December 10 - 23, 2007

SAN FERNANDO VALLEY BUSINESS JOURNAL

LOS ANGELES • GLENDALE • SANTA CLARITA VALLEY • BURBANK • CONEJO VALLEY • SIMI VALLEY • SAN FERNANDO • CALABASAS • AGOURA HILLS • ANTELOPE VALLEY

High Court Wage Hour Case Rulings Hurtful to Employers

EMPLOYMENT LAW

RICHARD S. ROSENBERG

California employers are beset with a confusing array of very technical wage hour obligations which must be followed to the letter. The stakes for non-compliance got even higher in 2007 as the California Supreme Court weighed in on a host of wage hour matters. This article discusses how four of these key rulings affect your business.

Meal and Rest Period Penalties

California law requires employers to provide employees with daily meal breaks and rest periods as follows: an unpaid 30-minute uninterrupted meal period whenever the employee works five or more hours (with a second meal period for 10+ hour workdays) and a paid 10-minute rest period for each four hours of work. The meal and rest periods cannot be combined, even if the employee asks to do so.

The law also provides for a stiff penalty if these rules are not followed. The penalty is equal to one hour of pay for each occasion that the employee does not receive the requisite meal and rest periods (maximum two penalties per day).

In a stunning defeat for California employers, the California Supreme Court upped the ante considerably for employers in a case involving upscale clothing retailer Kenneth Cole.

In a unanimous ruling, the high court ruled that employees who sue for meal and rest period violations can go back three years when seeking state mandated penalties. Previous rulings barred claims that extended beyond a year. By literally tripling the exposure, employers face in these claims, the Supreme Court set the stage for what has been a literal onslaught of meal and rest period class actions against California's employers.

As a side note, the Court made no mention of its earlier ruling which allows employees to go back four years on these claims if it is alleged that the employer pay practice is also an "unfair business practice" under California law. However, most labor law experts feel that the Kenneth Cole ruling allows for the extra year, and virtually all of the cases filed since the ruling, include the fourth year claim.

Part of the reason these cases can be so economically devastating is that the law governing these claims authorizes the payment of the employees' legal fees (if successful) as well as your own. In light of this expanded exposure, employers are well advised to establish a game plan with their human resources team and labor counsel to ensure compliance.

Termination Pay

California law provides that an employer shall pay terminated employees all wages due and owing at the time of termination. Should an employee quit without notice, the employer has 72 hours to tender the employee's the final paycheck. If the employee gives at least 72 hours notice of quitting, the final paycheck is due on the last day as well. If the wages are not paid timely, the employee's wages continue to accrue as a so-called "waiting time penalty" until paid, for each day they are paid late, up to 30 additional days. This requirement is mandatory and cannot be waived by agreement with the employee.

Earlier this year, high-end fashion retailer L'Oreal Corporation found out the hard way just how unforgiving this rule can be. L'Oreal hired an employee for a one-day assignment to work in a store as a hair model. When the assignment was over, the model asked to be paid. She was told that she'd have to wait until the payroll was processed from the corporate office. She sued for the state's waiting time penalty. The case went all the way to the California Supreme Court, where a majority ruled that the employee was in fact "terminated" within the meaning of the waiting time penalty statute. The case emphasizes the need for the payroll department to be ready with the final paycheck whenever employees are terminated.

Class Action Waivers

Some employers have endeavored to limit exposure for class action cases by insisting that employees sign an agreement promising to arbitrate such claims in lieu of participating in a class action civil suit. Such agreements got a very chilly reception recently when the California Supreme Court weighed in on the issue in a case involving electronics retailer Circuit City.

Interestingly, prior to the Supreme Court's ruling, the validity of so-called "class action waivers" had been anything but clear. A number of lower courts had ruled that such agreements were indeed enforceable. The Supreme Court's ruling was by a slim 4-3 majority. The Court's majority weighed in on the side of the Circuit City employees because they felt that class action waivers could interfere with employees' rights to enforce their employer's compliance with wage and hour requirements.

In the end, the Supreme Court said that it will be up to trial courts who hear challenges to such agreements to decide whether or not to insist employees sign such an agreement and gave the courts a host of factors to consider when doing so.

