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Labor/Employment News

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Personal Liability for Owners and Managers for FLSA Violations

The Ninth Circuit Court of Appeals, in the case of *Boucher v. Shaw* 572 F.3d 1087 (2009), held that a corporation's CEO, CFO and the person "responsible for handling labor and employment matters" were personally liable for wages owed to former employees under the Fair Labor Standards Act.

Several former employees of the Castaways Hotel in Las Vegas, together with their union, sued the Hotel managers in federal court for unpaid wages under state and federal law.

The three individual managers sued by the plaintiffs were the Chief Executive Officer, who owned 70% of the business, the Chief Financial Officer, who did not own any portion of the business, and the manager responsible

for "handling labor and employment matters at the Castaways," who owned the remaining 30% interest in the business.

The Court found that, under Nevada law, the defendant managers did not have any personal liability for the wages claimed by the plaintiffs because under that law individual managers are not deemed to be employers.

Similarly, under California law, managers are not personally liable for violations of California wage and hour law. In *Reynolds v. Bement* (2005) 36 Cal.4th 1075 the California Supreme Court found that under common law managers operating within the course and scope of their position were not personally liable for the employers' failure to pay wages.

However, under federal law,

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Employee's Right of Privacy: Video Surveillance at Work

In *Hernandez v. Hillside, Inc.* (2009) 47 Cal.4th 272 the California Supreme Court had occasion to again review the right of privacy of employees at the work place.

Abigail Hernandez and Maria-Jose Lopez worked in the same enclosed office during the day. Their employer discovered that someone

was accessing internet pornography late at night from their office. In order to discover the individual doing so, Hillside secreted a video camera in the office to be used at night. The plaintiffs were not advised of the camera and when they discovered it, they filed a lawsuit for invasion of their privacy.

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Personal Liability of Managers (continued)

specifically the Fair Labor Standards Act, owners and supervisors may be found to be personally liable for unpaid wages.

The Ninth Circuit stated that the definition of “employer” under the FLSA is not limited by the common law definition, but is to be given “an expansive interpretation in order to effectuate the FLSA’s broad remedial purposes.” It also found that if an individual exercises “control over the nature and structure of the employment relationship” or has “economic control” over the business, then the individual has personal liability under the FLSA.

The Court noted that this liability is not limited to someone having significant ownership interest in the business. It also includes someone with significant operational control of the day-to-day business functions, and a manager with the power to hire and fire employees, the power to determine salaries and even someone who has the responsibility to maintain employment records.

In the *Boucher* case the CFO did not own any interest in the Castaways Hotel. The CEO had a 70% ownership interest and the third individual defendant, who had control over labor and employment matters, owned a 30% interest in the business.

The Court concluded that the fact that the business had been in Chapter 11, and then Chapter 7 bankruptcy, did not have any effect on the lawsuit against the

individuals. The Court stated that “the Castaways bankruptcy has no effect on the claims against the individual managers at issue here.”

In the current economic situation it may be that employees choose to sue individual managers for wage violations under the FLSA rather than seek recovery under California or Nevada law against the business, which might go out of business or be in bankruptcy.

Tip Pooling: Legal Or Illegal?

Service businesses distribute tips left by customers in a variety of ways. Some businesses put them in a pot and distribute them to all employees, others allow only the table servers to share in the tips, and others allow all the employees in the “line of service” to share in the tips left by patrons.

Labor Code section 351 prohibits an employer from collecting, taking or receiving “any gratuity or a part thereof” which is left for an employee. It expressly provides that “Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.”

Of course the question is for whom the tip was left, especially

when there is usually no indication by the patron whether the tip is left for the table server, the bus boy, the person bringing the drinks, the dishwasher, the chef or the bartender.

There have been numerous class actions by employees claiming that their employer has distributed the tips to the wrong persons, that the employer has engaged in unlawful and unfair business practices under Business & Professional Code §17200, and that the employees are entitled to civil penalties under Labor Code §2698, the Private Attorneys General Act.

In *Etheridge v. Reins International California, Inc.* (2009) 172 C.A.4th 908 the plaintiffs were table servers and contended that their employer was illegally depriving them of tips by distributing the tips to employees who did not provide direct table service. The defendant contended that its tip pooling practice was proper, as long as it did not share its tips with management employees, which it did not.

After reviewing the history of tip pooling and Labor Code §351, the court in *Etheridge* concluded that “tip pooling is not illegal when the participants in the tip pool contribute to the patron’s service, even if not providing direct table service.”

