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The Year In Employment Law Review — Part II

Law360, New York (December 07, 2009) -- Continuing our survey of some of the more interesting 2009 employment law developments at the federal and California state levels, we explore in this final chapter what the legislative and executive branches (U.S. and California) have been up to (hint: It involves a lot of paperwork), and highlight a few of the more interesting California court employment law opinions.

While there were scores of new laws, regulations and opinions in 2009 that touch upon the minutiae of our daily work-life existence, a few stand out.

The Legislatures in Action

The Perfect Photo Op

What better way to start out an historic presidency than by making the equal pay promise a little closer to reality?

On Jan. 29, 2009, in one of his first presidential acts, President Obama signed the Lilly Ledbetter Fair Pay Act into law, thereby extending the time within which employees can bring claims for pay discrimination.

Previously, such claims had to be filed within 180 days of the making or adoption of the discriminatory decision (e.g., within six months of when the worker was first given the discriminatorily lower salary).

Now, a pay discrimination claim can be brought within 180 days of the receipt of any compensation affected by the decision. In other words, each paycheck begins a new statute of limitations period.

As another bonus, the time for employees to bring pay discrimination claims based on race, color, national origin, religion, disability and age have also been extended by the act.

More Leave Rights

Also in January 2009, new regulations under the Family and Medical Leave Act were issued by the United States Department of Labor, (which we would gladly include here if only our stingy editors would increase our word count to 375,000. Including the preamble, the new regulations are 750 pages!)

Perhaps the most important change for employers is the new requirement mandating three separate notices at specific times informing employees of their FMLA rights.

The regulations also established the rules applicable to the two kinds of military family leaves that Congress added to the FMLA in 2008. In the 2010 military budgeting process, Congress expanded the coverage of both military family leaves. (We can't wait for the DOL to issue 750 new pages of revised regulations to address these changes next year.)

Two Many A's

On Jan. 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 went into effect, greatly expanding the definition of "disability" in the Americans with Disabilities Act and overriding the holdings in several U.S. Supreme Court decisions and some EEOC regulations.

In September 2009, the EEOC published its long-awaited Notice of Proposed Rulemaking seeking to implement the ADAAA. Without going into the gory details (or doing a page count), the proposed new rules would expand the definition of "disability," among other things, making it much closer to the broad California version.

Alternative Work Weeks

In February 2009, California's governor signed AB 5 into law amending Section 511 of the California Labor Code pertaining to alternative workweek schedules.

The new law aims to (thankfully) make it easier for employees and employers to enter into alternative workweek schedules (i.e., four 10-hour days instead of five 8-hour days without having to pay overtime for the 10-hour days).

While the details are, well, detailed, the new law does allow (under certain circumstances) for non-exempt workers to work more than 8 hours a day without triggering the overtime pay requirements.

Laws That Should Be Unnecessary

Tops on our list of "Do We Really Need A Law For This?" is California's new "no texting while driving" law (SB 28), which was technically signed into law in late 2008, but made its way to the books and our consciousness in 2009.

This led employers who require their employees to carry and regularly check their Blackberries, iPhones, or equivalents, to add to their list of “Do We Really Need An Employment Policy For This?” a new policy (right after “don’t sexually harass your co-workers”) stating “do not read or write e-mails or texts while operating your motor vehicle.”

The California Courts in Action

Since We Are on the Subject of Commuting ...

A few commuting technicalities were addressed in 2009, including a clarification of exactly what constitutes the “commute.”

For instance, in Jeewarat v. Warner Bros. Entertainment Inc., 177 Cal. App. 4th 427 (2009), Warner Brothers was sued after one of its executives was involved in a tragic auto accident on his return home from the airport following a three-day business conference.

The employer sought to escape liability by arguing application of the descriptive “coming and going rule” (an employer is not liable for the acts of employees during their commute since they are not acting within the course and scope of their employment at the time.)

But for every descriptive rule, there is an equal and opposite descriptive exception.

The plaintiff pressed for application of the “special errand” exception, which holds the employee to still be acting within the course and scope of his employment when carrying out a “special errand” for the employer outside the normal work hours.

Was the drive home from the airport following a business trip — which happened to be along the very same commuting route traveled every day by the employee — part of the employee’s “commute,” or was it the tail end of the employer’s “special errand?” This was California, so you can guess how the appellate court ruled. Warner Brothers was on the hook.

More Commuting

But all was not bad for employers on the commuting front.

In Rutti v. Lojack Corp., 578 F.3d 1084 (9th Cir. 2009), a Lojack technician who drove his employer-issued van to and from various job locations to install vehicle alarm systems, sought to have his commute time compensated.

This was not a wholly irrational argument since Lojack, as many employers do when giving their employees vehicles, had certain restrictions on the use of Rutti’s van – i.e., he had to drive directly from home to the first job location, and from the last job location

to home, without making any personal stops (like dropping the kids off at school) or carrying any passengers.

He also had to keep his cell phone on and take job-related calls, if any (but, of course, no texting while driving!).

The Ninth Circuit analyzed the issues under federal law (the appropriately titled "Employee Commuting Flexibility Act") and determined that the commute time, even in the company vehicle with restrictions attached, was not compensable.

The court was less certain about application of California state law, but ultimately concluded that, while it was "a close call," even under state law the commute was noncompensable. Employers dodged a bullet with this one ... at least until a California state court looks at the issue.

Trade Secrets Galore

A) Preemption: California has long lacked a citable case holding that the California Uniform Trade Secret Act (CUTSA) preempts other overlapping causes of action, such as breach of confidence, tortious interference and unfair competition.

The void has finally been filled by K.C. Multimedia Inc. v. Bank of America Technology & Operations Inc.,171 Cal.App.4th 939 (2009). This is an important opinion because the CUTSA remedies are different than those for the common law and statutory claims that are preempted.

