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Employers Group 2010 Legal Update

Article written by Ms. Laura Reathafor. Ms. Reathafor is an Associate in the Labor and Employment Practice Group of Seyfarth Shaw LLP.

Decades ago, the Merchants & Manufacturers Association, the predecessor to Employers Group ("EG"), established the Legal Committee. The Legal Committee currently is comprised of 20 pre-eminent California labor and employment lawyers, 15 of whom are partners in major law firms, and five of whom work in-house at five of California's largest companies.

One of the main purposes of the Legal Committee is to monitor evolving labor and employment law, identify cases of importance, and then file "friend of the court" briefs, also known as amicus briefs, to make sure that a court considers the needs and arguments of EG members. These amicus briefs are filed in state and federal appellate courts, including the California and U.S. Supreme Courts. The members of the Legal Committee also advise EG on legislative issues of importance to its members.

In 2010, the Legal Committee filed a number of amicus briefs and amicus letters in cases in which it believed that the outcome of the case directly affected the interests of EG members and other California employers. In some cases, the Committee filed a brief seeking to persuade a court to decide a legal issue in favor of the employer. In other cases, the Committee filed a letter simply asking a court to publish a decision which was favorable to the employer so that the published decision could be relied upon in future litigation (or de-publish an unfavorable decision so that it could not be cited as legal authority). While many of these filings result in employer victories, some do not. The highlights and results of the Legal Committee's efforts in 2010 are outlined below.

Amicus Briefs

McCarthy v. Pacific Telesis Group -- This was a Kin Care case which raised the question of whether employers who do not limit (or cap) an employee's sick leave benefits must allocate any sick time to employees to care for a child, parent, spouse or domestic partner. (Typically, employers who cap or limit the amount of sick leave accrual must allocate half of the accrued



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sick leave to care for a child, parent, spouse or domestic partner.) The Committee filed an amicus brief with the California Supreme Court arguing that employers are entitled to rely on the law's plain language which only requires an employer to permit the use of sick days for Kin Care if the sick leave policy provides that a defined, measurable, finite number of days will accrue annually. The Supreme Court adopted the employer's position.

Chavez v. City of Los Angeles -- The issue is whether a trial court in an unlimited civil case (i.e. a case where the amount in controversy is greater than \$25,000) may deny attorneys' fees to a prevailing plaintiff in a discrimination case where the Fair Employment and Housing Act ("FEHA") allows the prevailing party to recover the fees but the California Code of Civil Procedure gives the trial court discretion to deny attorneys fees if the amount ultimately recovered is less than \$25,000.00? The Committee filed an amicus brief with the California Supreme Court arguing that attorneys fees should be denied. The Supreme Court adopted this position.

Sullivan v. Oracle Corporation -- In this currently pending case, the issue raised is whether California's employment laws apply to a non-California employee who worked in California for a very brief period of time. The Committee filed an amicus brief with the California Supreme Court supporting the employer's position that California laws did not apply to these employees. The case is currently pending.

Campbell v. PriceWaterhouseCoopers -- The question raised for the federal court is whether unlicensed accounting professionals are properly classified as exempt from California's overtime and meal/rest break requirements. The trial court held the employees were not exempt and the employer appealed. The Committee filed an amicus brief with the Ninth Circuit Court of Appeal, arguing that the trial court's ruling is contrary to established law and would disrupt the long standing practice of thousands of employers who currently classify [their] unlicensed professionals as exempt. The case is currently pending and oral argument is scheduled for February 2011.

CGA v. City of Los Angeles -- This matter involves whether California food safety laws or federal labor laws preempt a local ordinance that requires a grocery store, after a change of ownership, to retain the employees of the former owner for a 90-day transition period. The Committee filed an amicus brief with the California Supreme Court in support of preemption arguing that the local ordinance improperly invades the federal government's jurisdiction over such matters. The case is currently pending.

