Legal Updates & News

Bulletins

California Case Law Potpourri: Age Discrimination, Text Message Privacy, No-Match Letters, Meal Period Decision, and Cost of Training Reimbursement

August 2008
by Jacqueline Beaumont

Related Practices:

- Employment and Labor

Employment Law Commentary, August 2008

PDF Version

Over the last few months, federal and state courts have issued a number of important new employment law decisions. Some, but not all, of these cases place additional burdens on employers defending claims at trial. Other cases bring needed clarification to previously ambiguous issues and should be helpful for employers.

United States Supreme Court Decision

Employers Defending Age Discrimination Claims Bear Burden on "Reasonable Factors Other than Age" Defense

In *Meacham v. Knolls Atomic Power Lab.*, No. 06-1505 (U.S. June 19, 2008), the United States Supreme Court held in a 7-1 decision that an employer defending a disparate-impact claim under the Age Discrimination in Employment Act (ADEA) bears both the burden of production and the burden of persuasion in defending on the basis that the decision was made for "reasonable factors other than age" (the RFOA defense).

Factual and Procedural Background

In 1996, the U.S. government ordered its contractor, Knolls Atomic Power Laboratory, Inc., to reduce its naval nuclear reactor operational workforce as a result of the post–Cold War reduction in need. Knolls instituted a buyout offer which reduced the workforce by 100 jobs, but still needed to cut 30 more. Accordingly, Knolls instructed its managers to rate subordinates based on three scores—performance, flexibility, and critical skills. Along with consideration for years of service, the score totals were used to determine layoffs. Of the 31 salaried employees laid off, 30 were at least 40 years of age. Twenty-eight of them sued for both disparate-treatment (discriminatory intent) and disparate impact (discriminatory result) under the ADEA and state law. A jury awarded the plaintiffs $6 million, and the Second Circuit Court of Appeals affirmed the finding of disparate impact but reversed the disparate-treatment claim, pursuant to the employer's defense that the workforce reduction decisions were made on the basis of reasonable factors other than age (RFOA). The plaintiff appealed on the basis of conflicting appellate precedents as to whether the RFOA defense must be proven reasonable by the employer, or proven unreasonable by the employee.

Legal Analysis

The Supreme Court reviewed the text of the Act, finding that because the ADEA exempted decisions made for reasonable factors other than age as activity "otherwise prohibited" by the Act, it was an affirmative defense to be raised by an employer, and "entirely the responsibility of the person raising it." Accordingly, the Court held that the employer bears both the burden of proof (by introducing evidence of other reasonable factors) and of persuasion (by arguing that such evidence shows that the employment action was made for reasons other than age). The Supreme Court also confirmed its prior decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), that the application of the RFOA defense does not examine whether there are alternative methods for the employer to reach its goals, as does the separate "business necessity test" under discrimination law. Rather, the Court clarified, the main inquiry in assessing an RFOA defense to a disparate-impact claim is not whether the employment action was taken on account of "factors other than age," but whether those factors were "reasonable."

Application for California Employers

This decision has little impact on California employers, who have been held to the burden of production on the RFOA defense since a Ninth Circuit decision in 1983. (*Criswell v. Western Airlines, Inc.*, 709 F. 2d 544, 552 (1983).) However, for the rest of the country's employers, the Supreme Court's decision makes it easier for employees to bring age discrimination lawsuits, and more costly for employers to defend on the basis of reasonable factors other than age. California employers should continue to carefully assess legal exposure prior to making reductions in the workforce, including an assessment of the statistical impact of the layoff with respect to age. Employers should develop objective factors that can be articulated for the layoff decision, and ensure that the objective criteria are applied consistently.

Ninth Circuit Decisions

Employees Have a Reasonable Expectation of Privacy in Text Messages on Employer-Issued Pagers Pursuant to Informal Policy of Not Monitoring Contents

In *Quon v. Arch Wireless Operating Co. Inc.*, 529 F.3d 892 (9th Cir. 2008), the Ninth Circuit Court of Appeals sharpened limits on an employer's ability to conduct electronic monitoring of employees' text messages.