The contentious nature of this issue can be seen from the dissent which was of the opinion that “employees who do not render direct table service may not share in the proceeds of an employer-mandated tip pool.”

In another case recently issued

(Budow v. Dave & Buster's of California, Inc. (2009) 171 C.A.4th 875 the court found that employees who provide "indirect" table service are allowed to be included in a tip pooling arrangement. Thus, the sharing of tips with the cocktail waitress and the bartender was lawful.

The California Supreme Court declined to review either the *Etheridge* or *Budow* case. In addition, the Court declined to review the case of *Chau v. Starbucks Corp. (2009) 174 C.A.4th 688* where the Court of Appeal reversed an \$86 million judgment against Starbucks by a class of employees known as "baristas" who claimed that allowing "shift supervisors" to participate in the tips left by patrons violated Labor Code §351.

The *Starbucks* case presented a variation from the *Budow* and *Etheridge* cases. At Starbucks the tips were left in a collective tip box on the counter. The tips were shared between all of the employees preparing and serving patrons, including the employee designated as the shift supervisor, who spent more than 90% of his time serving patrons as a barista.

Store managers and assistant store managers sometime performed barista duties, but they were prohibited by company policy in sharing in the tips left by patrons.

The Court in Starbucks found that there was "no decisional or statutory authority prohibiting an employer from allowing a service employee to keep a portion of the collective tip, in proportion to the amount of hours worked, merely because the employee also has limited supervisory duties."

Right of Privacy (continued)

There was no evidence that the camera was ever used during the day or recorded plaintiffs. Hillside had a legitimate business reason to be concerned over the use of their equipment to view pornography since it provided a foster home for children who had been victims of emotional, physical and sexual abuse.

The Supreme Court found that the plaintiffs had a legitimate concern over their privacy since Hillside intentionally intruded into a place where the plaintiffs had a "reasonable expectation of privacy." The Court stated that "while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether."

The Court also noted that "employees who retreat into a shared or solo office, and who performed work and personal activities in relative seclusion there, would not reasonably expect to be the subject of televised spying and secret filming by their employer."

The Court also found that Hillside had not provided any warning to their employees that they were subject "to the risk of . . . surveillance" or that the plaintiffs' had agreed to it in advance.

Thus, the Court concluded that in fact there had been an invasion of the plaintiffs' privacy and that they had fulfilled the first prong of the tort of invasion of privacy.

A second element to be satisfied is that the invasion of the

plaintiffs' privacy must be "highly offensive" to a reasonable person and "sufficiently serious" to constitute an "egregious breach of the social norms."

The Court found this element lacking for two basic reasons: 1) although a camera was placed in their closed office, it was not the intent of Hillside to record them, and in fact it had not done so, and 2) Hillside had a legitimate business reason to install the camera and it was only installed for a limited time. The Court stated that in this case "privacy concerns are alleviated because the intrusion was 'limited' and no information about plaintiffs was accessed, gathered, or disclosed."

Employers must be very careful when considering to install video and camera monitors of employees in the workplace. As this case illustrates, such a decision with respect to any area where employees have a reasonable expectation of privacy may lead to a lawsuit. It is important for employers to adopt a policy stating that employees have no right to privacy in any location on the employer's premises, except in changing and restroom areas. Posting notices to the effect that such areas are subject to video monitoring is important to reconfirm the lack of privacy. Hillside was only saved from violating the privacy of the plaintiffs by reason of the fact that the monitoring was for a "limited" time, they had a good business reason for the monitoring and the plaintiffs were not recorded.

*

Employer Liable for Employee's Automobile Accident While Driving Home from Work Related Conference

Normally an employer is not responsible for injuries caused by an employee who is off work. An accident caused by an employee commuting from home to work, or back home, is also, absent unusual circumstances, not the responsibility of the employer.

However, a recent decision of the California Court of Appeal in Los Angeles, emphasizes that an employer can be held responsible for the automobile accident injuries caused by an employee returning home from a company sponsored trip.

In *Jeevarat v. Warner Bros. Entertainment, Inc.* (2009)177 C.A.4th 427 the employee had attended a conference on behalf of Warner Bros at a location to which he took an airplane. After attending the conference Jeevarat flew back to L.A. and picked up his car at the airport. On his drive home, after he drove past his place of employment for Warner Bros., he was involved in an automobile accident.

The injured parties sued Jeevarat and Warner Bros., contending that the employee was on a "special errand" for Warner Bros. and therefore the employer had vicarious liability for the injuries.