For example, the 17200 unfair competition cause of action carries with it a four-year statute of limitations whereas CUTSA is a three-year statute.

Further, punitive damages are limited to double damages under CUTSA, rather than the constitutional limitation of "everything and the kitchen sink" applicable to the standard California tort claim.

B) Sylvester Stallone and the Stolen Pudding Recipe: Trade secret litigators in California are only too aware of Code of Civil Procedure Section 2019.210, which requires a plaintiff to describe his trade secrets "with reasonable particularity" before he can commence discovery.

The statute has two primary goals: (a) "help the court shape discovery;" and (b) provide the defendant with sufficient notice of what he is alleged to have stolen so he can develop a defense.

This statute is also a trap for the unwary plaintiff: Describe the trade secret too specifically and whooops, there go the crown jewels. Describe it too broadly and the plaintiff will fail to satisfy the statute and be left with no discovery rights. It left for some frustrated plaintiffs.

In Brescia v. Angelin, 172 Cal.App.4th 133 (2009), a case filed against Sly Stallone and his co-defendants in the high protein pudding business, the court clarified the trade secret designation requirements, making the plaintiff's disclosure burden easier.

C) Trade Secrets, Inevitable Disclosure and $1.6 Million in Sanctions: In some jurisdictions, the inevitable disclosure doctrine (which allows a court to enjoin a former employee from working for a competitor in a job that makes it inevitable he or she will have to use or disclose the former employer's trade secrets) is alive and well.

That would not include California, where the doctrine is pretty much dead and buried. Indeed, not only is the doctrine all but rejected in California, a plaintiff can be sanctioned for even prosecuting the claim in the state.

Such was the hard and painful $1.6 million lesson learned by the plaintiff in Flir Systems Inc. v. Parrish, 174 Cal. App. 4th 1270 (2009).

There, the plaintiff sought to prevent a former employee from starting up a new competitive business under the theory that the new business' product could not be produced without utilizing the plaintiff's trade secrets (use of the trade secrets was inevitable).

Because there was no evidence of any actual misuse of trade secrets, the trial judge determined the action to have been brought in bad faith, based as it was on the discredited inevitable disclosure doctrine, and awarded the defendants $1.6 million in attorney's fees and costs as a sanction under the California Uniform Trade Secret Act. This was upheld on appeal.

Tip Pooling Cases a Hot Item

How much trouble can a 15 percent tip really cause? Apparently a lot, judging by the rash of tip pooling cases that were reported in California, including Budrow v. Dave & Buster's of Cal. Inc., 171 Cal. App. 4th 875 (2009), Grodensky v. Artichoke Joe's Casino, 171 Cal. App. 4th 1399 (2009), Etheridge v. Reins Int'l Cal. Inc., 172 Cal. App. 4th 908 (2009), and Chau v. Starbucks Corp., 174 Cal.App.4th 688 (2009). We'll look at Chau as representative of these.

California Labor Code Section 351 forbids employers and their agents from sharing in any tips left by patrons for the employees. Sounds simple enough.

At least that's what Starbucks thought when it allowed its hard-working shift managers – who stand shoulder to shoulder with their nonmanagement brother (and sister) baristas, steaming the soy and pressing the espresso, doling out caffeinated charm to an often charmless public — to share in the tip pool.

The San Diego superior court thought otherwise, classified the shift managers as “the employer,” and hence not allowed a share of the tips, and ordered Starbucks to return the shift manager’s share of the tips to the other baristas.

On a class basis, this amounted to a “return” of nearly $100 million.

The appellate court wisely reversed: Shift managers earned the tips doing the same work as the other employees, so they get to share in the tips.

(On a related note, the California Supreme Court is getting in on the “tip” act and will rule in Lu v. Hawaiian Gardens Casino Inc. (S171442) whether Labor Code Section 351 provides employees with a private right of action.)

No Punitive Damages on Labor Penalties

It is nice to know that not everything an employer does in California subjects it to possible punitive damages.

In a case decided late in 2008 (and finalized in 2009 after the Supreme Court denied review), the appellate court confirmed that Labor Code wage and hour violations relating to meal and rest breaks, pay stubs and minimum wage laws do not give rise to punitive damages. Brewer v. Premier Golf Props., 168 Cal. App. 4th 1243 (2008).

(They do, however, give rise to attorney's fees under Labor Code § 218.5 “because it is now settled that compensation for missed meal and rest breaks are wages.”)

Picking Off Those Pesky Class Action Plaintiffs, One at a Time

Addressing the issue head-on for the first time, the California appellate court in Chindarah v. Pick Up Stix, 171 Cal.App.4th 796 (2009), allowed an employer, when faced with a California wage and hour class action, to pick off the putative class members one employee at a time through a settlement agreement and release.

After the representatives for the plaintiff class refused the employer’s settlement offer in mediation, the employers made the same offer personally to the individual putative class members, and over 200 accepted the settlement and signed releases.

Seeing the size of their potential recovery shrink before their very eyes, the class action plaintiff’s attorneys challenged the releases on the grounds that under the California Labor Code Section 206.5 employees cannot waive their right to receive earned wages.

The court acknowledged the Labor Code section, but noted that the right to receive wages was in dispute, and “[t]here is no statute providing that an employee cannot release his claim to past overtime wages as part of a settlement of a bona fide dispute over those wages.”

(The court was careful to note that this strategy may or may not work under the federal FLSA statutory regime, depending on the jurisdiction.)

The End

This wraps up our short visit down memory lane. As noted at the outset, it was not our intention to identify the "top" employment law developments, as much as to highlight some of the more interesting cases and legislation around the country and in California impacting the relations between employers, employees and their attorneys.

Until next year ...

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