Bright v. 99 Cent Only -- This case concerns whether employees may sue for PAGA penalties for virtually any violation of the Labor Code or Wage Orders. The Committee prepared an amicus brief arguing that certain penalties [can] could only be recovered by the California Labor Commissioner. The Court of Appeal disagreed and held that employees could recover these penalties personally. The employer is seeking review by the California Supreme Court. If the Court decides to hear the case, the Legal Committee likely will file an amicus brief before that Court on behalf of EG members.



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Harris v. City of Santa Monica -- The question of whether an employer's evidence of alternative (non-discriminatory) reasons for terminating an employee's employment may act as a complete defense to a discrimination claim is the basis of this case. The Committee intends to file an amicus brief arguing that an employer has a legitimate business reason for termination that justifies an employee's termination regardless of the employer's alleged discriminatory motive. The case is currently pending before the California Supreme Court.

Wills v. Orange County Superior Court -- The issue is whether an employer may discharge an employee for making threats to other employees, if the threats were allegedly precipitated by or related to the discharged employee's disability? The Committee filed an amicus brief with the California Court of Appeal arguing that employers would be powerless to stop workplace threats if employees could use their disability to excuse their threatening behavior. The case is set for oral argument on January 18, 2011.

Reid v. Google -- The issue is whether a supervisor's "stray remarks" about an employee's race, gender, sex, etc., are admissible as circumstantial evidence of an intent to discriminate. The Committee filed an amicus brief with the California Supreme Court arguing that stray remarks made independent of the employment decision are irrelevant as to whether a particular action taken against an employee was discriminatory. The Court disagreed, and ruled against the employer.

Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8 -- The issue is whether an employer that owns or rents real property must permit union representatives on the employer's property. The Committee filed an amicus brief with the California Court of Appeal arguing that the employer has an absolute right to prevent a union from trespassing on its private property. The Court of Appeal agreed. The case is now pending before the California Supreme Court.

Dukes v. WalMart -- The issue is whether approximately 1.6 million female employees can bring a sex discrimination suit as a class action against the nation's largest retail employer. The Committee filed an amicus brief with the Ninth Circuit Court of Appeal arguing that each employee's claim of gender discrimination was individualized and, therefore, class certification was not appropriate. The Committee also argued that, given the size of the potential class, the case was not practically suitable for class action status. The Ninth Circuit Court affirmed [the]certification of the class action. The case is now pending before the United States Supreme Court.

Brinker Restaurant Corp. v. Superior Court -- In one of the most highly anticipated cases pending before the California Supreme Court, this case will address some of the critically important issues regarding California's meal and rest period rules, as well as the requirements relevant to class certification in wage-hour cases. One of the central questions presented in the case is whether an employer meets its obligations to "provide" meal periods by making them available to employees, or whether employers must "ensure" that employees take meal breaks. Issues regarding the timing of meal periods and how long they must last are also part of the case.



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The Committee filed an amicus brief with the California Supreme Court arguing that an employer need only make meal periods reasonably available. The brief argued that public policy supports the notion that class action lawsuits in this area, which are escalating in frequency, are contrary to the interests of employees and employers and have a negative impact on an employee's freedom to choose when and whether to break for a meal. The brief also argued that the plaintiffs' theory that employers are strictly liable if an employee fails to take a full 30-minute meal period within a narrow window of time, regardless of the reason, is inconsistent with the law and public policy. In fact, it would result in liability on the part of the employer even if an employee insubordinately refused to take a scheduled meal period. The Court of Appeal cited the amicus brief submitted by the Employers Group in its favorable decision. The Committee seeks to achieve a successful outcome before the California Supreme Court as well.

Lazarin v. Superior Court -- This case involves whether construction employers that have relied upon an exclusion in Wage Order 16 (governing construction occupations) and have negotiated with unions and agreed to meal period rules that are different than those required under the Labor Code and the Wage Order may be subject to significant retroactive liability for meal period violations. The Court of Appeal ruled against the employer, which is appealing the case to the California Supreme Court. If the Court accepts the case, the Committee intends to file an amicus brief arguing that the meal period exception found in Wage Order 16 should preclude the imposition of meal period premiums. [exceptions found in collective bargaining agreements should stand] exception found in Wage Order 16 should preclude the imposition of meal period premiums.