Warner Bros. contended that the employee was on his normal commute home from his office and

therefore was not responsible for the results of the accident. The lower court agreed that the employer had no liability under the "going and coming" rule which provides that an employer is not liable for accidents occurring during an employee's commute to or from the workplace.

On appeal, the court held that the "special errand" doctrine applied to this situation because Warner Bros. paid for the employees airfare, hotel accommodation and airport parking. It was reasonable to assume that the employee would use the information gained at the conference for the benefit of his employer. Thus, the special errand doctrine was applicable.

The court also held that the mere fact that the employee's route home required him to drive past his place of employment, and thereafter he was on his normal commute route, was not a reason to conclude that the special errand had concluded. The court noted that the special errand rule applied until the errand is completed, in this case, returning home, or the employee substantially deviates from the special errand.

An important factor in this analysis is to determine when the special errand is completed. In order to avoid liability as incurred in this case an employer may want to consider requiring the employee to leave from and return to the normal place of employment. Thus, the trip from the office to home would not be part of the "special errand" and the employer should not be liable for any accident on the way to or from work.

Reaffirmation of the Invalidity of Non-Solicitation Clauses

The recent case of *The Retirement Group v. Galante* (2009) 176 C.A.4th 1226 reaffirmed the importance of the California Supreme Court's decision in the case of *Edwards v. Arthur Andersen LLP* (2008) 44 C.4th 937.

In *Edwards* the court stated that "An employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions" to Business and Profession Code section 16600.

Edwards and now *Galante* confirms that the only legal grounds for a non-competition clause is to prevent employees from using the trade secrets of a company. As the *Galante* court stated "it is not solicitation of the customers, but is instead the unfair competition or misuse of trade secret information, that may be enjoined."

The *Galante* case arose out of a common business situation. The Retirement Group (TRG) provided securities related services to its clients and engaged in substantial marketing efforts to develop its client base. No one was allowed access to the database of information about its clients unless they signed a confidentiality agreement. In addition, the database precluded electronic copying of any information in the database.



Several individuals (Advisors) who had been providing services to TRG decided to terminate that relationship and join a competitive business. The Advisors contacted many of their clients at TRG and advised them of their new business and provided forms for the clients to sign if they wanted to follow them to the new business. The Advisors obtained the names and contact information from databases owned by independent third parties.

TRG contended that the Advisors had misappropriated TRG confidential information which constituted its trade secrets. The trial court granted an injunction which enjoined two primary activities of the Advisors: (1) from using any information found on TRG databases, and (2) from soliciting any current TRG client to transfer their business to Advisors.

On appeal, the court noted the *Edwards* holding that “an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions” to section 16600. The primary exception to 16600 is the misappropriation of trade secrets. The *Edwards* court stated that it was not addressing the extent of the trade secret exception. This analysis fell to the *Galante* court.

The court noted that there were many cases which held that if a former employee solicited existing customers to redirect their business to his new employer, this could be enjoined “if the employee is utilizing trade secret information” to solicit those customers.

Thus, the *Galante* court found that “it is not the *solicitation* of the former employer’s customers, but is instead the *misuse of trade secret information*, that may be enjoined.” The court noted that “customer lists” may be a trade secret if the employer “has expended time and effort identifying customers with particular needs or characteristics. . .” and it has taken steps to keep that information confidential. In this case, TRG did keep their customer database confidential as noted above.

However, TRG was unable to show that Advisors had in fact used their confidential database of customers. The court noted that information about customers was available from independent third parties. In addition, the court noted that “it is not the solicitation of the customers, but is instead the unfair competition or misuse of trade secret information, that may be enjoined.”

Thus, the court found that the injunction enjoining the Advisors from “directly or indirectly soliciting any current TRG customers to transfer any securities account or relationship from TRG to defendants . . .” was invalid and unenforceable.

It is not enough to show a court that the ex-employee has solicited customers to follow him to a new employer, it must also be established that the employee used “trade secrets” in that solicitation. *Edwards* and *Galante* hold that an ex-employee can solicit customers from his prior employer by using independent means to identify those customers, such as trade

business directories which identify potential customers.

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Legality of Tip Pooling (continued)

The court found that patrons left tips in a collective box for all employees who provide service and that the tips were distributed according to the number of hours worked by the employees. Based on these facts, the court concluded that there was not a tip-pooling case, but a distribution of tips left for all employees performing services and was not in violation of Labor Code §351 because the tips were not distributed to management.