Factual and Procedural Background

The City of Ontario Police Department contracted with Arch Wireless to provide its employees with two-way alphanumeric text-messaging pagers and wireless text message service. The City had a general employee "Computer Usage, Internet and E-mail Policy," which provided that the City-owned computers and associated services were to be used for City-related business only, that access to the Internet and e-mail systems was not confidential, that users had no expectation of privacy in the use of these systems, and that use of obscene or harassing language on the systems was prohibited. The City did not have a policy expressly governing the use of the pagers or text messages sent and received via the pagers. However, the City did have an informal policy governing their use: the Arch Wireless contract allotted the City 25,000 characters per pager per month, and the City paid fees to Arch Wireless for overage charges. Jeffery Quon went beyond the overage limit three or four times. The lieutenant responsible for the contract and for collecting money to pay overage charges told Quon that if he simply reimbursed the full overage charge, then there would be no need to do an audit to determine how many messages were work-related and how many were personal. Each time, Quon paid the overage charges. The lieutenant also told Quon that the use of the pagers was considered e-mail and public records, and could be audited at any time.

After Quon and another employee went over the message limit on multiple occasions, the City police chief ordered an internal affairs investigation to determine whether the character limits should be increased because overages were being incurred for City business. The contents of the text messages was stored on the Arch Wireless server, and Arch Wireless turned over the contents to the City upon e-mail request. No notice was provided to the employees that the City was obtaining the transcripts. The transcripts disclosed that many of the text messages sent by Quon included sexually explicit messages to other employees and his wife.

Quon, his wife, and two other police employees involved in the exchange brought suit against the City, Arch Wireless, and Department individuals. They claimed, among other things, that the City and the Department had violated their rights under the federal and California constitutions by procuring and reading the stored text messages. The court agreed that the employees had a reasonable expectation of privacy in the text message, but held a jury trial on the issue of the Police Chief's intent in the investigation; the jury determined that the search was reasonable. The district court held for defendants. Plaintiffs appealed.

Employee Right to Privacy

The Ninth Circuit agreed with the trial court that the employees had a reasonable expectation of privacy under the Fourth Amendment and the right to privacy under the California Constitution. Despite the City's general computer use policy disclaiming employees' expectation of privacy in computer resources, the Ninth Circuit affirmed that such was not the "operational reality" at the department. The City's informal policy that the text messages would not be audited if Quon paid the overage charges rendered Quon's expectation of privacy reasonable. Moreover, evidence showed that the City followed its informal policy by not auditing Quon after he incurred and paid overage charges three or four times. The Ninth Circuit rejected the trial court's finding on the reasonableness of the search overall, however, stating that, while the purpose of the search was to verify the efficacy of the 25,000 character limit, the purpose of the investigation could have been achieved by less-intrusive means, including means authorized by Quon's consent, and therefore the search was not reasonable as a matter of law.

Application for California Employers

The decision clarified that an employees' reasonable expectation of privacy in the content of electronic messages can be bolstered by informal verbal policies, particularly when those informal policies are followed in practice. Although this case involved the Fourth Amendment because it involved a public-sector employee, it also has implications for private employers on the "reasonable expectation of privacy" element under the

California Constitution and common law. Employers should review their workplace surveillance practices to ensure compliance with state and federal law. More importantly, employers should review whether their practice of surveillance accords with their written technology use policy, and consider revising the written policy to provide for the contingency of a failure to enforce monitoring rights.

Social Security Administration "No- Match" Letters Do Not Put an Employer on Constructive Notice of Hiring Undocumented Workers Sufficient to Terminate Employment Quickly Without Confirmation

In *Aramark Facility Services v. Service Employees International*, 530 F.3d 817 (9th Cir. 2008), the Ninth Circuit recently held that an employer may be forced to reinstate employees with full backpay if the employer does not give the employees enough time to respond to a no-match letter from the Social Security Administration. At the same time, the employer may be exposed to potential civil and criminal penalties under federal immigration law if the employer continues to employ the no-match employee for too long of a period.

