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The Year in Review  
California Employment Law 2007

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January 31, 2008

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## EEOC Charge Filing Trends & Jury Verdict Results

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# Nationwide EEOC Charge Filing Statistics

	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>Title VII</b>	59,075	58,328	55,976	56,155
<b>ADA</b>	15,377	15,376	14,893	15,575
<b>ADEA</b>	19,124	17,837	16,585	16,548
<b>EPA</b>	1,167	1,011	970	861
<b>All Statutes</b>	81,293	79,432	75,428	75,768
<b>Unemployment Rate</b>	6.00%	5.50%	5.10%	4.60%

# California Employment Law Jury Verdicts Since January 1, 2007

- Plaintiffs prevailed 27 out of 47 times (57%), and received an average award of \$2,476,349, which excludes costs and attorneys' fees.
- Whistleblower verdicts were the largest, averaging in excess of \$4,000,000.
- Employees won more often on retaliation claims (75% of the time) than they did on the underlying discrimination claim (less than 50% of the time).

# Alameda County Superior Court

- Two current Lebanese drivers sued their employer and one of its managers for racial discrimination and harassment, claiming that the manager used racial epithets toward the drivers over a two-year period.
- The jury found for the employees and awarded \$61 million in damages: \$10 million in emotional distress, \$50 million in punitive damages, and the manager was ordered to pay \$1 million.
- On September 5, 2007, the judge reduced the award to \$12 million. An appeal has been filed.

# United States District Court, Northern District of California 2007

- Federal jury awarded \$5.6 million to an engineer who alleged that she was wrongfully terminated for complaining about discrimination.
  - \$836,000 in past economic loss
  - \$2.24 million in future economic loss
  - \$2.5 million in punitive damages

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## 2007 Case Law Developments

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# Harassment

- Is it sexual harassment to spank your employees to motivate them?

# Harassment

- Yes, according to a jury that awarded a female employee \$1.5 million.
- No, according to the Court of Appeal, unless the employee can show that she was spanked because of her gender. The evidence showed that both men and women were spanked, both men and women administered the spankings, and the spankings were administered for the same reasons – being late to meetings or losing at sales competitions.

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## Disability and Accommodation Issues

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# Must an Employer Automatically Reassign a Disabled Employee?

- *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8 Cir. 2007) [Case settled pending review by US Supreme Court]
- Huber sued, claiming that she should have been automatically reassigned to a vacant position, regardless of whether she was the superior candidate.
- Eighth Circuit Court of Appeals ruled for Wal-Mart, and held that the employee was not guaranteed reassignment.

Note: ADA specifically lists “reassignment to a vacant position” as one example of a reasonable accommodation. 42 U.S.C. § 12111(9)(B).

# Can You Terminate a Disabled Employee for Misconduct Caused by a Disability?

- *Gambini v. Total Renal Care, Inc.* (9th Circuit 2007)
  - Plaintiff was bipolar. When she had finished reading her performance plan, she threw it across the desk and, in a torrent of profanities, expressed her opinion that it was both unfair and unwarranted. Before slamming the door on her way out, Gambini hurled several choice profanities at her manager.
  - She was terminated as a result of her behavior.
  - Ninth Circuit (applying Washington law) held that “[c]onduct resulting from the disability is part of the disability and not a separate basis for termination.”

Note: other circuits differ, and this is a developing area of law.

# Workplace Violence

- Must an employer protect its employees from threats from coworkers?

# Workplace Violence

- Yes. *Franklin v. Monadnock*, 151 Cal.App.4 252 (2007).
- In *Franklin*, an employee threatened to kill the plaintiff and three other employees, and the plaintiff claimed he was terminated after reporting this threat.
- According to the Court of Appeal, California law establishes an “explicit public policy requiring employers to provide a safe and secure workplace, including a requirement that an employer take reasonable steps to address credible threats of violence in the workplace.”

# Intersection of Accommodating Employees and Workplace Safety

- What if, in the *Franklin* decision, the employee who threatened violence did so because of a mental disability?
- How do you *protect* the threatened employee and *accommodate* the threatening employee?

