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## Inside

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## *IN EMPLOYMENT LAW, AN OUNCE OF PREVENTION IS WORTH TEN POUNDS OF CURE!*

by **Jonathan P. Geen, Esq.**

As the flood of lawsuits and class actions filed against California employers continues, employers are no doubt wondering what they can do to protect themselves. An employer cannot prevent lawsuits from being filed against it, and in fact there is much truth to the saying that there are two kinds of employers in California, those that have been sued, and those that will be sued. Nevertheless, there are several preventative measures that employers can use that are worth their weight in gold.

### *1. Hire the Right Kind of Employees*

There are certain kind of employees that you should try to weed out in the hiring process because they are more likely to result in claims down the road. It is much easier to never hire a problem employee in the first place than to find a way to deal with them when they have been working for you for a considerable period of time and have the expectation of continued employment. Here are just a few of the red flags to watch for:

a. complainers; if they complain about several of their past supervisors or employers, chances are they will soon be complaining about you;

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## *Dee H. 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.

## **RECENT APPELLATE DECISIONS**

**By Dee H. Stasnopolis, Esq.**

### **FEDERAL APPELLATE DECISIONS**

In *Davis v. O'Melvine & Meyers (2007) (9th Cir. 2007) 45 F.3d 1066*, the plaintiff, a former employee, sued the defendant law firm of O'Melvine & Myers alleging violations of the Federal Fair Labor Standards Act and seeking a declaration that the Dispute Resolution Program (DRP) was unconscionable under California law. The Ninth Circuit, who has historically taken an anti-arbitration stance on employment disputes, declared that the DRP was both procedurally unconscionable, because it was a take it or leave it condition of employment and substantively unconscionable, due to the DRP's one-year universal limitation period forcing employees to arbitrate employment-related statutory claims on a shorter period of time than required under California law. It also found that the confidentiality clause, as written, to be substantially unconscionable favoring the employer because it impeded the ability of employees and their counsel to investigate claims and conduct discovery. The Ninth Circuit held that the exemption from arbitration to permit the employer to seek injunctive relief in court relating to disclosure of the firm's confidential information too one-sided and too vague. In addition, the court found that the DRP's attempt to limit and preclude its employees from contacting the DFEH or EEOC to seek injunctive relief by suit instituted by them to be unconscionable. The court, in its decision, took the position that it was relying upon the Armendariz decision, as well as federal law, in its ruling.

In *Burnside v. Kiewit (9th Cir. 2007) 491 F.3d 1053*, the Ninth Circuit reviewed the district court's order that the employees' claims, brought under state law, were preempted by Section 301 of the Labor Management Relations Act (LMRA). The employees had alleged that they did not receive compensation for time spent traveling from designated meeting sites to their job sites back to the designated meeting sites. The Ninth Circuit held that the employees' claims were not preempted by Section 301 because the right to be compensation for compulsory travel time was a right conferred as a matter of state law that existed independent of the terms of the Collective Bargaining Agreements, and because the claims to compensation for that time could be resolved without interpreting the Collective Bargaining Agreements. They reversed the district court's order.

In *Detabali v. Saint Luke's Hospital (9th Cir. 2007) 482 F.3d 1199*, the plaintiff appealed the dismissal of her case by the district court, who ruled that her California Fair Employment & Housing Act (FEHA) claims for employment discrimination and retaliation were preempted by Section 301 of the Labor Management Relations Act (LMRA). In reversing the district

court, the Ninth Circuit held that unless the claims relate to the interpretation or application of terms of the Collective Bargaining Agreement, which are in dispute in the litigation, Section 301 of the LMRA does not preempt a person's state law claims under FEHA. The Ninth Circuit reversed the district court's ruling dismissing plaintiff's complaint.

In *Noyes v. Kelly Services (9th Cir. 2007) 488 F.3d 1163*, the plaintiff employee brought a reverse religious discrimination action under Title VII, alleging that a supervisory employee of her former employer passed her over for a promotion because she was not part of his small religious group. She appeals the trial court's granting of a summary judgment. On appeal, the Ninth Circuit reverses holding that while the employer's evidence satisfied its burden of production to articulate a legitimate, non-discriminatory reason for the failure to promote the employee, the employee had countered with evidence undermining the credibility of those reasons. Specifically, the employee offered evidence that another employee's rejection was tainted by the supervisor's actions in falsely telling other employees that the employee was not interested in the promotion. The court held that the trial court erred by taking the position that plaintiff had to show both that the employer's proffered reason was false and that discrimination was the real reason. This, it held, was error and reversed the matter and remanded it to the trial court.