Factual and Procedural Background

The Social Security Administration uses information from an employee's W-2 form in determining entitlement to social security benefits, and routinely sends "no-match" letters when there is a discrepancy between the employer's W-2 records and the SSA database. While the main purpose is benefits-related, the SSA believes that one reason for discrepancies is unauthorized work performed by non-citizens or persons not authorized to work under immigration laws. The no-match letters do not trigger automatic employee penalties or immigration enforcement procedures. However, in August 2007, the Department of Homeland Security (DHS) amended 8 C.F.R. § 247a.1(*l*) to incorporate receipt of no-match letters as an example of an employer's knowing employment of a person without appropriate authorization to work in the United States. The DHS regulations are currently subject to a preliminary injunction in federal district court, pending review of revised regulations issued by DHS.

The *Aramark* case arises out of events occurring in 2003, prior to the DHS's revised regulations, when Aramark received no-match letters for 3,300 employees nationwide. With respect to the 48 employees at the Staples Center in Los Angeles for whom no-match letters were issued, Aramark managers responded by notifying the employees of the mismatch and instructing them to bring either a new social security card or verification that a new card was being processed, within three working days from the postmarked date of the Aramark letter, or be terminated. The employees were represented by the Service Employees International Union (SEIU), which requested extension of the three-day deadline. Aramark rejected SEIU's request, and only 15 employees were able to provide proper documentation within the three-day window. Aramark promptly terminated the employment of the 33 remaining employees and notified them that they would be rehired upon providing the correct documentation. Pursuant to arbitration under a collective bargaining agreement, an arbitrator found the firings to be without cause because there was no convincing evidence that the employees were undocumented, and awarded reinstatement and backpay. Aramark filed a complaint with the United States District Court to vacate the award on grounds of public policy, and the district court agreed with Aramark that the arbitration award violated public policy against knowing employment of undocumented workers. SEIU appealed the district court's decision to the Ninth Circuit.

Legal Analysis

The Immigration Reform and Control Act of 1986 (IRCA) subjects employers to civil and criminal penalties if they knowingly employ undocumented workers or have "constructive knowledge" of a worker's undocumented status. Aramark argued that the arbitration award violated public policy because it essentially required Aramark to ignore "constructive notice" of the employee's undocumented status. The Ninth Circuit sided with the employees, holding that receipt of a no-match letter, without more, does not put an employer on constructive notice that it is employing undocumented workers and is thereby violating federal law. Looking to the immigration regulations prior to the recent DHS revision, the Court held that, for the purposes of the IRCA, constructive notice was narrowly interpreted. Citing the fact that the no-match letters do not create sanctions for employees under immigration law, the court held that a social security number discrepancy does not, by itself, automatically mean that a worker is undocumented; such a discrepancy could arise for a number of non-immigration related reasons. Even the DHS revisions to the regulations made after the firings, which find that no-match letters are an example of constructive notice, punish an employer only for "failing to take reasonable steps" upon such notice within a 90-day "safe harbor provision." 8 C.F.R. § 247a.1(*l*)(2)(i)(B). The Ninth Circuit found that the time period of less than three days was too short a period of time to allow workers to respond, and that no negative inference could be drawn from the fact that some workers failed to respond and correct the discrepancy within the three days, particularly given the fact that a no-match letter, alone, does not provide convincing proof of immigration violations. The Ninth Circuit reversed the district court and ordered it to reinstate the arbitration award of reinstatement with full backpay.

Application for California Employers

The Ninth Circuit did not provide guidance as to what steps an employer can take to balance the employees' rights with the employer's potential exposure to civil and criminal penalties for employing unauthorized workers. Although enforcement of the DHS regulations is currently stayed, employers should use the DHS "safe harbor" as guidance and not terminate an employee based solely upon receipt of a no-match letter. Under those circumstances, employers should allow an employee a reasonable period of time of at least 90 days to respond to the no-match letter and correct the mismatch. Where no-match letters are a recurring issue, employers should institute policies and procedures for responding. The DHS has set up a free, online E-Verify system, which allows enrolled employers within seconds to verify an employee's eligibility to work and validity of social security number. Federal contractors are required to use E-Verify under a new executive order issued in June. In any case, employers should seek legal advice before firing an employee upon suspicion that the employee is undocumented, in order to avoid the potential for substantial back pay penalties.