There are two additional cases pending review by the California Supreme Court which involve the legality of distribution of tips. *Lu v. Hawaiian Gardens Casino* and *Grodensky v. Artichoke Joe’s Casino*. The *Lu* case involves the legality of tip-pooling arrangements with casino dealers and the *Grodensky* case raises the issue of whether Labor Code §351 provides a private right of action, or whether it can only be enforced administratively.

Until the California Supreme Court rules on these cases, employers must be very careful with respect to any policy requiring individuals to share tips left by patrons with any other employee.

*

9th Circuit Limits the Right of Employers to Test Returning Employees to Determine Fitness to Perform Job

The Ninth Circuit Court of Appeal in the case of *Indergard v. Georgia-Pacific Corp.* (2009) 582 F.3rd 1049 interprets the Americans with Disabilities Act to prevent employers from requiring their employees to take a “fitness of ability” test, when they return from a leave of absence, if any part of the procedure can be found to be a “medical examination.”

In this case, Indergard took a medical leave of absence to have her knees surgically repaired from injuries caused by work and non-work activities. She was off work for approximately three months before she returned with permanent restrictions.

Upon her return, Georgia-Pacific (GP), first had an independent occupational therapist conduct a job analysis of Indergard’s past and potential future positions. As a result of that review, GP concluded that Indergard’s permanent restrictions were inconsistent with her ability to perform the work required. When Indergard contested that finding, and had her doctor remove the permanent restrictions, GP required her to have a “physical capacity evaluation” (PCE) by an independent occupational therapy provider.

Under the Americans with

Disabilities Act (ADA), employers are prohibited from requiring a “medical examination” of a current employee unless the examination is shown to be job-related and consistent with business necessity.” The regulations adopted by government provide that an employer “may make inquiries into the ability of an

“ . . . we note that although it might be a prudent medical procedure to take these physiological measurements [heart rate], including them in the report provided to GP was unnecessary for the purpose of determining whether Indergard was physically capable of performing her job duties.”

employee to perform job-related functions.”

The question presented to the court was whether the PCE was “a medical examination under the ADA” or simply “an inquiry into whether Indergard was capable of performing the job-related functions of the positions she was qualified to return to after her medical leave.”

Notwithstanding that GP used an “independent occupational therapy provider” for the PCE, the court found that the PCE constituted a “medical examination”

because the PCE included a measurement of “Indergard’s heart rate and recorded an observation about her breathing after the treadmill test.”

Giving substantial deference to the 7 factor test set forth in the *EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities*, the court found that using a physical therapy provider, and not an MD, did not prevent the test from being found to be a medical examination. The court noted that the test was administered 1) by a health care professional, 2) interpreted by a health care professional, 3) the test was capable of “revealing impairments of her physical and mental health, and 4) Indergard’s “heart rate and breathing pattern,” after the treadmill test, were recorded, along with “muscle pain and stiffness, after the first day of testing.”

Based on these findings, the majority of the court concluded that although “the purpose of the PCE may very well have been to determine whether Indergard was capable of returning to work” the “substance of the PCE” sought “information about physical or mental impairments or health” as prohibited by the *EEOC Enforcement Guidance*.

Circuit Judge O’Scannlain wrote a strong dissenting opinion, concluding that the evaluation made by the occupational therapy provider was not a medical exami-

Employer Right to Test (continued)

nation because it was “not designed to reveal a disability.” In addition, any “medical” aspects of the evaluation were “incidental to the physical agility aspects . . . of the examination.”

Absence *en banc* review by the Ninth Circuit, or review by the United States Supreme Court, the *Indergard* case is the law in the Ninth Circuit and employers have to be very careful concerning the tests and examinations given by an occupational therapy facility to which any returning employee is sent. As Judge O’Scannlain noted, “no blood was drawn, no urine samples collected, no labwork performed, and no x-rays or scans taken,” yet the majority still found the PCE to be a medical examination.

Thus, the tests administered by an occupational therapist must be carefully monitored in order to prevent the conclusion that it is an improper “medical examination” which violates the Americans with Disabilities Act.

Notwithstanding this strict interpretation of the phrase “medical examination,” employers should note that Section 1630.16 (c) of the ADA specifically exempts a drug test. “For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination.”

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Demise of “No-Match Rule” Extension of E-Verify Program

The Department of Homeland Security (DHS) has issued a final rule rescinding the Social Security “No-Match” rule.