# Obligation to Accommodate Pregnant Employee

May 2007 San Francisco Jury Verdict

- Pregnant employee requested accommodation that she not be required to lift more than 20 lbs.
- Employer provided light duty only for employees with industrial injuries.
- \$2.34 million jury verdict
  - \$131,700 for past economic loss
  - \$87,000 for future economic loss
  - \$100,000 for past emotional distress
  - \$22,000 for future emotional distress
  - \$2 million in punitive damages
  - Plus attorneys' fees

## What Is the Employee's Burden of Proof in Disability Cases?

- Q. Does the FEHA, like the ADA, require that plaintiffs prove they are qualified individuals under the statute, i.e., that they have the ability to perform a job's essential duties, before they can prevail in a lawsuit for disability discrimination?
- A. Yes, under *Green v. State of California*, 42 Cal.4 254 (2007).

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## Meal and Rest Break Issues

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## *Murphy V. Kenneth Cole Productions,* 20 Cal.4 1094 (2007)

- The California Labor Code requires employers to pay nonexempt employees one hour of pay for each day that a required meal or rest period is not “provided.”
- Is this payment a “wage,” subject to a three-year statute of limitations, or a penalty that is subject to a one-year limitations period?

## Holding of *Murphy*

- Labor Code Section 226.7 payments are “wages,” not penalties; therefore, a three-year statute of limitations applies under the Labor Code, and a four-year statute of limitations applies under Business & Professions Code Section 17200.

# Suggestions for Employers in Light of *Murphy*

The holding in *Murphy* makes cases for missed meal breaks even more lucrative for plaintiff class action lawyers.

- Employers with California employees should reexamine their policies, practices, and forms that relate to rest breaks and meal periods.
- Employers may also wish to reexamine their classification of California positions and employees as exempt.
- Employers should train their managers on the importance of making sure employees take their breaks.

# Meal and Rest Break

Must employers ensure that California nonexempt employees take their legally mandated meal periods, or merely make such meal periods available?

# What Does It Mean to “Provide” Employees with Meal and Rest Breaks?

- This is one of the most significant legal issues currently facing California employers.
- *Murphy* suggested that employers need only to “provide” the meal periods.

## *White v. Starbucks*, 497 F.Supp.2d 1080 (N.D. Cal. 2007)

- The court held that the requirement that employers “provide” meal periods means an employer must “offer,” not “ensure,” meal periods.
- The court explained, “[t]he California Supreme Court, if faced with this issue, would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that he was forced to forgo his meal breaks as opposed to merely showing that he did not take them regardless of the reason.”

*Moreno et al. v. Guerrero Mexican Food  
Products et al.,*  
No. CV-057737 (C.D. Cal. Oct. 11, 2007)

- The court held that California’s meal period rules affirmatively obligate employers to notify employees that they are free to take a thirty-minute, off-duty break.
- However, these rules “do not suggest any obligation to ensure that employees take advantage of what is made available to them.”
- The court explained that “requiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous or . . . who do not remain in contact with the employer during the day.”

# *Brinker Restaurant Corp. v. Sup. Ct.*, 2007 WL 2965604 (Oct. 12, 2007)

- The court concluded that meal period cases cannot be decided without first resolving the issue of whether “provide” means “ensure.” The court remanded the case to the trial court to decide this issue.
- In so holding, the court hinted about the result it expected, emphasizing the conclusion in *Starbucks* that “the California Supreme Court . . . would require only that employers offer meal breaks, without forcing employers to actively ensure that workers are taking these breaks.” The court also referenced the dictionary definition of “provide” as “to supply or make available.”

# What Should Employers Do?

- Without a definitive ruling from a California court on the issue, it is not clear whether employers must ensure that employees take their meal periods, or merely make such meal periods available.

# What Should Employers Do?

- Until a California state court decides this issue, employers may want to do the following to ensure compliance:
  - Implement a written meal period policy that entitles employees to off-duty meal periods as required by law.
  - Communicate the policy to all nonexempt employees and their managers, and train their managers.
  - Schedule meal periods for all nonexempt employees.
  - Monitor meal period compliance by employees.
  - Investigate instances of missing, late, or short meal periods to determine whether employees are prevented from taking, or choose voluntarily to forgo, meal periods.