California Appellate Court Decisions

"Providing" Meal and Rest Periods to Hourly Employees Requires Individual Analysis

The California Court of Appeal issued a favorable ruling for employers regarding class certification in meal and rest break cases, confirming in *Brinker Restaurant Corporation, et al. v. Superior Court, (Hohnbaum) et al.*, No. D049331 (Cal. Ct. App. July 22, 2008), that California employers satisfy legal requirements for "providing" meal and rest periods by making them available to employees, and need not ensure that they are taken. The court also held that individual issues predominated on both the meal and rest break issue and the off-the-clock work.

Factual Analysis

Brinker Restaurant Corporation operates 137 restaurants in California, including well-known concepts Chili's Grill & Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. In 2002, the California Division of Labor Standards Enforcements (DLSE) investigated Brinker's alleged failure to provide meal and rest breaks as required by law, and to pay premium wages to employees not provided with such meal and rest breaks. Brinker settled the subsequent DLSE complaint before any findings could be made. Even so, employees filed a class action complaint alleging rest break violations, meal break and early lunching violations, unpaid off-the-clock work during intended breaks, and time-shaving violations. Plaintiffs moved for certification of a class of more than 63,000 hourly restaurant employees working for Brinker since 2000. The trial court entered a class certification order, which was vacated by the Court of Appeal in October 2007. Following a remand from the California Supreme Court, the Court of Appeal recently issued a new opinion confirming its original analysis and resolving the issues in favor of the employer.

Class Certification

The Court of Appeal stated that a trial court "cannot reach an informed decision" on whether class certification is proper without first determining what laws apply to plaintiffs' claims. Subsequently, the Court of Appeal analyzed each claim alleged by plaintiffs. In all cases, the court held that the legal standard the employer was held to necessarily involved individual factual issues and therefore the class could not be certified.

Rest Period Claims

Plaintiffs alleged that Brinker violated Labor Code section 226.7 by violating IWC Wage Order 5-2001. Wage Order 5-2001 states that an employer must give an hourly employee a paid rest period of ten minutes "per four (4) hours or major fraction thereof" worked. The Court of Appeal disagreed with plaintiffs' interpretation, and held that the Wage Order does not mean that an employee must be given a rest break for every three and a half hours of work, but only on days where the employee is scheduled to work only between three and a half and four hours of work. The court further interpreted the regulations to state that rest breaks must be afforded in the exact middle of a four-hour period only when "practicable," and that "early lunching" (before the first half of an employee's shift ends) is not unlawful insofar as the regulations do not require rest breaks to be taken before meal breaks in a given shift. More importantly for class certification law, the court held that the issue of whether rest periods are prohibited by the employer or voluntarily waived by the employee is "by its nature an individual inquiry," interpreting the regulations to provide that employees may waive rest periods and employers are not required to force employees to take them. As a result, the court held, because the breaks need only be made available and not ensured, individual factual issues would predominate, and therefore the case was not amenable to class action treatment.

Meal Period and Off-the-Clock Claims

For the meal break violations, the plaintiffs similarly alleged that Labor Code section 226.7 was violated by early lunching practices, by failing to give employees a meal break for every five consecutive hours worked if a meal break is taken early in the shift, and by Brinker's alleged failure to ensure that employees took meal periods. As with the rest period claim, the court held that early lunching practices are valid, and that the regulations do not provide for a "rolling" five-hour period whereby the five-hour time period requiring a meal break restarts each time an employee takes a meal break on his or her shift. As for the plaintiffs' claim that

employers must ensure, and not merely provide, meal breaks, the Court of Appeal again held that California law requires that employers need only provide meal periods. Again, the Court denied class certification due to the presence of individual issues in determining why each plaintiff missed a meal break. With respect to plaintiffs' claims of working off the clock during meal periods, the court made similar rulings.

