably or in bad faith in the very matter in which he seeks relief. The Court held that although unclean hands may be a complete defense to some causes of action, it <u>may not</u> be used to defeat a claim based on a public policy, such as a discrimination claim, though it may reduce the damages awarded.

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San Francisco Restricts Use of Conviction Records in Employment Effective August 13, 2014

by
Robert Fried, Jonathan Judge, AALRR

The San Francisco Fair Chance Ordinance (the "Ordinance") took effect August 13, 2014. The Ordinance limits use of criminal conviction information in hiring and employment in a trend informally referred to as "Ban the Box" legislation.

The Ordinance (San Francisco Policy Code, Article 49 and Administrative Code, Article 12) (the "Ordinance") mostly builds upon existing California law, making parallel requirements under city law, but adding some key provisions that go beyond state law. Some of the overlap and additional requirements are highlighted below.

The Ordinance applies to employers with 20 or more employees, city contractors, and housing providers. According to the City's Frequently Asked Questions regarding the Ordinance, "The [Ordinance] applies to private employers that are located or doing business in San Francisco, and that employ 20 or more persons worldwide. This 20-person threshold includes owner(s), management, and supervisorial employees. Job placement, referral agencies, and other employment agencies are considered employers."

The prohibition against inquiries and considerations mostly parallels California Labor Code Section 432.7. However, the definition of "Unresolved Arrest" does not exist in the California Labor Code and is defined in the Ordinance as "an Arrest that is undergoing an active pending criminal investigation or trial that has not yet been resolved." Under the Labor Code, a permissible inquiry may be made as to "arrests for which the applicant is out on bail or on his or her own recognizance pending trial."

The Ordinance also prohibits inquiring into "(4) A Conviction or any other determination or adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system," which does not appear directly addressed by California statute.

The Ordinance overlaps and exceeds state law in several prohibitions. The Ordinance specifically addresses "(5) A Conviction that is more than seven years old," as a prohibited inquiry, which is similar to the prohibited inquiries under the California Consumer Credit Reporting Agencies Act ("CCRA") (California Civil Code Section 1785.13) and the California Investigative Consumer Reporting Agencies Act ("ICRA") (California Civil Code Section 1786.18), but which is not addressed under Labor Code Section 432.7. Also, "(6) Information pertaining to an offense other than a felony or misdemeanor, such as an infraction," is not specified in Labor Code Section 432.7, but the Labor Code effectively prohibits such inquiries.

The Ordinance requires additional notice to be provided to individuals who will be the subject of a criminal history inquiry. Employers must already provide notice under the Fair Credit Reporting Act ("FCRA")(15 USC Section 1681), the CCRA, and ICRA, prior to conducting background checks, so this is an additional notice that must be provided.

Similarly, the Ordinance requires an additional pre-adverse notice to be made to an applicant or employee if an adverse decision will be made based on the criminal history discovered in a report. This builds upon existing obligations to provide pre-adverse information under the FCRA, which requires a copy of the report and a statement of rights be provided prior to the adverse action is taken. The Ordinance additionally requires provision of (1) notice of the prospective adverse action, and the (2) specified basis for the action. Following provision of this information, the employer must defer the adverse action for a "reasonable period of time" if within seven (7) days, the individual reports inaccuracy in the report or provides other mitigating evidence. The employer must reconsider the action and provide final notice of the action if it proceeds with the proposed adverse action. Such final notice is duplicative of requirements under the FCRA, CCRA, and ICRA.

The most onerous of the Ordinance requirements appears to be the requirement that job advertisements reasonably directed toward San Francisco applicants include a statement that the employer "will consider for employment qualified applicants with criminal histories in a manner

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9th Circuit Holds the FAAAA does not Preempt California's Meal and Rest Period Laws

by

Paul M. Huston, Jonathan Judge, Robert Fried, AALRR

On July 9, 2014, the 9th Circuit held that California meal and rest period laws were not sufficiently related to prices, routes, and services to be preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). *Dilts v. Penske Logistics*.