As we reported in our last Labor/Employment News, the DHS previously issued a rule requiring employers to take certain specific steps upon being advised by the Social Security Administration that employee names do not match with their social security number.

Failure to comply with those requirements could result in substantial fines. Compliance would have required the employer to discharge workers who could not clear up discrepancies in their Social Security records.

The implementation of that rule was immediately challenged in federal court and a preliminary injunction was issued blocking its enforcement. As a result of that court decision and substantial opposition to the procedure, DHS decided to withdraw its “no-match” rule.

However, the DHS has stated that dropping the “no-match” rule does not mean that the agency is reducing its enforcement efforts. In fact, the DHS has stated that it will put more inspectors in the field to determine if employers are knowingly employing illegal workers.

E-Verify Program

On September 8, 2009 the E-Verify program became effective, requiring certain federal contractors and some of their subcontractors to use the E-Verify program to determine that their employees are eligible to work in the United States by verifying their employment information.

This program is web-based and allows employers who voluntarily use it to determine if their employees are authorized to work by comparing information from the I-9 Form against federal government databases to verify workers’ employment eligibility.

In addition, some federal contractors and their subcontractors are required to use the program.

As with the “no-match” rule the E-Verify program is being challenged in court on the grounds that the implementing legislation only provided that the program was voluntary, not required as DHS has ordered.

On August 26th a district court in the District of Maryland rejected arguments that the E-Verify program was unlawful, and granted summary judgment for the DHS Secretary. Recently, the 4th Circuit Court of Appeal denied an injunction pending an appeal.

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9th Circuit Strikes Down Shopping Mall Rules Restricting Picketing

The recent decision of the Ninth Circuit Court of Appeal in the case of *United Brotherhood of Carpenters v. NLRB*, 540 F.3d 957 (9th Cir. 2008), is of substantial importance to shopping center and mall owners who wish to limit the use of their premises by unions picketing their tenants. This case held that the rules restricting expressive activity by two California shopping malls to certain limited areas of the mall infringed on the unions' rights to picket and hand out leaflets under the National Labor Relations Act (NLRA).

The malls had promulgated a list of "Rules for Public Use of Common Areas," which prohibited among other things: 1) any activities that identify by name the mall owner, manager, or tenants; 2) handing out written materials that interfered with the "commercial purpose" of the mall; 3) the wearing or carrying of signs; 4) the use of all exterior areas of the mall, including mall sidewalks, from areas where expressive activities may occur; and 5) any expressive activities during "peak traffic days." In addition one rule required the pre-submission of written materials.

Union representatives distributed handbills and picketed at each mall to protest the use of nonunion contractors. The representatives were asked to leave, and when they refused to do so, several were arrested.

The unions filed unfair labor practices charges against the

malls' management company, alleging that the company had violated the NLRA by unlawfully restricting the unions' protected expressive activities.

The Ninth Circuit held that all of the above rules were unlawful because they interfered with protected union activity and impermissibly infringed on free speech rights.

The Ninth Circuit found that the rule which banned activities identifying the mall or its tenants was an impermissible attempt to control free speech and that the mall's attempt to protect the "good name" of the malls and their tenants was insufficient to justify the rule, especially in light of the unions' right to free expression.

Similarly, the rule which banned written materials interfering with the "commercial purpose" of the mall was also an attempt to control free speech and was entirely motivated by hostility towards speech critical of the mall or its tenants.

The Ninth Circuit noted that bans on solicitation may properly prohibit *conduct* that could disrupt business operations by causing congestion, impeding access or promoting fraud or duress. However, speech that attempts to peacefully advocate a boycott cannot be banned on the ground that it interferes with normal business operations.

The rule which required the pre-submission of written materials was also an infringement of

free speech and was used to ferret out materials based on their objectionable content.

The court found that the rule which banned the carrying or wearing of signs was overly broad. The rule was not narrowly tailored to meet these interests of the mall in protecting its patrons from injuries caused by signs and their sticks. Because the rule banned virtually all speech communicated through images and text this rule was also invalid. The court noted that the malls could address aesthetic concerns by restricting the size of signs and safety concerns by banning only signs with dangerous characteristics.

The complete ban on signs also failed to leave open ample alternatives for communication. Picketing and hand billing on public property outside of the mall premises would fail to reach the unions' intended audience: patrons of the malls and their tenants.

