LAW OFFICES OF BORTON PETRINI LLP

Labor & Employment Law

QUARTERLY UPDATE

bortonpetrini.com

FALL 2008

Published By
The Law Offices Of
Borton Petrini, LLP
5060 California Avenue, Ste. 700
Bakersfield, CA 93309
bpcbak@bortonpetrini.com

Inside

CALIFORNIA SUPREME COURT AGREES TO HEAR BRINKER RESTAURANT V. SUPERIOR COURT CASE

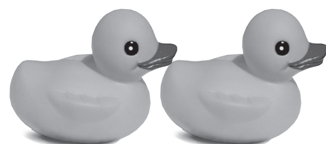
RECENT APPELLATE DECISIONS

Page 2

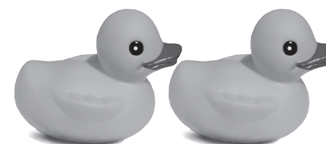
If you are interested in receiving the Labor and Employment Law Quarterly Update Newsletter, *or have someone to whom you would like it sent, call (661) 322-3051, ext. 2227 or e-mail publish@bortonpetrini.com and leave your name, e-mail and/ or mailing address to request a free copy.*

Editor:
Jonathan P. Geen
(619) 232-2424

LAYOFFS LEAD TO LITIGATION - DO YOU HAVE YOUR DUCKS IN LINE?



by Jonathan P. Geen, Esq.



With the troubled economy, many businesses will be laying off employees over the next several months. As one insurance company representative who oversees employment practices claims recently commented, a series of claims and lawsuits for wrongful termination and discrimination will certainly follow.

If you are an employer who anticipates that you may need or want to make job cuts in the near future, there are issues to consider and necessary preparation that can minimize the chances that you will be sued, or at least "stack the deck" in your favor should litigation result.

Check Out Handbooks and Other Policies

Employers often have chosen to draft employee handbooks and other policies and documents that were designed to give their employees the "warm and fuzzies" but can be used as a sword by terminated employees against their employers. It is important that businesses go through the documents they have distributed to their employees and make sure they are

Continued on page 3

Jonathan P. Geen

Jonathan P. Geen is a partner in the San Diego office of Borton Petrini, LLP. He received his undergraduate degree from Columbia College of Columbia University in the City of New York, and received his J.D. from Northwestern University School of Law.

Jonathan has practiced law in Illinois, as well as California. He is experienced in both litigation and non-litigation matters. He has successfully defended employers from wrongful termination, wage and hour, discrimination, harassment, and retaliation claims before both courts and administrative agencies, and managed to get employee cases decided in employers' favor on summary judgment.

He is regularly consulted by numerous companies on all of their day-to-day human resources issues, including employee disputes, effective discrimination/harassment investigation and training, as well as evaluation and drafting of their employment policies. He has presented seminars on employment law for several organizations, including the San Diego Employers' Association.

CALIFORNIA SUPREME COURT AGREES TO HEAR BRINKER RESTAURANT V. SUPERIOR COURT CASE

By Jonathan P. Geen, Esq.

On October 22, 2008, the California Supreme Court granted certiorari, agreeing to hear the case of *Brinker Restaurant v. Superior Court* (2008) 165 Cal.App.4th 25. The Brinker decision in the Court of Appeal was a victory for employers trying to avoid the virtual deluge of wage and hour class-action lawsuits that have been filed.

The Supreme Court will be reviewing the decision of the Court of Appeal for the Fourth District that it rendered on July 22, 2008. In that decision, the appellate court reversed an order of the trial court's granting class certification to a group of employees in a restaurant group that includes Chili's, Macaroni Grill, and Mangiano's, who claimed they were required to work off the clock and were denied meals and rest breaks.

The Court of Appeal reversed the trial court's granting of plaintiffs' class certification motion because it found that the trial court failed to consider the predominance of individualized issues that would be involved in the various claims. As part of this ruling the appellate court found that employers need only provide, not ensure, that their employees take meal and rest breaks and that employers can only be held liable for employees working off the clock if they know or should have known they were doing so.

The Brinker decision was so helpful to California employers since these three types of claims (denied rest and meal breaks and uncompensated work time) are among the most usual class-action wage and hour claims. The Brinker analysis, if it is upheld, would likely eliminate most rest and meal break claims on a class-wide basis because of the individualized issues inherent in why various employees choose not to take such breaks. Employers who had written policies clearly setting out employee rights and duties with regard to breaks and off-the-clock hours would be far less subject to these types of class-wide claims based on the appellate court's view of the relevant factual standards for such claims.

It is unclear why the Supreme Court agreed to hear the case. It may be that they disagree with the Court of Appeal's analysis. That distinct possibility is of concern to those of us who regularly defend employers. On the other hand, it may be that the Supreme Court simply wanted to thoroughly address the issue itself and put it to rest.

We will be monitoring the proceedings in the Supreme Court with interest. In the meantime, employers would be well advised to ensure that their written policies on meal and rest breaks and off-the-clock work hours are clear and sufficiently well drafted for them to take the benefits of any and all portions of the Brinker appellate court analysis that remains good law after Supreme Court review. ❖

RECENT APPELLATE DECISIONS

By Jonathan P. Geen, Esq.