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## Incentive Compensation Plans

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*Prachasaisoradej v. Ralphs Grocery Company, Inc.*, 42 Cal.4th 217 (2007)  
“*Ralphs*”

- May employers use profit-based incentive plans to compensate employees?

## Key Facts of *Ralphs*

- *Ralphs* maintained an Incentive Compensation Plan (ICP) whereby participating employees were eligible to receive additional compensation above the contractually agreed-upon regular wage rate.
- Under the ICP, an employee was eligible for a bonus based on the company's actual net earnings that took into account revenues and expenses of the store, including workers' compensation costs, merchandise losses and shrinkages, cash shortages, and other operations expenses.

## Key Facts of *Ralphs*

- Plaintiff filed a class action lawsuit claiming that by taking into account such expenses, the ICP violated various California laws, including
  - California Labor Code section 221, which prohibits an employer from collecting or receiving back any part of wages paid; and
  - California Labor Code section 3751, which prohibits an employer from directly or indirectly receiving or deducting amounts from an employee's earnings to cover workers' compensation costs.

## Holding of *Ralphs*

The California Supreme Court held that the ICP was lawful because

- Compensation under the ICP was supplemental to the participating employees' guaranteed wage, from which no deduction or contributions for employer expenses were taken.
- The ICP did not create an entitlement to a specific amount of supplemental compensation, from which various employer business expenses were then deducted. Rather, payments under the ICP were clearly conditioned on the profitability of each participant's store as a whole, without regard to contributions or losses attributable to individual employees.

# Considerations in Light of *Ralphs*

When drafting or reviewing incentive compensation, bonus, or commission plans, employers should consider the following:

- Profit-based bonus plans, which reward group efforts and do not provide employees' sole or primary compensation, can take into account expenses of doing business without violating California law.
- The court affirmed that commission or bonus plans that “charge back” employees or reduce future payments for reversed sales, identified returns, or other contingencies, can be permissible if the plan is drafted with proper care and precision.
- The court left undisturbed other cases holding that promised compensation based on individual employees' sales or managerial efforts cannot be reduced for losses or costs of doing business except in very limited situations.<sup>34</sup>

# Schachter/Citibank

- Is a plan that provides that an employee forfeits shares he has purchased at a discount from his employer if he voluntarily leaves his employment or is terminated for cause within two years illegal under the Labor Code?
- No. The purpose of the plan is the retention of high-level employees. Participation was voluntary. Plaintiff received immediate benefits from owning the stock.

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## Expense Reimbursement

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# Compensation Issues

- Can an employer satisfy its duty to indemnify employees for reasonable and necessary business expenses by paying enhanced compensation in the form of salary or commissions?

# Compensation Issues

- Yes, under *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554 (2007).

## Holding of *Gattuso*

- The court rejected the plaintiff's argument that the lump-sum method violated various Labor Code provisions.
- The court made clear that an agreed upon lump-sum payment does not (1) relieve an employer from its obligation to fully reimburse an employee, or (2) bar an employee from challenging the payment as inefficient to cover his or her expenses.
- Further, an employer must ensure that some method or formula exists to separately identify (1) the amount intended for labor performed, and (2) the amount for expense reimbursement.

# Other Expense Reimbursement Considerations

- In light of *Gattuso*, employers should consider:
  - What travel/automobile expenses should be included as reimbursable expenses
  - What insurance requirements, to cover accidents or other losses, can/should be placed on employees driving vehicles for company business, and whether any insurance costs must be reimbursed
  - If employers decide to pay increased compensation instead of reimbursing expenses, employers should consider the tax consequences to ensure that employees receive a sufficient amount to cover their expenses
  - What other expenses incurred by employees in California are subject to reimbursement under applicable law?

Note: as of 1/1/08, the IRS rate for mileage reimbursement increased to 50.5 cents per mile from 48.5 cents in 2007.

# Paychecks

- Are your paychecks drawn on a California branch?

