

## EMPLOYERS BEWARE: IMPORTANT ISSUES TO CONSIDER



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*Litigation with current or former employees strains the employer's resources and can detrimentally affect the company's culture and employee morale. Case law constantly evolves and must be monitored, as demonstrated by the following recent rulings.*

### PREVENTING MISSED MEAL AND REST PERIOD CLAIMS

A recent court decision in California has expanded California employer liability for meal and rest period violations involving their non-exempt employees.

On April 16, 2007, the California Supreme Court ruled in *Murphy v. Kenneth Cole Productions, Inc.* that the payment required under Labor Code Section 226.7—one hour of pay for each day a meal or rest period is not provided—is a “wage.” As a result, such claims are subject to a three-year statute of limitations, and not a one-year statute for a “penalty” as employers had argued and some lower court decisions had ruled.

Employers must be vigilant about ensuring that their non-exempt employees take meal periods and have the opportunity to take their rest breaks. Generally, non-exempt employees are entitled to a 30-minute, duty-free meal period after working five hours and a paid, 10-minute rest period for every four hours worked. If an employee misses a meal period or is not permitted to take a rest break, the employee is entitled to an hour's pay. This hour of wages is due immediately at the time of the next regular payroll, much like overtime.

How can employers ensure that employees take their meal periods and rest breaks? In some workplaces,

supervisors can schedule regular rest breaks and meal periods. In office environments, supervisors can check on employees to determine if they have had an opportunity to take their rest breaks and require them to leave their workstations for their meal periods. For remote employees, supervisors should use the telephone to monitor them and keep a record of their phone calls.

Employers can also require their employees to sign their time records, under penalty of perjury, attesting to the fact that, during the payroll period reflected in the time record, they took an uninterrupted meal period, they were permitted to take their rest periods every day, and the hours recorded are accurate. The certification can be added to the bottom of the timesheet or time card, and even on a printout of an electronic time sheet (employers can use a sticker with the certification preprinted on it).

While the courts have not tested the use of a certification, it is a tool to use in defending a wage and hour case, not only for missed meal and rest periods, but also for alleged overtime wage violations.

### ARBITRATION AGREEMENTS WITH EMPLOYEES CAN BE DEEMED UNCONSCIONABLE

During the past seven years, several key decisions have established that California employers can require their employees to enter into agreements to arbitrate employment claims, provided that the agreements meet certain legal requirements. A recent federal decision amplifies the importance of drafting mandatory arbitration agreements carefully so they are not one-sided and are consistent with California and federal law.

On May 14, 2007, the Ninth Circuit in *Davis v. O'Melveny & Myers* invalidated the employer's mandatory arbitration agreement as substantively and procedurally “unconscionable,” based on the California Supreme Court's seminal decision in 2000 in *Armendariz v. Foundation Health Psychcare Services, Inc.*, and subsequent decisions. The subject arbitration

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agreement included the following fatal defects:

(1) a one-year notice period that arbitrarily shortened the statute of limitations applicable to employee claims;

(2) an overbroad and one-sided confidentiality clause that impeded the ability of employees and their counsel to investigate claims and conduct discovery;

(3) the exemption from arbitration to permit the employer to seek injunctive relief in court relating to the disclosure of the firm's confidential information, which was deemed to be one-sided and too vague; and

(4) the prohibition on employees filing certain administrative claims, which was held to be invalid under *Armendariz* as well as federal law.

The court also found the firm's process of imposing its arbitration policy on current employees to be defective. Instead of asking employees to sign an arbitration agreement, it gave current employees three months to "opt out" of the arbitration policy by leaving the firm, an impermissible "take it or leave it" approach. The court's analysis illustrated that it is much easier to impose arbitration on new hires before they begin employment.

Arbitration agreements are helpful to employers in reducing litigation costs and exposure to major jury verdicts. For these reasons, we recommend that California employers have arbitration agreements with their employees. However, it is important to note that arbitration has its downsides, including the potential for arbitrators to be arbitrary (with limited opportunities to overturn decisions), as well as some potential tactical disadvantages compared with litigation in court (including reduced discovery and less focus on legal issues and dispositive motions).

If employers choose arbitration, *Davis* and *Armendariz* serve as warnings to employers not to overreach and seek to require employees to agree to provisions that contravene the continuously evolving case law permitting mandatory arbitration agreements with California employees.

**PROMOTE ZERO TOLERANCE FOR VIOLENCE**

In *Franklin v. The Monadnock Company*, plaintiff sued his former employer for wrongful termination in violation of public policy. Plaintiff alleged that he informed the company's HR department that a co-worker threatened to have him and three other employees killed and that the company refused to take proper steps to keep him or his fellow co-workers safe; he claimed that the threatening co-worker attempted to stab plaintiff just one week after his complaint to HR. Plaintiff further alleged that he then filed a report with the police department, and the company subsequently terminated his employment as a result of his complaints.