CALIFORNIA APPELLATE DECISIONS

In *McDonald v. Antelope Valley Community College District* (2008) 2008 WL 4694301, Sylvia Brown, one of the named plaintiffs, was an African-American library technician's assistant for the school district. She twice applied for a position as a database administrator. The district refused to interview her because of her race and instead selected a non-African-American for the position. Ms. Brown chose to file an internal grievance to the vice chancellor of human resources, which was investigated over a period of a year, at which time Ms. Brown then filed an administrative complaint with the California Department of Fair Employment and Housing, alleging both race and sex discrimination. The California Supreme Court affirmed the decision of the Court of Appeal, which reversed the trial court's granting of summary judgment in the district's favor on the basis that Ms. Brown's DFEH claim was untimely. The Supreme Court held that the statute of limitations on her FEHA claim should be subject to equitable tolling due to her having attempted to grieve her complaints internally and within the system set up by the district.

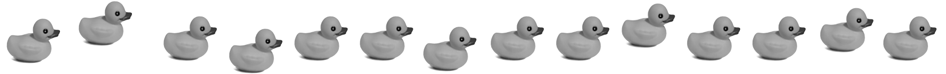
In the case of *Chin v. Namvar* (2008) 166 Cal.App.4th 994, the court held that a worker who misrepresents himself as a licensed contractor when he is not, is estopped from asserting that his unlicensed status makes him an employee, despite the fact that Labor Code section 2750.5 establishes a rebuttable presumption that a worker who is required to obtain a contractor's license is an employee. In that case, the plaintiff initially accurately informed the company that he was licensed, but then said nothing when his license had expired or was revoked, and the company had not made further inquiry.

FEDERAL DECISIONS

In the case of *Pannebecker v. Liberty Life Assurance Co. of Boston* (9th Cir. 2008) 2008 WL 4253640, a plan participant brought an action under the Employee Retirement Income Security Act (ERISA) against their plan administrator. The Ninth Circuit held that while the plaintiff employee was not "disabled" within the meaning of the plan, the plan administrator had arbitrarily discontinued the employee's benefits under improper standards. Therefore, the court found the employee was entitled to retroactive reinstatement of those benefits from the time of improper denial until the administrator made a benefits determination under the proper standards.

LAYOFFS LEAD TO LITIGATION - DO YOU HAVE YOUR DUCKS IN LINE?

continued from page 1



following their own policies. If you fail to do so, you are providing frustrated and disappointed employees with valuable ammunition. Have someone go through your documents with a keen eye, checking for such things as: (1) Do your documents state anything about layoffs or the extent to which seniority will be used in employment decisions? (2) Are you intending to layoff certain employees for poor job performance, but you have a progressive discipline policy that has been ignored?

Read Personnel Files of Employees Involved

The employees who are being laid off and who consult counsel about their rights and potential claims may ask to obtain a copy of their personnel file as their first step. What story does that personnel file tell? If you have decided which employees to layoff based on job performance, is that reflected in the relevant personnel files? If you place the most recent job performance evaluations of those employees to be laid off with those who are not, do they provide evidence to support your rationale or do they instead suggest that the business was manufacturing a reason to justify the decision after the fact? Are there facts and/or documents in the personnel files of the employees to be laid off that provide particular risks for the employer such as recent workers' compensation claims, FMLA leave, or internal complaints to the employer? Make sure the personnel files tell the story that you intend to tell and not some other story that will set you up for a claim of pretext.

Do Some Statistical Analysis of Those Subject to Layoff

In discriminatory layoff cases, plaintiff's lawyers will frequently use a statistical expert to show some kind of disparate impact such as that the layoffs disproportionately affected older employees, or those of a particular race or other minority group. It is worthwhile, particularly for larger employers, to conduct at least some informal statistical analysis to see what kinds of trends there are in the data. If the data are particularly skewed, for example employees over 50 are four times more likely to be laid off compared to those under 40, you may want to reevaluate the risks and benefits of your layoff decisions.

Use Severance Agreements

Many employers have successfully used severance agreements to resolve all potential claims with employees being terminated or laid off. As long as employers have well-drafted severance agreements that provide employees with sufficient additional consideration and that satisfy all statutory and contractual prerequisites, these agreements are generally enforceable. Having signed well-drafted severance agreements from all laid-off employees virtually assures employers that they will have few resulting claims. While it is true that tendering a severance agreement to employees will generally prompt them to consult an attorney, which could result in claims that might not have previously been asserted, the only way to virtually prevent litigation is to get severance agreements signed across the board. Most employees will choose to accept reasonable additional compensation at layoff time and sign a general release rather than hold out for the pie in the sky. The ones who hold out and may need additional compensation or negotiation are those who may have already thought they had very valid and lucrative claims.

Follow the Rules and Provide Proper Notices/Forms

It is important that employers follow all California and federal rules when they terminate employees. Failing to provide an employee with all the compensation to which they are entitled in their final paycheck or failing to give them such check immediately upon termination, exposes the employer to extensive penalties and unnecessary labor commissioner claims.

Failing to provide employees with timely COBRA notices and other required documentation is another way to play with fire and employers need to make sure they have staff and procedures in place to adequately handle all these legal requirements.

Treat Employees with Respect/Dignity

No employee wants to be laid off, but if they are treated fairly, compassionately, and with respect by their employer, the more likely they may be resigned to and understand the economic realities that led to the situation.

These preventive measures are definitely worth the time and thought. Our firm is always ready and able to consult with employers considering layoffs or any other human resources issues to help them minimize their risks. ❖

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.