### **CALIFORNIA APPELLATE DECISIONS**

In *Murphy v. Kenneth Cole Productions (2007) 40 Cal.4th 1094*, a store manager filed a wage claim with the California Labor Commissioner asserting claims for unpaid overtime and waiting time penalties. The issue the California Supreme Court addressed was whether payments under Labor Code section 226.7, dealing with the awarding of one hour of pay for each day a meal or rest period is not provided, is a wage or a penalty. If a penalty, a one-year statute of limitations would apply. If a wage, a three-year statute of limitations would apply. The Supreme Court held that payments under Labor Code section 226.7 constitute wages and are not subject to the one-year statute of limitation, therefore, the employers were responsible for three year's retroactive payments to the manager.

In *Green v. State of California (2007) 42 Cal.4th 254*, the California Supreme Court held that the burden of proof is on the employee to establish that he was a qualified individual under the California Fair Employment & Housing ADA provisions. Thus, it is the employee's obligation to prove, at the time of trial, that he is a "qualified individual" able to perform the essential job duties with a reasonable accommodation.

In *Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, the California Supreme Court addressed issues pertaining to a post judgment settlement reached between the parties and whether the settlement would preclude the filing of a malicious prosecution action. The court held that the settlement did not preclude a malicious prosecution action because the executive received a favorable judgment in the underlying proceeding and settled without giving up any significant portion of the judgment in his favor. Therefore, the parties' settlement constituted a favorable determination. The court acknowledged that although the settlement agreement compromised certain amounts awarded against the company regarding costs, the judgment favoring the executive remained intact. Most notably, the settlement agreement specifically provided that it did not modify the final termination of the action entered in favor of the employee-executive. This appears to be the key point in the case.

In *Gentry v. Superior Court*, (2007) 42 Cal.4th 443, the Supreme Court considered whether a class arbitration waiver clause in a pre-dispute employment arbitration agreement was valid and enforceable to preclude an employee from pursuing an arbitration class action claim for unpaid overtime. Concluding that the "prohibition of class-wide relief would undermine the vindication of the employee's unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws," the *Gentry* court reversed the court of appeal's decision that upheld the class arbitration waiver clause. Instead, the Supreme Court established new law governing such waivers, and remanded the case to the trial court to determine the validity of the class action waiver clause in light of the new standards articulated by the court. ❖

## **AN OUNCE OF PREVENTION IS WORTH TEN POUNDS OF CURE**

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- b. employees who have difficulty working within the rules and procedures of the workplace;
- c. supervisors who take a particularly authoritarian or micromanagement approach; these supervisors often instill hostility in their employees resulting in a potential slew of witnesses willing to support a claim later brought by a disgruntled employee.

Have a concern about a potential employee that you would like to raise to an attorney? We are always just a phone call away.

### **2. Have Written Policies/Handbooks that Provide an Effective Shield**

California employers generally know that they need written employment policies and handbooks, but do

not fully comprehend that these documents can later be used as strong ammunition by employees in their lawsuits, particularly when employers do not follow the rules they themselves implemented or suggest in any fashion that the presumption of "at will" employment has been altered. One size fits all does not work for employee handbooks, and employers who try to cut costs by using forms off the internet or elsewhere get what they pay for. Wise employers consult competent counsel like Borton Petrini, LLP to prepare their handbooks and other policies and have them reviewed periodically to make sure they still comply with California's ever-changing laws.

### **3. Create and Maintain All Necessary Employee Records**

The Department of Labor Standards Enforcement and other administrative agencies place the burden on employers to produce records showing that all California laws have been complied with. Are you sure that your company is maintaining the documentation necessary to show, for example, that all nonexempt employees are afforded and/or taking rest and meal breaks required by law and are being paid for any overtime that they are working? Maybe it is time for your business to have a brief cost-efficient legal checkup for your employment records.

### **4. Know What Mistakes to Avoid in Terminating Employees**

In our practice, we see many companies, including large well-known companies making mistakes when they terminate employees that may subject them to automatic penalties under the Labor Code as well as potential liability under other laws. A pre-termination consultation with our firm will help reduce your risk.

### **5. Maintain Personnel Files that Tell the Intended Story**

If an employee does pursue a discrimination/harassment or other wrongful termination claim, the first thing they are going to do is obtain a copy of their personnel file and try to find documents that can be used to support various aspects of their case such as; that the reasons given by the employer for the termination are pretextual. Do your company personnel files contain enough and the right kind of documentation that tells the story you intend to tell to the judge or jury? Are there truly no holes or inconsistencies? Taking the time to call us and work with us on what documents you place in your files may help you "stack the deck" in your favor. ❖

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