The rule that prohibited the use of exterior sidewalks from the designated areas where expressive conduct could occur was also found to be overbroad. Although the malls argued that the rule was necessary to preserve traffic flow and to ensure compliance with fire codes, the court found less restrictive alternatives would serve the same purpose and preserve the right of the union to communicate with mall patrons. By confining expressive activity to designated areas, which may be hundreds of yards from a store or its patrons, the rule effectively cut off access to the unions' intended audience.

The malls also prohibited expressive activities during “peak traffic days,” which they defined as throughout almost all of the holiday shopping periods. The malls attempted to justify the ban as a “common sense” measure to decrease crowding during peak times.

This ban was also found invalid because it was overbroad. Numerous less restrictive alternatives were available, including limiting the number of individuals engaged in expressive activities at any one time. The court found that limiting expressive activity to non-peak times foreclosed any chance of effectively reaching a large percentage of the target audience.

Effect of Ruling

California businesses that enact rules banning or limiting expressive activity on their private property must recognize that those rules may be unlawful under the NLRA when applied to union hand billing and picketing. Privately owned shopping centers and tenants must be especially careful before enacting any rule restricting expressive activity. *At a minimum*, these businesses should have specific evidence establishing that the rule is necessary to serve a compelling interest (e.g., a specific safety concern) and ensure that the rule is narrowly drawn to meet that interest. Without the requisite justification for the rule, privately owned shopping centers and their tenants will have limited ability to prevent unions from peacefully protesting on their premises.

Request for USSC

Review—This case may not be the last word with respect to

California Supreme Court Approves Forfeiture Provision of Employee Incentive Compensation Plan

In *Schachter v. Citigroup, Inc.* (11/2/09) __Cal.4th__ the court held that a voluntary employee incentive compensation plan (“Plan”), which required the employee to remain employed for 2 years in order to receive the restricted stock, was legal and was not unlawful because the employee left before the 2 year vesting and therefore forfeited the stock and thus, the wages used to purchase the stock.

Schachter was a stockbroker for his employer and voluntarily agreed to have 5 percent of his annual compensation used to purchase the employer’s restricted stock, at a reduced price. As part of the restriction Schachter agreed that if he voluntarily left his employment before 2 years that he would forfeit the restricted stock.

USSC Review (continued)

the rules restricting picketing and hand billing on shopping center properties. A petition for certiorari was filed by one of the malls (Macerich Management Company) on August 26, 2009 with the U. S. Supreme Court and we will have to wait to see if that court decides to review the case. If it does not, the decision in this case is the law applicable to shopping centers restricting picketing and hand billing in the jurisdiction of the Ninth Circuit (i.e. CA, OR, WA, AK, HI, ID, NV, AZ, MT).

The Plan not only provided that if the employee left within 2 years that he would forfeit all of the restricted stock, but also his original investment, i.e. the wages used to purchase the stock. However, the Plan also provided that in the event that the employee was terminated by the employer without good cause that the employee would be entitled to receive the amount of the wages which he used to purchase the restricted stock.

After less than 2 years, Schachter voluntarily quit to join another employer, but contended that notwithstanding the Plan, he was legally entitled to the “wages” which he had earned but which were not paid to him by his employer but were used to purchase restricted stock. He contended that the Plan was a subterfuge which allowed his employer to avoid paying him the full amount of his wages.

The Court started its analysis by emphasizing some basic principles stated by the lower courts. These included the recognition that “an employer may **unilaterally** alter the terms of an employment agreement, provided that such alterations does not run afoul of the Labor Code.” (emphasis added) The Court also approved of the statement of a lower court that an “employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions.”

Based on these principles, the Court found that since Schachter had agreed to a “restructured compensation package” there was no

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violation of any provision of the Labor Code. When Schachter signed the Plan he "renegotiated the terms of his compensation" package to agree that he would not receive the restricted stock unless he remained employed for 2 years. Again the Court quoted a lower court holding that an "employee who voluntarily leaves his employment before the

bonus calculation date is not entitled to receive it." The Court concluded that Schachter's "bargained-for wages" had been paid in full.

This case provides employers secure grounds to create an incentive program that requires the employee to stay employed for some minimum time in order to receive the benefits of that plan. However, the plan has to be carefully drafted to avoid forfeiture for involuntary terminations.

25th Annual Labor Law Conference Orange County Chapter of LERA

As in prior years, the Firm will participate in this annual review of important labor and employment law issues. Please join Tony Oliver and other members of our Labor and Employment Department in July at this conference in Anaheim, CA.

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