July 2011

FitzGerald & Mulé LLP
Employment Law Bulletin

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In This Issue

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Not surprisingly, the majority of case developments in employment law that occurred in the last few months were in the area of wage and hour law. In this issue we will review three cases and one "app" on the topic. That's right, wage and hour law has become so popular that the federal Department of Labor has developed an application for handheld devices to help employees keep track of overtime. The app is called, "Timesheet." Now, employees can track their compensable time on their iPhones, email their timesheets, and conveniently contact the DOL Wage and Hour Division with just a click.

So, if you are not keeping good records, your employees may be doing so.

Wage & Hour

Court Holds that Unlicensed Accountants May Qualify for Overtime Exemptions

Campbell v. PricewaterhouseCoopers (9th Cir. 6/15/11)

The California Ninth Circuit Court of Appeals reached an important decision for employers by holding that unlicensed accountants are not categorically ineligible for the professional exemption to overtime compensation. Under California law, certain licensed professionals are exempt from the payment of overtime wages. Certified public accountants fall under this exemption. But, accountants who have not passed the CPA exam are not exempt from overtime compensation under this portion of the test. However, the professional exemption also applies to individuals who qualify as "learned professionals."

In *Campbell*, approximately 2,000 unlicensed junior accountants sued their employer for alleged unpaid overtime wages. They petitioned the court to rule as a matter of law that they

HIGHLIGHTS

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- *California Overtime Laws Apply to Non-Resident Employees Who Perform Any Amount of Work in California*
- *Another Pro-Employer Decision Anticipating Brinker & Brinkley*
- *Keeping Track of Wages: There's an App for That!*
- *Class Certification Denied in Landmark Discrimination Class Action*
- *Case Against Union for Defamatory Flyers in Labor Dispute Allowed to Proceed*
- *IRS Mileage Rate Increase*

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REPRESENTING CLIENTS IN ALL ASPECTS OF THE EMPLOYMENT RELATIONSHIP

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We strongly recommend that employers seek employment law counsel to determine the proper classification for unlicensed professional employees.

were entitled to overtime compensation because they did not qualify for any overtime exemption. The trial court ruled that unlicensed accountants are categorically ineligible for the professional exemption. The Ninth Circuit disagreed by holding that unlicensed accountants are not categorically ineligible for the exemption simply because of their unlicensed status. Rather, unlicensed accountants may qualify as "learned professionals" under the professional exemption. The court also held that depending on the accountants' duties and responsibilities, they may qualify under the administrative exemption as well.

Although the court did not hold that the plaintiffs in this case actually qualified for either exemption, it held that the plaintiffs *could* qualify depending on their actual job duties. The court stated that "[e]ach case will require a fact-specific inquiry into whether the unlicensed accountant meets the [tests] various benchmarks."

The Ninth Circuit's decision is not a green light for professional firms to reclassify all their unlicensed professionals as exempt. However, it is very good news for accounting firms and potentially law firms, engineering firms and other employers who fall under one of the eight (8) specified professional exemptions. Under this ruling, employees may be properly classified as exempt even if they do not have a license under one of the eight categories provided that they meet the elements of the test as a "learned professional" or fall under the administrative exemption.

California Overtime Laws Apply to Non-Resident Employees Who Perform Any Work in California

Sullivan v. Oracle Corp, (SC 6/30/11)

The California Supreme Court held that California's overtime laws apply to non-residents who do *any* work in California on behalf of their California-based employers. The Court held that three out of state instructors for Oracle who were periodically required to travel to other states (e.g., California) to present training sessions were entitled to overtime for work performed here. The case affirms that California law applies to employees who work in California regardless of where they live.

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Another Pro-Employer Decision Anticipating Brinker & Brinkley

Flores v. Lamps Plus, Inc. (CA 5/10/11)

In the several years that we have been awaiting the Supreme Court's decision in *Brinker*, several appellate courts have issued opinions anticipating the Supreme Court's decision. In this fourth and latest decision, three former employees of Lamps Plus filed a class action lawsuit on behalf of 2,600 current and former putative class members alleging that Lamps Plus violated labor laws by denying meal and rest breaks among other claims.

In denying the plaintiffs' motion for class certification, the trial court found that individual issues predominated over common issues as to the meal and rest period claims, and class treatment was not superior to individual actions. The trial court also held, with regard to meal and rest breaks, that employers need only *authorize and permit them*, which means make them available, but not *ensure* they are taken. The Court of Appeals agreed with the trial court's legal analysis and affirmed the decision.

Flores is the fourth appellate decision (post-*Brinker* and *Brinkley*) to hold that employers must only **provide**, not ensure, meal and rest periods. One can safely say there is a trend afoot. Whether the California Supreme Court will follow that trend remains to be seen.

Keeping Track of Wages: There's an App for That!