Plaintiffs brought a class action against Penske alleging that Penske failed to comply with California's overtime, and meal and rest period requirements. Plaintiffs represented a certified class of 349 delivery drivers and installers, who alleged they worked over 10 hours per day, and generally worked in pairs with one driver and one installer in each truck. The employees alleged that Penske assumed that the employees were taking their meal and rest periods but simultaneously created an environment that discouraged the employees from doing so. Penske responded by arguing that the FAAAA preempted California's meal and rest period laws for transportation workers.

The court explained the original intent of the FAAAA: to prevent states from undermining the federal goal of deregulating the interstate trucking industry. The court observed that in order to prevent state legislatures from overriding the federal objective of deregulation, the FAAAA was designed to preempt state laws that are "significantly related to rates, routes, or services, even if indirectly."

While the 9th Circuit held that the question before it was "not close," the issue presented with respect to mandatory meal and rest periods raises statutory benefit issues largely unique to California. Writing for the majority, Judge Graber explained that California's meal and rest period laws do not mandate or prohibit certain routes, or compel motor carriers to act in some specific way with respect to the services they provide. The court specifically rejected the argument that meal and rest period requirements affect prices, routes, and services by forcing companies to adjust to them in setting certain prices, routes, and services. The court noted that meal and rest period laws are "broad laws applying to hundreds of different industries with no other forbidden connection with prices, routes, and services," and are "normal background rules for almost all employers." Such laws, according to the court, are not the sort of "directly related" laws that Congress sought to preempt with the FAAAA.

What this means for employers:
Transportation employers in California battling meal and rest period and other wage and hour complaints have one less defense in their arsenal after this decision. Employers with workers in the transportation industry need to make sure their meal and rest period policies and practices strictly comply with, and echo the Industrial Welfare Commission Wage Order 9.

There is no indication yet as to whether the decision will be appealed to the Supreme Court. FAAAA preemption remains a live issue in other wage and hour cases before California courts as well as in other matters in litigation elsewhere in the country. Two cases, *Rodriguez v. RWA Trucking Company, Inc.*, and *Harris v. Pac Anchor Transp., Inc*. are currently pending before the California Supreme Court on related FAAAA pre-emption arguments. At issue in those cases is whether the FAAAA pre-empts California's Unfair Competition Law with regard to trucking industry employees classified as independent contractors. A case is also pending in the First Circuit Court of Appeals, *Massachusetts Delivery Association v. Martha Coakley*, on the FAAAA pre-emption issue. In that case, the Massachusetts Delivery Association challenged a Massachusetts law that requires companies to provide independent contractors with the same wages and benefits as those given to employees.

Also recently decided was the case of *Sanchez v. Lasership*, Inc. (E.D. Va. 2013), where a Massachusetts statute that attempted to redefine "independent contractor" to only include those who

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NLRA Violation for Refusal to Allow Union Representation Prior to Drug Test

Executive Summary: The National Labor Relations Board (NLRB or Board) recently held that an employer violated the National Labor Relations Act (NLRA) when it discharged an employee who refused to take a drug test without first consulting with his union representative. *See Ralphs Grocery Company and United Food and Commercial Workers Union, Local 324*, 361 N.L.R.B. No. 9 (July 31, 2014). In the 2-1 decision, the Board found that the employee's suspension and subsequent discharge were "inextricably linked to his assertion of *Weingarten* rights," and therefore, reinstatement and backpay were warranted.

Background: On May 18, 2011, the employee, Razi, arrived to work an early morning shift. Several co-workers informed Ralphs' store director that Razi appeared agitated, anxious, and nervous and that his speech was slurred. The store director found Razi stocking produce and noticed that he was fidgety, spoke rapidly, and had trouble focusing on the conversation. Based on the circumstances, the store director asked Razi to take a drug and alcohol test. Razi refused, at which point the store director informed him that a refusal to take the test would be grounds for immediate suspension because it would constitute insubordination and an automatic positive test result. Razi then asked to contact his union representative.

