



TIP #2: KNOW THE NEW JUDICIAL DECISIONS AND HOW THEY IMPACT EMPLOYERS Murphy Austin Adams Schoenfeld LLP

While things were relatively peaceful on the legislative front, 2007 proved to be an interesting year for decisions impacting California employers. The following is a summary of several of the most important decisions issued by the California Supreme Court last year:

Gattuso v. Harte-Hanks Shoppers, Inc. In *Gattuso*, the California Supreme Court held that in addition to the Division of Labor Standards and Enforcement sanctioned "actual expense" and "IRS mileage rate" methods of reimbursement, an employer may also satisfy its obligation to reimburse employees under Labor Code section 2802 by paying employees enhanced compensation or "lump sum" reimbursement. The enhanced compensation can be in the form of an increase in base salary or an increase in commissions.

Employers that elect to reimburse employees in this manner, must make certain to establish some means of identifying the portion of overall compensation that is intended as expense reimbursement, and ensure that the amounts are sufficient to fully reimburse the employees for all expenses actually and necessarily incurred. One of our attorneys can assist you in developing a "lump sum" reimbursement plan that ensures your company does not run afoul of Labor Code section 2802.

Murphy v. Kenneth Cole Productions, Inc. The Supreme Court's decision in *Murphy* was one of the most highly anticipated decisions of the year. The Court's decision, however, was not what employers anticipated or one that employers were pleased with. In short, the Court determined that the "additional hour of pay" due employees under Labor Code section 226.7 for missed meal and/or rest periods constitutes a "wage" rather than a "penalty." As a result of the Court's decision, employees claiming violations of meal and rest period requirements under the Labor Code and Wage Orders may now recover damages dating back three years rather than being limited to the one-year statute of limitations that would have governed if the Court had determined that the payment constituted a penalty.

Obviously, the Court's holding means that the potential for liability has exponentially increased. Therefore, it is more imperative than ever that employers ensure their employees are provided with, and taking, meal periods and rest periods at the appropriate intervals. It is also important for employers to document that these breaks have been taken. Contact your counsel at Murphy Austin Adams Schoenfeld, LLP for innovative and efficient ideas on how to monitor employee compliance.

In the wake of *Murphy*, there are questions left to be resolved by the courts. First, who bears the burden of

proving that the breaks were, in fact, taken? Second, do employers have to affirmatively force employees to take meal and rest breaks or does simply offering the opportunity to take meal and rest breaks suffice? Recent decisions have varied. In *Perez v. Safety-Kleen* the United States District Court for the Northern District of California held that an employer must affirmatively provide breaks and may not assume that breaks are being taken by employees. The same court had previously decided in *White v. Starbucks* that employers need only offer periods and are not required to ensure that breaks are taken. The court determined that once the employer demonstrated that the breaks were offered, the burden would then shift to the employee to demonstrate that he or she was required to forego the break. Finally, in *Brinker Restaurants v. Sup. Ct.* (an unpublished decision) a California appellate court held that class certification should be denied where it rested on the assumption that the employer had a duty to ensure that meal periods were taken.

Prachasaisoradej v. Ralphs Grocery Co., Inc. The Court's decision ended years of uncertainty and a multitude of class action lawsuits. The decision also reversed two California Court of Appeal decisions which held that profit-based incentive compensation plans (bonus plans) that take into account breakage due to negligence, losses due to theft, and workers' compensation costs when calculating the amount of the bonus are unlawful under California law.

The Supreme Court held that Ralphs' 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" Important to the Court's decision, participants in the plan understood that their entitlement to a bonus as well as the amount received under the plan was calculated based upon a formula that compared the store's actual defined profit with the company's pre-defined target figures. Once the employees' bonus compensation had been calculated using this formula, Ralphs did not reduce the bonus by taking unauthorized deductions from any employee wages.

Employers that wish to implement an incentive compensation plan that takes into account such business associated costs should consult with their counsel. However, in the event that the employer's plan clearly delineates the terms and conditions of the plan, i.e. informs employees of the costs to be accounted for in

ascertaining goals and/or profits, such a plan will most likely not constitute an unlawful wage deduction.

Green v. State of California. The Supreme Court held that it is the employee's burden to demonstrate that he or she is a "qualified" individual with a disability, i.e. the individual was capable of performing the essential functions of his or her job with or without accommodation, in order to establish a prima facie case of disability discrimination in violation of the Fair Employment and Housing Act.

The Court's holding, while not surprising, settled a conflict among several of California's appellate courts. The decision properly places the burden of proof on plaintiffs claiming they have been discriminated against based upon their disability. Make certain to contact counsel if your company has been placed on notice, or you feel as if your company has been placed on notice, of a qualifying disability.

Gentry v. Superior Court (Circuit City Stores, Inc.). Another long awaited case, the Supreme Court decided in Gentry that class action waivers set forth in employment arbitration agreements are, with limited exception, invalid.

The Court's decision has, thus, made it difficult for class arbitration waivers to be enforced. Because, under California law, the presence of more than one unconscionable provision in an arbitration agreement can be enough to render an entire agreement unenforceable, employers should review any standard arbitration agreements provided to their employees. Employers requiring assistance reviewing their current policy or drafting an arbitration agreement can contact an attorney at Murphy Austin Adams Schoenfeld, LLP.

Supreme Court Cases to Watch in 2008

Jones v. Lodge at Torrey Pines Partnership. The Supreme Court will review the limited issue of whether an individual may be held personally liable for retaliation under the Fair Employment and Housing Act.

Edwards v. Arthur Andersen, LLP. The Court will determine the following issues: (1) whether a non-competition agreement between an employer and an employee that prohibits the employee from performing services for former clients is invalid under Business and Professions Code section 16600, unless it falls within the statutory or judicially-created trade secrets exceptions to the statute; and (2) whether a contract provision releasing "any and all" claims the employee might have against the employer encompasses non-waivable statutory protections, such as the employee indemnity protection of Labor Code section 2802.

Hernandez v. Hillside, Inc. This case presents the question of whether employees may assert a cause of action for invasion of privacy against their employer for installing 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.

Amalgamated Transit Union v. Superior Court. The following issues are presently before the Court: (1) whether a worker's assignment of a cause of action for meal and rest period violations to the worker's union carry with it the worker's right to sue in a representative capacity under the Private Attorneys General Act of 2004 or the Unfair Competition Law; and (2) whether Business and Professions Code section 17203, as amended by Proposition 64, which provides that representative claims may be brought only if the injured claimant "complies with Section 382 of the Code of Civil Procedure," require that private representative claims meet the procedural requirements applicable to class action lawsuits.

Harris v. Superior Court. The Court has granted review of this case which presents the question, are insurance claims adjusters exempted from California overtime pay requirements under the administrative exemption?



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