Application for California Employers
The *Brinker* decision is a major victory for employers in defeating class actions alleging meal and rest break violations. The decision affirms the current weight of authority that California employers are required only to provide, i.e., make available, meal and rest breaks to employees, and need not ensure that employees take these breaks, and that these types of actions are not amenable to class treatment. In the aftermath of *Brinker*, the California Labor Commissioner issued a memorandum to all Division of Labor Standards Enforcement staff regarding the decision, instructing that the decision must be followed effective immediately, including the holding that employers must provide meal and rest breaks, but need not ensure that they are taken.

Agreement to Reimburse Training Costs Is Valid Under Fair Labor Standards Act, But Withholding of Final Paycheck to Cover Debt Is Unlawful

A California Court of Appeal recently concluded, in *City of Oakland v. Hassey*, Case No. A116360 (Cal. Ct. App. June 18, 2008), that an agreement for reimbursement of training costs was lawful under the Fair Labor Standards Act (FLSA), but that the FLSA prevents an employer from withholding an employee's final paycheck to cover the training costs owed.

Factual and Procedural Background
In an effort to encourage its police officers to stay with the department longer, the City of Oakland, in 1996, entered into a memorandum of understanding with the Oakland Police Officers' Association, whereby the City could require its police officers to reimburse the City for training costs at the Oakland Police Academy if they left the department before five years of service, and the City could collect these expenses from their final paycheck. The amount was staged to decrease over time such that an officer would pay the full $8,000 cost of training for leaving prior to one year of service, the amount would decrease by 20 percent for each year the officer stayed with the department, up to five years. The officers would not have to repay any wages earned during training. When the City hired Kenny Hassey as a police officer in March 1998, Hassey signed an agreement for "reimbursement of training expenses" setting forth the reimbursement conditions. Hassey attended and graduated from the Oakland Police Academy, but soon after was told that he was not performing up to standard and should consider resigning in lieu of termination. Hassey resigned, and upon his resignation signed a "training costs repayment agreement" confirming that he owed repayment of $8,000 in training costs to be paid in installments. The City withheld Hassey's final paycheck in February 1999, as well as a check to cash out Hassey's retirement balance, to cover some of the money owed. After Oakland sent a series of collection letters to Hassey and he did not respond, Oakland sued Hassey for breach of contract for the remaining amount of $6,619. In his answer and cross-complaint, Hassey alleged that the contract and paycheck withholding breached the Fair Labor Standards Act and state law, including unfair competition. The trial court held for the City and granted summary judgment on the complaint and cross-complaint.

Legal Analysis
Hassey argued on appeal that the reimbursement agreement violated the minimum wage and overtime provisions of the FLSA because the agreement was a condition on his wages in violation of federal regulations. The Court of Appeal held that the training costs could not be considered wages incurred "primarily for the benefit of the employer," noting that a repayment agreement was similar to other valid incentives to offer to workers to stay with the employer. The court also noted that Hassey did not stay with the Police Department long enough for the Department to get the benefit of training Hassey. In any case, Hassey did not prove that deduction of the training costs drove his salary below the minimum wage, and therefore there was no violation of the FLSA or the Labor Code.

The second issue addressed was whether the Department's withholding of Hassey's final paycheck to cover part of the training costs was unlawful. The Court of Appeal held in this case that the Department's withholding did drive Hassey's wages below minimum wage for the final pay period he worked, violating the FLSA. Citing *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1 (1981), the court also confirmed the broader and longstanding California rule that prohibits an employer from deducting any wages from an employee's paycheck to collect a debt owed to the employer.

Application for California Employers
This case highlights for employers the importance of carefully preparing training and other reimbursement agreements and determining the process for collecting employee debts. Employers should not take payroll deductions from employees' paychecks unless it is done under the limited circumstances set forth in Labor Code section 224 and with the assistance of legal counsel. Payroll managers and administrators should be trained regarding these laws to ensure compliance with federal and state law.