# Paychecks Must be Drawn on California branch Solis v. Regis (N.D. Cal 12/10/07)

- California Labor Code § 212 requires paychecks to be: (1) negotiable, (2) payable in cash, (3) on demand, (4) without discount, (5) at an established place of business in the State, (6) the name and address of which appears on the instrument, and (7) which place of business has been prepared, by the deposit of funds, the establishment of credit, or by some arrangement or understanding, to pay the money called for by the instrument
- Cannot be a fee to cash the paycheck
- Labor Code § 213(d) prohibits direct deposit unless an employee voluntarily authorizes it
- Summary judgment granted to named plaintiff

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## Recruiting & Hiring Issues

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# Drug Testing

- Can you refuse to hire an applicant who tests positive for marijuana?

# Drug Testing

- Yes. *Ross v. Ragingwire Telecommunications (January 24, 2008)*
  - The employer was not required to allow the employee to use medical marijuana as a reasonable accommodation of his disability (chronic back pain).
  - California's Compassionate Use Act is not a fundamental public policy that protects the employee from termination.
  - An employer has a legitimate interest in refusing to employ someone who violated federal law.

# Fixed-Term Employment Agreements Impact the Hiring Process

Q. Is a California employer subject to liability for hiring a competitor's employees when such employees are subject to fixed-term employment agreements?

# Fixed-Term Employment Agreements Impact the Hiring Process

- A. Potentially yes, under *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099 (2007).

# Key Points from CRST Case

- The Ninth Circuit held that Werner did not have the legal right to solicit the employees because they were not employed “at will.”
  - Under California law, to maintain a claim for unlawfully soliciting “at will” employees, in addition to the solicitation, the employer must show an independently wrongful act, such as trade secret misappropriation, fraud, or an antitrust violation.
  - However, the Ninth Circuit concluded CRST was *not* required to prove an independently wrongful act because its employees were not “at will”. The freedom of both employer and employee to “walk away” from employment at CRST was limited by the one-year contract because neither party could break the relationship without a financial penalty.
  - Werner engaged in wrongdoing merely by soliciting CRST’s employees after Werner became aware of these contracts.

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## Arbitration Issues

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# Arbitration Issues

- Are class action waiver clauses contained in employment arbitration agreements enforceable?

# Arbitration Issues

- Possibly, according to *Gentry v. Circuit City Stores, Inc.*, 42 Cal.4th 443 (2007). However, such a waiver could not be enforced if a class action arbitration would be a significantly more effective way of vindicating the rights of employees as opposed to individual arbitrations.

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## Release Issues

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# Release Issues

- In *Taylor v. Progress Energy, Inc.* (4th Cir. July 3, 2007) (*Taylor II*) the Fourth Circuit reaffirmed its earlier decision that waivers of FMLA claims are barred. On January 14, 2008, the Supreme Court asked the Solicitor General to brief whether it should review the decision.
- This decision establishes the controlling law on the waiver of FMLA claims in the Fourth Circuit (states include Maryland, Virginia, West Virginia, North Carolina, and South Carolina).
- The decision also underscores the importance of tailoring separation agreements and releases to the circumstances of the particular situation and not relying on “form” agreements.

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## 2007 California-Specific Employment- Related Statutes

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# AB 392 Military Spouse Leave

- Emergency legislation took effect on 10/9/07.
- Applies to employers with 25 or more employees.
- Eligible employees must be given up to 10 days of unpaid time off when their spouse is on leave from military deployment.
- An “Eligible Employee” is one who
  - works an average of at least 20 hours per week;
  - is a spouse of either (a) a member of the Armed Forces deployed to an area designated as a combat theatre or combat zone or (b) a member of the National Guard or Reserves who has been deployed during a period of military conflict;
  - provides the employer with notice of the intent to take such leave within at least two business days of receiving official notice that his or her spouse will be on leave; and
  - who submits written documentation to the employer certifying that the spouse will be on leave from deployment during the time military spouse leave is requested.

# SB 1613 – Use of Hands-Free Devices While Driving

- Effective 7/1/2008
- Requires drivers to use a hands-free device when using a cell phone while driving.
- Employers should implement policies in accord with this new provision.

# SB 929 – Lowered Hourly Rate for Computer Software Professional Exemption

- Effective 1/1/2008.
- Existing law exempts computer software professionals from overtime requirements if the employee is primarily engaged in duties that meet the requirements of the exemption and is paid at least a specified minimum hourly rate on an hourly or salary basis.
- The hourly rate is adjusted each year on January 1.
  - In 2007, the hourly rate was \$49.77.
  - In 2008, the hourly rate is \$36.00.

