



# California UPDATE

## EMPLOYMENT LAW

SECOND QUARTER 2008

### Shift Supervisors Can't Share In Service Tips

In a class action brought against Starbucks Corporation, a California Superior Court judge recently ordered Starbucks to pay more than \$105 million to its baristas as reimbursement for the portion of the employee tip pool that was given to shift supervisors. The Court found that under state law, because shift supervisors direct and supervise the baristas, they should be treated as "agents" and cannot be compensated from the employee tip pool. An injunction was also issued to prevent Starbucks from continuing the

practice. After this ruling, similar actions have been filed against the world's largest coffeehouse company in Massachusetts, Minnesota, and New York.

Hospitality employers should reevaluate their tip pool practices in light of this new ruling. Prior guidance from the state warned against supervisors sharing in such a pool. In a 2005 letter, the California Labor Commissioner approved a tip-pooling policy that required employees to contribute 15% of their actual tips to a pool that would then be distributed to other employees

in the chain of service based upon hours worked. The Commissioner stated that no employee with the authority to hire or fire, or direct or control the employees in the chain of service to the guest can receive any part of the gratuities intended for the employees. In a restaurant, the Commissioner stated that servers, buspersons, bartenders, hostesses, wine stewards, and front room chefs might all participate in the pool. Erring on the side of exclusion of potential agents is advised. ♦

### Do's And Don't's For Faith-Based Employee Assistance Programs

Some employers incorporate faith-based programs, such as corporate

chaplain services, into the workplace. Such programs may include the following: confidential counseling, crisis intervention, management consultation, programs for worship or prayer, referral to other professionals or social service agencies, training and education for employees and supervisors, employee/community/church relations and programs, or special events scheduled in response to needs that arise in the workplace. Particularly at a time of tragedy or loss, a company may bring in pastoral professionals to provide counseling and support available 24 hours a day. These companies say that these practices have a positive impact on

employee morale and worker retention.

Keep in mind that faith-based programs offered by non-church employers put a company at greater risk for religious discrimination claims. In order to avoid such claims, employers should not require employees to attend religious services or counseling and should ensure that the work environment is free from direct influence from supervisors' religious beliefs. If wholly voluntary, and perhaps where no other employee assistance program exists, a faith-based counseling service may provide a welcome safety net to employees in need. ♦

## ISSUE

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### Sox May Not Provide Right To A Jury Trial

A U.S. District Court judge in the Northern District recently held that because the Sarbanes-Oxley Act (SOX) does not mention jury trials, there is no indication that Congress intended to create the right to a jury trial. In a whistleblower case brought by former

employees of Levi Strauss & Co., the judge found that since SOX provides equitable remedies and related special damages, and not "discretionary monetary relief" which would be a jury issue, the plaintiffs did not have a constitutional right to a jury trial. ♦

# EEOC Comments On Termination And Discrimination Settlement Agreements

At a recent conference, an attorney with the Equal Employment Opportunity Commission (EEOC) stated that the agency opposes “no-rehire” and “no-reapply” clauses in termination agreements or discrimination settlement agreements as a matter of policy. The agency perceives these clauses as unfair to individuals pursuing their legal rights against an employer who may have engaged in illegal discrimination.

While the EEOC will not permit such a clause in their conciliation

agreements, employers may negotiate with the claimant for a separate general release that includes “do not apply” language. From the defense perspective, once the claimant has settled a claim with the employer, it is generally in the best interest of both parties to end the relationship.

In addition, to avoid potential defamation lawsuits, the EEOC advises that employers should consider making non-disparagement clauses in termination agreements mutual. The agreement should include language

controlling who at the employer may answer inquiries about the former employee and what type of information may be disclosed.

The best way to avoid improper references is to provide the claimant with a signed letter of employment verification as part of the settlement stating dates of employment and positions held. This achieves two important goals: (1) clarification of the limits of the verification and (2) closure to the communications necessary between the parties. ♦

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## *Employers Should Prepare Now For New California Cell Phone Law*

The California Wireless Telephone Automobile Safety Act goes into effect on July 1, 2008. This new law prohibits drivers from operating a motor vehicle while using cell phones without a hands-free device, and completely prohibits those under the age of 18 from using a cell phone while driving.

Although the new law does not impose any affirmative obligations on them, employers should consider establishing a cell phone policy or revising existing rules. Consider the tragic fates of 15-year old Naeun Yoon and attorney Jane Wagner. On the evening of March 8, 2000, Ms. Wagner hit something on the side of the road on her way home from work. Thinking it was a deer, she continued onward.

