

LAW OFFICES OF  
**BORTON**  
**PETRINI**  
LLP

**Bakersfield**

1600 Truxtun Avenue  
Bakersfield, CA 93301  
(661) 322-3051  
E-mail: [bpcbak@bpclaw.com](mailto:bpcbak@bpclaw.com)  
Managing Partner: George F. Martin

**Fresno**

2014 Tulare Street, Ste. 830  
Fresno, CA 93721  
(559) 268-0117  
E-mail: [bpcfrs@bpclaw.com](mailto:bpcfrs@bpclaw.com)  
Managing Partner: Dave Petrie

**Los Angeles**

707 Wilshire Blvd., Ste. 5100  
Los Angeles, CA 90017  
(213) 624-2869  
E-mail: [bpcla@bpclaw.com](mailto:bpcla@bpclaw.com)  
Managing Partner: Matthew J. Trostler

**Modesto**

1104 12th Street  
Modesto, CA 95354  
(209) 576-1701  
E-mail: [bpcmod@bpclaw.com](mailto:bpcmod@bpclaw.com)  
Managing Partner: Brad Post

[www.bortonpetrini.com](http://www.bortonpetrini.com)

**Orange County**

3020 Old Ranch Parkway, Suite 300  
Seal Beach, CA 90740  
(562) 596-2300  
E-mail: [bpcoc@bpclaw.com](mailto:bpcoc@bpclaw.com)  
Managing Partner: Rosemarie S. Lewis

**Sacramento**

P. O. Box 277790  
Sacramento, CA 95827  
(916) 858-1212  
E-mail: [bpcsac@bpclaw.com](mailto:bpcsac@bpclaw.com)  
Managing Partner: Mark Newman

**San Bernardino**

290 North D Street, Ste. 500  
San Bernardino, CA 92401  
(909) 381-0527  
E-mail: [bpcsbdo@bpclaw.com](mailto:bpcsbdo@bpclaw.com)  
Managing Partner: Dan Ferguson

**San Diego**

402 W. Broadway, Ste. 880  
San Diego, CA 92101  
(619) 232-2424  
E-mail: [bpcsd@bpclaw.com](mailto:bpcsd@bpclaw.com)  
Managing Partner: Paul Kissel

**San Francisco**

463 Pacific Avenue  
San Francisco, CA 94133  
(415) 677-0730  
E-mail: [bpcsf@bpclaw.com](mailto:bpcsf@bpclaw.com)  
Managing Partner: David H. Bremer

**San Jose**

99 Almaden Blvd., Ste. 700  
San Jose, CA 95113  
(408) 535-0870  
E-mail: [bpcsj@bpclaw.com](mailto:bpcsj@bpclaw.com)  
Managing Partner: Samuel L. Phillips

*Labor News You Can Use*

THE LAW OFFICES OF BORTON PETRINI, LLP  
QUARTERLY UPDATE  
**Labor and Employment Law**

**SUMMER 2006**

REED PRINT, INC.  
PAID  
STANDARD  
U.S. POSTAGE  
PRESORTED

LAW OFFICES OF  
**Borton Petrini LLP**  
1600 Truxtun Avenue  
Bakersfield, CA 93301

# Labor and Employment Law

QUARTERLY UPDATE

THE LAW OFFICES OF BORTON PETRINI, LLP

[www.bortonpetrini.com](http://www.bortonpetrini.com)

SUMMER 2006

Published By  
The Law Offices Of  
Borton Petrini, LLP  
1600 Truxtun Avenue  
Bakersfield CA 93301  
E-mail [bpclubak@bpclubaw.com](mailto:bpclubak@bpclubaw.com)

## Inside

RECENT APPELLATE DECISIONS

PAGE 2

*If you are interested in receiving the Labor and Employment Law Quarterly Update Newsletter, or have someone to whom you would like it sent, call (661) 322-3051, ext. 170 or e-mail [publish@bpclubaw.com](mailto:publish@bpclubaw.com) and leave your name, e-mail and/or mailing address to request a free copy.*

Editor:  
**Dee Stasnopolis**  
**(661) 322-3051**

## *AVOIDING THE EXEMPT EMPLOYEE TRAP*

By **Dee H. Stasnopolis**

For years, California employers have been prime targets for claims by their employees that they have been misclassified as an “exempt” employee, and are, therefore, entitled to overtime pay and penalties. Generally speaking, “exempt” employees are salaried employees who employers do not pay overtime to. While historically, these have been managerial, administrative and professional employees, many employers classify employees in the mid-level ranks as “exempt” and do not pay them overtime. In the past, employees have filed labor commission claims and have generally been very successful, inasmuch as California uses a wholly different approach to determining the “exempt” status of an employee.