# AB 650 Employer Required Notification – Earned Income Tax Credit

- Effective 1/1/08.
- Applies to all CA employers who are required to provide unemployment insurance.
- Must provide notice to all employees that they may be eligible to take a federal Earned Income Tax Credit.
- The notice must be hand-delivered or mailed to employees within one week before, after, or at the same time the employer provides an annual wage summary (W-2 or 1099).
- Employers may not satisfy this obligation by posting the notice on an employee bulletin board or delivering it through interoffice mail.

# AB 338 Temporary Disability Payments

- Effective 1/1/08.
- Under prior law, disabled worker could receive 104 weeks (two years) of temporary disability benefits; however, the benefits had to be collected within 104 weeks of the first date that temporary disability was paid.
- Under the new law, the 104 weeks of benefits must be collected within five years of the date of injury, thus the injured worker has a longer period of time in which to collect the benefits.

# Minimum Wage Increase

- Effective 1/1/2008.
- California minimum wage increased to \$8.00/hour.
- San Francisco minimum wage increased to \$9.36/hour.

# Exempt Employee Salary Adjustments

- Effective 1/1/2008.
- California's executive, administrative, and professional exempt employees must be paid a salary of at least \$640 per week, \$2,773.33 per month, or \$33,280 per year.

# SB 1618 – Truncated Social Security Numbers on Pay Stubs

- Effective 1/1/2008.
- Pursuant to California Labor Code section 226, California employers are required to provide certain information on employee's pay stub, including the employee's name and Social Security number.
- SB 1618, enacted in 2004, mandates that effective 1/1/2008, only the last four digits of an employee's Social Security number, or an employee identification number other than a Social Security number, be shown on the pay stub.

# San Francisco Sick Leave Ordinance

## *Golden Gate Restaurant Assoc v. City & Country of San Francisco*

- The ordinance requires private employers with 20 or more employees to make healthcare expenditures of specific amounts per hour of work, including:
  - contributions to health savings accounts,
  - direct reimbursement to employees for some of the expenses incurred in the purchase of healthcare services,
  - payments to third parties for the purpose of providing healthcare services,
  - costs incurred in the direct delivery of healthcare services, or
  - payments by the employer to the city “to be used on behalf of covered employees.”

# New Forms

- I-9
- EEO-1

# New/Pending Regulations

- Sexual harassment training regulations finalized.
  - [http://www.fehc.ca.gov/pdf/SexualHarassmentTrainingRegulations\\_Approved\\_by\\_OAL\\_July\\_18\\_2007.pdf](http://www.fehc.ca.gov/pdf/SexualHarassmentTrainingRegulations_Approved_by_OAL_July_18_2007.pdf)
- New regulations possibly coming on Labor Code 2802 (obligation to indemnify employees for expenses).

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## Trends

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# Trends

- Wage and hour laws – are employees properly classified as exempt?
- Family responsibilities discrimination
- Disability discrimination
- Security breach laws
- Testing

# Trends

- Telecommuting
- Are your independent contractors properly classified?
- PAGA claims
- Relying on social networking sites for information about employees and applicants
- Megan's Law website [cannot be used in making employment decisions. Penal Code Section 290.46(j)(2).]

# California Supreme Court Cases to Watch

- *Harris v. Superior Court*
  - (Administrative/production dichotomy)
- *Arias v. Superior Court*
  - (Must an employee bringing claims under PAGA meet the class action requirements)
- *Edwards v. Arthur Andersen*
  - (Covenants not to compete and releases)
- *Hernandez v. Hillsides, Inc.*
  - (privacy)

# California Supreme Court Cases to Watch

- *Jones v. Lodge at Torrey Pines*
  - (Is there personal liability for retaliation under FEHA?)
- *Lonicka v. Sutter Health Central*
  - (Does an employee have a right to a leave under CFRA if he or she can work for one employer but not another doing the same work?)
- *McDonald v. Antelope Valley*
  - (Is the one year statute of limitations to file an administrative charge tolled while an employee is pursuing an internal administrative remedy?)
- *Roby v. McKesson*
  - (Extent of supervisor liability for harassment for personnel and business management actions)

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