Sadly, the victim, Ms. Yoon, died as a result of the accident. Allegedly, Ms. Wagner had made several business calls on her cell phone while driving that night, resulting in a \$25M wrongful death lawsuit against her and her law firm. Ms. Wagner served jail time and a jury awarded Ms. Yoon’s family \$2M in damages against her. The law firm settled the matter, suggesting that employers might be held vicariously liable for accidents of their employees caused by cell phone distractions.

An employer can assist its employees to comply with the new law, and lessen exposure to potential liability, by implementing a company cell phone policy and providing hands-free devices to employees who may use cell phones

while driving on company business. Employers can amend their handbooks to include provisions addressing employees’ work-related use of cell phones for safe driving.

Other suggested policy additions include limiting employees’ use of cell phones to certain situations where it is safe to do so (e.g. prohibit use in heavy traffic or bad weather) and prohibiting text messaging or e-mailing while driving. Any new or revised policies should be acknowledged by each employee in writing. With certain cell phone safety precautions in place, and clear guidance to employees that violations of policies will not be tolerated, perhaps more driving accidents can be avoided. ♦

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## “Me Too” Evidence Might Be Allowed

In *Sprint/United Management Co. v. Mendelsohn*, the U.S. Supreme Court held that “me too” evidence introduced by a plaintiff in a discrimination suit is “neither per se admissible nor per se inadmissible.” The plaintiff was included in a corporate reduction-in-force and brought an age discrimination against Sprint. In order to establish her “pattern and practice” age discrimination claim, the plaintiff tried to introduce the testimony of five former employees, also

over the age of 40 and involved in the layoff. These employees were not parties to the litigation, worked in different departments and had different supervisors. The district court excluded the “me too” evidence because the other employees were not “similarly situated,” and the appeals court ruled that excluding the testimony was an abuse of discretion.

The Supreme Court held that the admissibility of “me too” evidence

should be reviewed by the trial courts on a case-by-case basis, and that the courts need to balance the relevance of the evidence against its prejudicial effect. Although this decision seems to have properly directed the analysis of evidence to occur at the trial court level, being fair to both sides, some ADEA plaintiffs will consider this decision a win. ♦

# Beware Of Overuse Of BlackBerrys

BlackBerrys have become as common as cell phones in the business world. Some employers require employees at all levels to stay connected to e-mails with this technology. Yet even if an employer does not require its non-exempt employees to check BlackBerry devices or take work-related calls after hours, this may not be a viable defense to a claim for overtime wages.

To avoid overtime claims, employers who issue such devices should amend their policies to state that non-exempt employees may not use their BlackBerrys or cell phones for work-related purposes beyond their normal work hours without prior authorization. If an employee violates the rule and works overtime without permission, employers must still pay the employee for the overtime worked, but should take disciplinary measures to ensure future compliance.

Although the risk of wage and hour claims falls mostly on non-exempt employees' use of BlackBerrys, there are potential problems that could arise from

exempt employees' use of these devices as well. If an exempt employee on unpaid leave checks his or her BlackBerry or makes work-related telephone calls for more than a de minimus amount of time, that employee

should be paid for the entire week. Similarly, employees on sick leave or vacation should be encouraged to "unplug" or the employer risks having to pay the exempt employee his or her standard salary for that day. ♦

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## *Smith Barney Settles Sexual Discrimination Class Action*

In April, Smith Barney settled a sexual discrimination class action by 2,500 female financial advisors filed in 2005. The plaintiffs alleged discrimination against women in compensation, distribution of accounts, partnerships, and other business opportunities. In addition to paying a \$33 million settlement, Smith Barney also agreed to require their managers to go through diversity training every other year

and initiate substantial changes to the way in which they distribute accounts of departing brokers. The settlement also requires that an industrial psychologist review and suggest changes to the branch management assessment program and that a diversity monitor review reports of any complaints by female brokers for sex discrimination, sex bias, or retaliation. ♦

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## **Ninth Circuit Rejects NLRB's Ruling Allowing Hospital To Prohibit Nurses From Wearing Union Buttons**

In *Washington State Nurses Assoc. v. NLRB*, the Ninth Circuit rejected a ruling by the National Labor Relations Board that allowed a hospital to prohibit union buttons. During collective bargaining agreement talks between the hospital and the Washington State Nurses Association in 2003, the nurses wore buttons with messages such as "Staffing Crisis – Nursing Shortage – Medical Errors – Real Solutions" and "RNs Demand Safe Staffing." The hospital banned the buttons because it was afraid the buttons would alarm patients by giving them the impression that the hospital had an unsafe level of staffing. The nurses' union filed an unfair labor

practice charge against the hospital with the NLRB.