With the recent relaxation of class action requirements and the enactment of the “sue-your-boss” laws, mid-size employers have found that they are now being faced with class action lawsuits that can involve significant exposure in terms of penalties, which are many times far greater than any past wages due. For this reason, it is important for employers to take a proactive approach to ensure that their employees are properly classified as “exempt” and conduct annual reviews of their exempt employees to ensure that they continue to meet the “exempt” requirements.

*Continued on page 2*

### *Dee Stasnopolis*



Dee H. Stasnopolis is a Partner in the Bakersfield office of Borton Petrini, LLP. Dee graduated from Southwestern School of Law in 1982. In addition to his admittance to the State Bar of California, he is admitted to practice before the U.S. Supreme Court, the Ninth Circuit Court of Appeals and all Federal District Courts for the State of California.

His areas of speciality at Borton Petrini, LLP involve employment law, commercial litigation and health care.

Dee is a member of the Kern County Bar Association, as well as the State Bar of California. His professional involvement also has included instructing insurance companies on settlement tactics, conducting legal-liability assessments for companies, handling unfair labor practice charges in front of the NLRB, advising clients on collective bargaining issues, conducting seminars on employment law for businesses, and has served as an arbitrator for the Los Angeles and Kern County Superior Courts. He sits on the Labor and Employment Law Committee of the Bakersfield Chamber of Commerce. He is a member of the Bakersfield Employers Advisory Council and the Society for Human Resource Management. He also is a member of the Employment Law Section of the State Bar of California.

## AVOIDING THE EXEMPT EMPLOYEE TRAP

continued from page 1

In order to perform this review, it is essential that employers understand the complex nature associated with determining whether an employee is “exempt” under California law. Virtually all other state jurisdictions and federal law follow what is known as the “qualitative” test. This test looks at the duties assigned to an individual, along with the associated minimum pay required to qualify for exempt status, and if the quality of the duties assigned to the employee meet the requirements of the exemption, then the person is considered “exempt.” In stark contrast, California follows what is known as the “quantitative” approach. Under the “quantitative” approach, the labor commission or courts will look at the duties assigned to an individual, along with the minimum required pay structure, and in evaluating the duties will quantify the time spent performing particular duties to determine if at least 51% of the time that person is performing “exempt” duties, as compared to other nonexempt duties. If the person’s time is spent performing more nonexempt acts, then the person is not an “exempt” person under California law.

Problems can arise for employers when an employee’s job evolves from an exempt position, to a nonexempt position, due to changes in their job over the years. A person might be doing 75% managerial/exempt work, but five years later, due to various job reassignments or additions to the workforce, might only be doing 30% managerial/exempt work and thus no longer exempt. This can result in significant penalties, not only for overtime pay, covering the past three years, but penalties for failure to timely pay, and other statutory payments which are all non-intent based violations. That is to say, the intent of the employer is irrelevant. If there is a violation, a penalty will be imposed.

For that reason, it is essential that employers follow the following guidelines relative to being proactive in evaluating their exempt employees. First, employers must have written job descriptions for each exempt employee. These job descriptions should be reevaluated annually with an emphasis in updating the duties that have fallen off or been added to the job description. Secondly, on an annual basis or, better yet, on a six-month basis, employees should be given a written document requiring them to allocate the time they spent performing certain job duties. This documentation could be invaluable, in the event a claim is later made by an employee that he should have been paid overtime and was misclassified as an exempt/salaried employee, inasmuch as the employee will have signed documentation evidencing the time spent performing managerial duties. This documentation also is very beneficial for employers, inasmuch as it will allow employers to determine when a person should be reclassified or if an employee’s job is changing and evolving

from an exempt to a nonexempt position. Thus, the employer can then consider making modifications to the job or reclassifying the employee.

It is essential that employers understand that once the written job duties have been developed, their evaluation against the applicable wage order, needs to be performed by a trained professional. Many times, it is at this stage where an attorney’s input is needed, to ensure that there is compliance with the applicable wage orders when determining the exempt status. By employing these procedures, employers can reduce, if not eliminate, any exposure by employees for overtime payments due to misclassifications.



## RECENT APPELLATE DECISIONS

By Dee H. Stasopolis

*Arbaugh v. Y & H Corporation* (2006) – In this case, the US Supreme Court found that the exemption under Title 7 for employers that have fewer than 15 persons from being sued for discrimination claims, is a substantive and not jurisdictional defense. It appears that the employer, in the underlying action, failed to raise the issue of the exemption until after the judgment had been reached against it. The Supreme Court held that in so doing, the employer had waived the right to raise the defense and the defense was not a “jurisdictional” basis for the district court to set aside the judgment.