The company sought to dismiss plaintiff's lawsuit, contending that plaintiff's complaint failed to state a wrongful termination cause of action because: (1) plaintiff's complaint to the company about his co-worker's threats and his report of the assault to the police did not involve a fundamental public policy; and (2) the policies upon which plaintiff relied did not involve any duties that would benefit the public at large.

On May 27, 2007, the California Court of Appeal disagreed with the company and allowed plaintiff's lawsuit to continue. The court held that the California Labor Code and the Code of Civil Procedure establish 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. The court also ruled that plaintiff's conduct inured to the benefit of the public because there is a public interest in promoting workplace safety, deterring workplace crime, and protecting the interests of innocent co-workers.

The court's decision is a reminder that complaints of workplace violence must be taken seriously and that employers cannot terminate or otherwise retaliate against an employee for filing a complaint regarding a credible threat of workplace violence. The requirement to investigate complaints of workplace violence is not limited to conduct based on physical attacks. Workplace violence also includes verbal or written threats; harassment (i.e., physical gestures, intimidation, or bullying); and verbal abuse (swearing and insults).

To ensure complaints of workplace violence are properly addressed, all employers should maintain a written workplace violence policy that reiterates the company's zero tolerance for violent acts or threats of violence. The policy should encourage employees to bring all acts or threats of workplace violence to the attention of the company immediately. The policy should also describe the proper complaint procedure and remind employees that all threats will be thoroughly investigated. Moreover, the policy should inform employees that all reported complaints will be treated with as much confidentiality as possible, and that no one will retaliate against employees for filing workplace violence complaints.

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*Olivia Goodkin, Frank Melton and William Kampf litigate and provide preventive day-to-day advice in connection with a wide range of issues that confront employers, such as those discussed in this article and the representative engagements summarized on the next page. If you have any questions about labor and employment issues, please call Olivia, Frank or Bill at (310) 286-1700.*

## R H D A T T O R N E Y U P D A T E

We are pleased to welcome Beth Hummer to the firm's Litigation practice. Beth has represented clients in complex civil business litigation matters ranging from patent infringement to Internet defamation, toxic torts, securities, insurance and real estate. Beth previously worked at Latham & Watkins and Sullivan & Cromwell, and received her J.D. in 1997 from the University of Oregon School of Law.



We are also excited that Steven Papkin has joined the firm's Corporate practice. Steve advises clients in the areas of finance, securities, mergers and acquisitions, entertainment and intellectual property. He also is experienced in the restructuring of loan facilities and bankruptcy issues. Steve was previously with Milbank, Tweed, Hadley & McCloy LLP, Simpson Thacher & Bartlett and Clifford Chance. He earned his J.D. from Harvard Law School in 1994.

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#### COUNSELING AND NEGOTIATIONS

- Advised manufacturing company on investigation and termination of employees for misconduct.
- Negotiated separation agreements on behalf of a non-profit employer.
- Negotiated employment agreement for executive of advertising firm.
- Negotiated employment agreement for physician entrepreneur in connection with the merger of his business with another firm.
- Negotiated buy-out of employment agreement for long-term studio executive.
- Negotiated separation agreements for CFOs in connection with their departure from major firms.
- Advised professional services firm on wage and hour issues and classification of employees as exempt or non-exempt.
- Advised manufacturing company on issues relating to leaves of absences for employees with work-related and other disabilities.

#### LITIGATION

- Successfully defended claims for sexual harassment against a high-level executive employee of a major retail chain brought by two female employees.
- Successfully defended a disability discrimination and retaliation case against a professional services firm.

- Successfully defended wage and hour claims for overtime pay and failure to provide meal and rest periods against a large retailer.
- Successfully defended claims for breach of a non-solicitation covenant and unfair competition against a manager of a Fortune 500 company.
- Successfully represented a museum in an investigation by an administrative agency of a disability discrimination charge.
- Successfully defended a claim before the California Labor Commissioner for overtime pay by a former manager claiming to be non-exempt.

#### DRAFTING DOCUMENTS

- Drafted and updated employee handbooks for numerous employers.
- Drafted offer letters and related new hire documents for a start-up company.
- Drafted independent contractor agreements for numerous companies.
- Drafted employment agreements for executives of entertainment, retail and manufacturing companies.

#### INVESTIGATIONS

- Investigated issues of sex-based harassment and violation of company policies by the CEO of an entertainment company.