Although the store director informed Razi that he did not have the right to have a union representative present, she permitted him to contact one. However, Razi was unable to reach his representative. Razi still refused to take the test, so the store director suspended him pending further investigation. The next day, Ralphs fired Razi for insubordination and refusal to take the drug test. Razi filed a grievance with the union, which contested Razi's suspension and discharge under the parties' collective bargaining agreement (CBA). Six weeks later the union filed a charge with the NLRB alleging that Ralphs violated the NLRA by unlawfully interfering with Razi's *Weingarten* rights. Under *Weingarten*, employees have a right to union representation at an investigatory interview they reasonably believe may result in discipline. *NLRB v. Weingarten*, 420 U.S. 251 (1975).

Board Affirms ALJ's Determination that Employer Violated the NLRA

In the grievance under the CBA, the arbitrator found that Ralphs terminated Razi for just cause based on his refusal to take the drug test. He further found that the meetings where Ralphs requested the drug test did not constitute investigatory interviews and, as such, did not trigger Razi's *Weingarten* rights. The Administrative Law Judge (ALJ) disagreed and rejected the arbitrator's decision on the grounds of repugnancy to the Act, finding it "totally inconsistent with Board precedent." In adopting the ALJ's findings, the Board stated that Razi's suspension and termination were a direct result of his invocation of his *Weingarten* rights, and thus, Ralphs violated the NLRA.

In his dissent, Member Johnson agreed that Ralphs interfered with Razi's *Weingarten* rights but concluded that Ralphs suspended and terminated him because of its belief that he was intoxicated, not due to any hostility toward his representation request. He stated that under the circumstances, Ralphs should not have been required to postpone a time-sensitive test simply because, through no fault of its own, it was unable to comply with Razi's request. The majority agreed that employers have a legitimate interest in promptly addressing situations where employees may be under the influence of drugs or alcohol. Nevertheless, that interest does not allow employers to take actions against employees who invoke their rights under the NLRA.

Employers' Bottom Line: As always, when conducting any type of investigation, an employer must respect an employee's right to a union representative in any situation where that employee could face discipline. In light of this recent decision, employers should be aware that the Board may find, at least in some situations, that this right extends to employees who are asked to take a for-cause drug test.

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NLRB Moves Toward New Standard to Hold Franchisors Are Joint Employers of Their Franchisees' Employees

by
Frederick L. Warren, FordHarrison

Executive Summary: Over the last two years fast-food workers have engaged in walkouts and other activities protesting their wages and seeking an increase to $15/hr. Numerous unfair labor practice charges have been filed with the National Labor Relations Board (NLRB) against restaurant franchisors and franchisees accusing them of illegally firing, threatening or otherwise retaliating against workers for activities protected by the National Labor Relations Act (NLRA).

On July 29, 2014, the General Counsel (GC) of the NLRB issued a directive to the regional offices handling charges against one such franchisor, McDonald's, stating that McDonald's could be held liable as a joint employer of the employees of its franchisees for any unfair labor practices committed. Absent settlement, the NLRB will issue complaints against McDonald's and its franchisees as joint employers. The written directive by the GC has not been made available to the public. Consequently, the specific grounds on which the GC made his determination are unknown.

The fast-food workers alleged that McDonald's is a joint employer on the grounds that it directs its franchisees to adhere to its rules on food, cleanliness and employment practices. Additionally, McDonald's frequently owns the restaurants in which its franchisees operate. McDonald's strongly disputes that it is a joint employer and vowed to litigate the issue.

It is important to understand that the GC's determination is not legally binding. A complaint will be litigated before an administrative law judge who will issue a decision. That ruling is appealable to the NLRB. Any decision by the NLRB may be appealed to a federal court of appeals. The losing party can seek a discretionary appeal to the U.S. Supreme Court. The litigation process likely will take several years.