*Stephens v. County of Tulare* (2006) – In this case, the California Supreme Court ruled that a supervisor in placing an employee on sick leave and telling the employee not to return to work until his condition improved, did not constitute a “dismissal” of the employee. The court held that a dismissal did not have to be accompanied by any particular formality, however, a termination of some form was required and merely instructing an employee not to return to work until his condition had improved did not constitute a “termination.”

*Harris v. Investors Business Daily* (2006) – In this case, the California court of appeal held that the Fair Labor Standards Act (FLSA) may serve as a predicate act for a claim of unfair business practices under California Business & Professions Code section 17200.

*Stamps v. Superior Court* (2006) – In this case, the California court of appeal reviewed a writ of mandamus following the dismissal of a complaint by the trial court. The court of appeal held that the statutory protections against

discriminatory violence and intimidation and against denial of civil rights by means of threat and intimidation embodied within Civil Code section 51.7 and 52.1, may be asserted as a separate cause of action in an action alleging wrongful termination and employment discrimination. The trial court's determination that they were inapplicable in the employment context was overruled.

*Williams v. Genentech, Inc.* (2006) – In this case, the California Court of Appeal held that an employer acted properly when it terminated an employee following the employee's return from medical leave. The employer had filled the position with a full-time employee during the employee's lengthy leave and when the employee sought reinstatement, had no vacant positions available and she was terminated. The court of appeal found that the employee presented no evidence that the medical leave was an ineffective and reasonable accommodation under FEHA and that the employer established that the holding open of the position, for a lengthy period of time, constituted a hardship.

*Bearden v. U.S. Borax, Inc.* (2006) – In this case, the California court of appeal held that a wage order promulgated by the California Industrial Welfare Commission (IWC) exempted employees from a second meal break provision, who were covered by a Collective Bargaining Agreement (CBA). The court ruled that the IWC exceeded its authority and that the exemption was invalid. The court further held that the CBA did not require that the employees arbitrate their claims regarding the second meal break and also held that the plaintiffs could not assert a claim for a violation of Labor Code section 226.7, violating a wage order, as there was no violation of a wage order that existed prior to the court's ruling.

*Harmon v. City & County of San Francisco* (2006) – In this case, the court affirmed the judgment damages for plaintiff who sued the city and county for compensatory damages for a violation of 42 USC section 1983, the Federal Civil Rights Act of 1871. The plaintiff contended that he was discriminated against because he was a "white male" and did not receive the promotional opportunities because of that basis. The court remanded the \$1.1 million in attorneys' fees for further consideration to the lower court.

*Gelfo v. Lockheed Martin Corp.* (2006) – This is an interesting case in which the appellate court reviewed a directed verdict entered by the trial court following a jury

trial. In this case, which was an ADA lawsuit, the employee claimed that he was not disabled, while the employer took the position that they regarded the plaintiff as being disabled based upon the medical evidence presented during his employment, and therefore, because he could not perform the essential job duties, did not rehire him following his disability leave. In essence, in this case, the plaintiff wanted to be rehired and the employer did not want to rehire him.

The trial court had directed a verdict for the employer on the cause of action for failure to provide reasonable accommodation on the ground that FEHA imposes no duty to accommodate an applicant or employee who is not actually disabled and in light of plaintiff's admission, no such duty exists. The court of appeal reversed the trial court's directed verdict, holding that when a plaintiff takes the position at trial that he has no disability and claims such,

this judicial admission precludes him from seeking relief on alternative theories, such as that he was disabled. The same is true with respect to employers who took the position, at trial, that they regarded the plaintiff as being disabled. The court further held that an employer could be sued separately for failure to reasonably accommodate an employee who was not disabled, but was "regarded as disabled" by the employer. The court noted that the reasonable accommodation process is an interactive process which must be triggered by a request by the plaintiff and is a continuing

interactive process that is not limited to one attempt. The appellate court held that an employer must engage in an informal dialogue to determine effective reasonable accommodations with an applicant or employee who the employer regards as disabled, regardless of whether the employee or applicant considers themselves disabled.

*Jones v. Gregory* (2006) – In this case, the Labor Commissioner sued the chief executive officer of a suspended corporation to recover unpaid wages owed to 45 former California employees. The trial court entered a judgment holding the CEO individually liable for the corporation's delinquencies in paying outstanding wages, expenses, interest, and penalties on the basis the CEO had operational control over the corporation. On appeal, the court of appeal reversed, holding that absent an establishment of alter ego liability on a corporate officer, personal liability for wages, expenses, interest, and penalties of the employees cannot be imposed on an officer of a corporation.



**DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF LABOR AND EMPLOYMENT LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN LABOR AND EMPLOYMENT LAW.**