Oral Argument Before California Supreme Court

Pearson Dental Supplies, Inc. v Superior Court -- In January 2010, the Committee participated in oral argument before the California Supreme Court in a case challenging the finality of arbitration awards under employer-mandated arbitration programs. The plaintiff, who lost before an arbitrator, sought a ruling that would permit broad "judicial review" of any arbitration award under the Fair Employment and Housing Act or involving "non waivable rights." The Committee filed an amicus brief. A member of the Committee argued before the Supreme Court, along with lawyers for the employer, the employee and the California Employment Lawyers Association (a plaintiffs' attorneys group). In a 4-3 decision, the Supreme Court permitted judicial review of arbitration awards where a clear error of law precluded the employee's claim from being resolved on the merits.

Amicus Letters

Dotson v. Amgen -- The California Court of Appeal decided, in an unpublished decision, that parties to an arbitration agreement can assign to an arbitrator the duty to evaluate issues of unconscionability (a legal question arguably left to the courts). The Committee filed an amicus letter requesting publication of this decision so that employers could rely on it. As requested, the Court published its decision.



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Arenas v. El Torito – The California Court of Appeal affirmed, in an unpublished decision, the trial court’s denial of a motion to certify a class of restaurant managers allegedly misclassified as exempt. The Committee filed an amicus letter seeking publication of this decision so that employers in California could rely on it in fighting class certification in other exemption and wage-hour cases. The Court published this favorable decision as requested.

Pellegrino v. Robert Half -- The California Court of Appeal affirmed, in a published decision, the trial court’s determination that recruiters who work at a staffing agency are not exempt from California overtime and meal/rest break laws. The Committee filed an amicus letter supporting the employer’s petition seeking review of this decision by the California Supreme Court and requesting that the Court of Appeal de-publish the decision. The employer’s request for review was granted and the decision was de-published.

Jaimez v. Daiohs -- The California Court of Appeal decided, in a published decision, that a very modest showing of injury is all that is required to establish a claim for wage statement violations under Labor Code section 226(a). It also ruled that meal and rest period claims could be pursued in a class action where an employer allegedly prevented employees from taking their breaks. The Committee filed an amicus letter supporting the employer’s petition for review of this decision by the Supreme Court and also requested that the Court of Appeal de-publish the decision. Both requests were denied. On a favorable note, members of the Committee were able to limit the holding of the case in subsequent cases, such as the Chipotle case discussed below.

Baker v. American Horticulture – The California Court of Appeal decided, in a published decision, that “willfulness” under the Independent Wholesale Sales Representatives Act (Civ. Code, §§ 1738.10, et seq.) includes inadvertent, as well as intentional conduct. The Committee filed an amicus letter supporting the employer’s petition for review of this decision by the Supreme Court and also requested that the Court of Appeal de-publish the decision. Both requests were denied. However, the Court did, as requested by the Legal Committee, modify its opinion to lessen the impact on California employers.

Hernandez v. Chipotle -- In this very important case dealing with issues of meal and rest period compliance and the standards regarding class certification in wage-hour cases, the California Court of Appeal affirmed the trial court’s decision denying the plaintiff’s motion for class certification and granting the employer’s motion to deny class certification of a variety of claims, including a former employee’s overtime, pay stub, and meal and rest period claims. The trial court had found that the employer’s meal period records were insufficient to justify class certification as they did not show the reason why a meal period was missed or too short. Significantly, the Court also determined that conflicts of interest within a proposed class made class certification inappropriate. The Court of Appeal affirmed the entire decision and agreed that employers must provide meal periods, but need not “ensure” they are taken. The Legal Committee filed an amicus letter supporting Chipotle’s efforts to seek publication of this favorable decision so that employers in California could rely on it and benefit from its holdings. As requested, the Court of Appeal published its decision.