An NLRB panel ruled in favor of the hospital, stating that although the ban was presumptively invalid, the hospital had sufficiently shown that the buttons would disturb patients and therefore was justified by "special circumstances." The Ninth Circuit rejected the decision, relying on the substantial evidence test and finding that when the record was examined as a whole, substantial evidence did not support the NLRB's conclusion that the hospital fulfilled its burden of establishing the existence of special circumstances. ♦

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## *Living Wage Ordinance Will Go Into Effect For LAX Hotels*

On April 9, the California Supreme Court declined review of a decision by the appellate court upholding a Los Angeles city living wage rate ordinance affecting 13 hotels located near Los Angeles International Airport. The ordinance requires that the hotels pay their workers the city's living wage rate of at least \$9.39 per hour if health benefits are provided and \$10.64 if no health benefits are provided. The lawsuit was brought by the Hotel Association of Los Angeles, which issued a statement saying that the decision would negatively affect the hotel industry's growth and prevent the creation of new jobs. ♦

## Out-Of-State Employers Should Note California Rules On Criminal Background Checks

California law limits the information that an employer can collect about an applicant's criminal history. No information regarding an arrest that did not lead to conviction can be sought. This does, however, permit the employer to inquire about an arrest that is being prosecuted. Also, the employer should state on the application that the existence of a conviction will not necessarily bar employment.

We suggest this language be inserted in your employment application prior to

a request for disclosure of criminal convictions:

*Convictions that have been expunged, sealed, discharged, or otherwise cleared from your record do not have to be disclosed. Do not disclose (1) a marijuana conviction that is more than two years old, (2) a misdemeanor conviction for which probation was successfully completed or discharged and the case has been judicially dismissed under Penal Code Section 1203.4, or (3) any record regarding a pre- or post-trial diversion program. ♦*

## Meal Period Rules Will Be Clarified

The California Senate Labor and Industrial Relations Committee unanimously approved legislation (SB 1539) declaring its intent to provide clarification on the meal period law. The current law has created much confusion, particularly with regard to voluntary waiver of meal periods and on-duty meal periods, and expected legislation likely will provide an opportunity for the state to reconcile the varied interpretations by the courts and state enforcement officials. ♦

## California Grants Same-Sex Couples The Right To Marry

The California Supreme Court decision granting same-sex couples the right to marry goes into effect on June 17, 2008. The state Constitution's guarantees of personal privacy and autonomy protect "the right of an individual to establish a legally recognized family with the person of one's choice," said Chief Justice Ronald George, who wrote the majority opinion.

As a result of this decision, all benefits provided under state law or employer policy will have to be provided equally to opposite-sex and same-sex spouses. Since 2005, health and other insurance policies purchased in California already cover domestic partners to the same extent they cover opposite-sex spouses.

Same-sex spouses also will be eligible for certain leaves of absence, such as leave under the California Family Rights Act; "kin care" sick leave to attend to a spouse; or time off to accompany a

spouse who is the victim of a crime to legal proceedings. These statutes previously have applied to domestic partners as well. Failure to provide spousal benefits provided under employer policies to same-sex couples would likely violate the Fair Employment and Housing Act's prohibition against discrimination on the basis of sexual orientation. Moreover, marital status discrimination claims in California would seem to be available to same-sex couples under this change.

The state Supreme Court already rejected a petition to delay its decision. Same-sex couples may wed starting on June 17, the date California cities and counties will begin issuing marriage licenses to gay couples. Employers will not be dramatically affected by this change in California law other than to be sure to include gay marriage with any reference to spouses in their California policies. ♦

## Notable Recent Court Decisions

- *Federal Express Corporation v. Paul Holowecki et al.* (U.S. Supreme Court): Employees who have filed job discrimination complaints with the EEOC should not be penalized if the EEOC failed to adequately investigate their claims. The EEOC did not notify FedEx of the complaints prior to the plaintiffs filing a lawsuit, but the Court allowed the suit to go forward.
- *LaRue v. DeWolff Boberg & Associates Inc.* (U.S. Supreme Court): Under the Employee Retirement Income Security Act (ERISA), individual 401(k) pension plan participants can sue their employers for losses to their personal retirement savings.
- *Sepulveda v. Wal-Mart Stores Inc.* (9th Circuit): The Ninth Circuit reversed a district court's refusal of class certification because the decision relied on the conclusion that monetary relief claims were not incidental to the plaintiffs' primary claim for injunctive relief. The appeals court held that the trial court also must look at the plaintiffs' intent in bringing the suit. ♦

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