The U.S. Department of Labor's Wage and Hour Division has developed a timesheet application for smart phones to help employees independently track the hours they work and determine the wages they are owed. The app is available in English and Spanish and users conveniently can track regular work hours, break time and any overtime hours for one or more employers.

Additionally, users will be able to add comments on any information related to their work hours; view a summary of work hours in a daily, weekly and monthly format; and email the summary of work hours and gross pay as an attachment.

The DOL announced that "the new technology is significant because, instead of relying on their employers' records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records."

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Dukes is an important case that bodes well for employment counsel defending class-wide discrimination cases. However, its practical application to the average workplace and HR practitioner is less significant.

"I am pleased that my department is able to leverage increasingly popular and available technology to ensure that workers receive the wages to which they are entitled," said Secretary of Labor Hilda L. Solis. "This app will help empower workers to understand and stand up for their rights when employers have denied their hard-earned pay."

Both the app and the calendar can be downloaded from the Wage and Hour Division's home Web page at http://www.dol.gov/whd/index.htm.

Discrimination / Class-Actions

Class Certification Denied in Landmark Discrimination Class Action

Dukes v. Wal-Mart Stores, Inc. (US 6/20/11)

The United States Supreme Court denied class certification in a discrimination case involving 1.5 million female Wal-Mart employees. The plaintiffs alleged that Wal-Mart's store managers made discretionary decisions regarding pay and promotions that discriminated against women under Title VII. Both the lower court and the Ninth Circuit Court of Appeals found the case appropriate for class certification. However, the Supreme Court disagreed and reversed the prior rulings.

Writing on behalf of the Court, Justice Scalia focused on the procedural requirement that to maintain a class action there must be questions of fact or law that are common to the class. The plaintiff must demonstrate that class members have suffered the same injury that arises out of a "common contention – for example, the assertion of discriminatory bias on the part of the same supervisor." This "common contention must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

The Court noted that "pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised 'in a largely subjective manner.'" The plaintiffs did not

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allege that Wal-Mart had an express corporate policy against the advancement of women. Rather, they claimed that their local managers exercised discretion over pay and promotions disproportionately in favor of men. Consequently, the plaintiffs called into question "literally millions of employment decisions at once." "Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*?" The Court stressed that in class actions the mere existence of common questions are not as important as the ability to "generate common answers apt to drive the resolution of the litigation." Given that there was no evidence that uniform criteria were used to drive the individual decisions of the local managers, the Court found that a class proceeding would not generate "common answers" applicable to the whole class.

Unions / Defamation

Case Against Union for Defamatory Flyers in Labor Dispute Allowed to Proceed

Price v. Operating Engineers Local No. 3 (CA 5/20/11)

James Price began working for Road Machinery as a Vice-President and General Manager. At the time of his employment, Road Machinery was in the process of negotiating a new collective bargaining agreement with its union members. However, Price had no role in the collective bargaining process nor did he have the ability to affect Road Machinery's negotiations with the union.

As a result of unsuccessful contract negotiations, the union went on strike. Thereafter, certain union members placed copies of a flyer containing the following statements on the doors and cars of Price's neighbors at his apartment complex ("Cobble Oaks"): "**NEIGHBORS, BEWARE OF THIS MAN: JIM PRICE**"…"[p]rotect your family, safeguard your property"…"there is no telling what he might do"… and "[c]omplain to Cobble Oaks about the sort of person they've let in your community." The flyer listed Price's business cell phone number and his apartment number, and encouraged Price's

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neighbors to complain to him directly.

A couple weeks later, a second flyer was posted containing the following statements: "COBBLE OAKS RESIDENT JIM PRICE…tried to take away workers pension benefits…threatened workers with arrest for publicizing their fight for workplace justice"… and "threatened to use armed guards against the workers to shut down their strike." This flyer also listed Price's cell phone number and apartment number.

Price sued the Union alleging defamation, invasion of privacy, and stalking among other claims. The Union tried to dismiss the lawsuit with a motion under California's anti-SLAPP statute. The Union argued that because the flyers were distributed during a labor dispute, their distribution was a matter of public interest and Price's lawsuit was strategically designed to place a chilling effect on public participation. The trial court disagreed with the Union.

Affirming the trial court's decision, the court of appeals stated that the Union did not establish a connection between the flyers and the labor dispute between the Union and Road Machinery. Consequently, it failed to show that its disparaging statements about Price involved an issue of public, as opposed to private, interest.

This is not the first case where a union has been sued for defamation arising out of its organizing tactics. The case illustrates the personal and aggressive tactics that unions sometimes use to leverage employers. When such tactics have crossed the line of legitimate free speech to illegal conduct, individuals as well as corporate entities can take legal action against the union.

IRS Mileage Rate Increased July 1

The IRS has announced a 4.5 cent increase in the standard mileage rate to be in effect for the last six months of 2011. Effective July 1, 2011, employers who use the IRS rate to reimburse employees for business mileage must pay 55.5 cents per mile.

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