An unrelated case involving Browning-Ferris Industries (BFI) is pending before the NLRB. The case arose out of a union election and involves whether BFI and a staffing agency are joint employers. The NLRB invited parties to submit briefs on whether the NLRB should adhere to its existing joint employer standard or adopt a new one. The current test is whether two entities share the ability to directly and immediately control or determine essential terms and conditions of employment such as hiring, discipline, termination, supervision and direction.

The GC filed a brief in the BFI case arguing what the new rule should be. The GC's brief may be instructive as to how he analyzed whether McDonald's is a joint employer of its franchisees' workers.

Under the GC's proposed new test a joint-employer determination will be based on the totality of circumstances, including how the potential joint employers structure their commercial dealings with each other. If a franchisor wields sufficient influence over the working conditions of the franchisee's employees, then the franchisor can be found to be a joint employer. The GC proposes making no distinction between direct, indirect and potential (unexercised ability) control over working conditions.

Among the factors mentioned in the GC's brief are franchisors: keeping track of data on sales, inventory and labor costs; calculating the labor needs of the franchisees; setting and monitoring employee work schedules; tracking franchisee wage reviews; tracking how long it takes for employees to fill customer orders; accepting employment applications through the franchisor's system; and screening applicants through that system.

The GC notes that technological advances permit franchisors to exercise significant control over franchisees through scheduling and labor management programs that go further than simply protecting the franchisor's product or brand.

It appears likely that the NLRB is moving toward a joint employer standard that will make it easier to

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Meal and Rest Period Laws... *from page 10*

perform services "outside the usual course of business of the employer" was challenged. The court found that such a redefinition would have a major impact on the business models of transportation companies, and was thus preempted by the FAAAA.

Conflicting decisions abound, and decisions are expected soon in the above cases. It will be interesting to see how much of an impact the *Dilts* case will have on those other courts' decisions. Should a split arise between the different Circuits of Appeal, the issue may work its way to the U.S. Supreme Court.

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NLRA Violation for Refusal to Allow Union Representation Prior to Drug Test *...from page 11*

If you have any questions regarding this Alert or any other labor or employment related issues, please contact Jacquelyn Thompson, jthompson@fordharrison.com, an associate in our District of Columbia office. You may also contact the FordHarrison attorney with whom you usually work.

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NLRB Moves Toward New Standard to Hold Franchisors Are Joint Employers of Their Franchisees' Employees ... From page 12

find that a franchisor and its franchisees are joint employers. Whatever standard is used, determinations will be fact specific.

Employers' Bottom Line

Franchisors should review their policies, practices and documents regarding the degree of direct and indirect control they exercise over the working conditions of their franchisees' employees. Among the things franchisors should not be involved in include: hiring, disciplining or terminating franchisees' employees; supervising or controlling those employees' work schedules or conditions of employment; determining rates or methods of payment; monitoring those employees' performance; or exercising control over franchisees' timekeeping or payroll practices. The NLRB has signaled that franchisors should not exercise control beyond what is necessary to protect their product or brand.

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Orange County Locations

OFFICE	ADDRESS	PHONE
Anaheim Job Service	2450 E. Lincoln Ave. Anaheim, CA 92806	714-518-2315
Anaheim Workforce Center	50 S. Anaheim Blvd. Anaheim, CA 92805	714-765-4350
Irvine One-Stop Center	125 Technology Drive #200 Irvine, CA 92618	949-341-8000
Westminster One-Stop Center	5405 Garden Grove Blvd. Westminster, CA 92863	714-241-4900
Santa Ana W.O.R.K. Center	1000 E. Santa Ana Blvd., Ste. 220 Santa Ana, CA 92701 (At the train station)	714-565-2610
Santa Ana Disability Insurance	P.O. Box 1466 Santa Ana, CA 92701	800-480-3287
Employment Tax Audit Area Office	2099 So St College Blvd., Ste. 401 Anaheim, CA 92816-6014	714-935-2920
EDD Labor Market Information	South County North County	949-341-8051 714-687-4816

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