Employers interested in using such an agreement should consult with expert labor counsel about these guidelines to be sure the agreement is right for them. Arbitration is not right for every employer. It has long been the law that there is no right to appeal in most cases and you are stuck with the arbitrator's ruling, even if the arbitrator made a mistake in applying the applicable law.

Wage hour cases often involve complex issues of unsettled law. You literally take your chances that the arbitrator gets it right. With perhaps six and seven figure exposure at stake, this may be an unwise choice. Also, arbitration of wage hour class claims is nearly as expensive as pursuing the case in court. Adding to that burden is the fact that state law requires employers to pay all of the arbitration costs.

Incentive Bonus Compensation

In a long-awaited decision involving Ralphs Grocery Company the Supreme Court clarified the rules on incentive bonus calculations.

For nearly a century, California law has prohibited employers from holding employees responsible for cash shortages and other routine business losses or expenses unless the employer could prove that the employee who caused the loss was guilty of dishonesty or gross negligence. This means that in all but the rarest of cases, employers cannot hold employees responsible for such things as lost cash, cash shortages, broken equipment and the like.

The Ralphs case involved an interesting twist on this long established rule. Ralphs created a profit-based bonus plan for its management team that rewarded eligible individuals with bonus compensation if certain store-wide "net profit" targets were achieved.

Net profit was calculated after making deductions for all expenses, including the kinds of losses that employees typically cannot be held responsible for repaying (e.g., pilferage, damaged goods, workers compensation costs). A group of employees challenged the formula in court because the formula took these matters into consideration when calculating the store's "net profit" under the bonus plan. In a decision which sent shock waves throughout the business community, a lower court ruled that the Ralphs bonus formula ran afoul of the longstanding California law and cleared the way for a class of employees to pursue a case for the extra bonus money.

A heavily divided Supreme Court (4-3 decision) reversed the lower court ruling and approved the Ralphs bonus plan. The Supreme Court treated shortages and workers' compensation costs the same as other employer expenses (e.g., utility costs), when calculating net profit.

However, the Supreme Court was careful to note that Ralphs' bonus plan it was reviewing applied to employees store-wide, and was based on the store's overall net profit. The Court was not disturbing its earlier rulings which prohibit such deductions from wages based on the employee's individual performance. In all likelihood, individual commission or bonus plans that consider prohibited matters like cash shortages, workers compensation costs or unidentified merchandise returns will still be illegal.

Expense Reimbursements

In a case involving the publisher of the popular Pennysaver magazines, California's Supreme Court clarified an employer's obligations to reimburse employees for expenses. Under California Labor Code, an employer must reimburse employees for all necessary expenditures incurred in the performance of their job duties. This includes such expenses as those associated with work-related travel when the employee uses a personal vehicle. The Court was asked to clarify whether an employer may satisfy the expense reimbursement obligation for employee auto expense reimbursement simply by paying the employee additional compensation (such as higher wages or commissions) rather than go through the hassle of doing an expense reimbursement.

The Supreme Court ruled that an employer may be able to satisfy its legal obligation to reimburse employees for such expenses by paying enhanced compensation in the form of increases in base salary or increases in commission rates, or both, provided there is a means or method to apportion the enhanced compensation to determine precisely what amount is being paid for labor and what amount is being paid for business expenses.

To do so, the employer must clearly identify what portion of the employee's compensation is intended to cover the employee's expenses. This should be done in the expense reimbursement policy or in a separate agreement where individuals will have their own reimbursement rates. Second, and perhaps most important, the amount designated as the expense reimbursement must actually cover all expenses necessarily incurred by the employee.

In the case of automobile expenses, reimbursement at the IRS mileage rate creates a refutable presumption that the employee has been fully reimbursed for all automobile expenses. This means that where the employee can establish that the actual expenses are greater, the employer must pay the difference. Likewise, an employer can pay a lump sum car allowance, or increased salary or commissions to reimburse the employee for automobile expenses, so long as it covers the employee's actual expenses.

For some employers, it may be simpler to stick with the old fashioned method of simply reimbursing employees for expense reimbursement requests rather than trying to come up with a one-size-fits-all amount. For those that feel it makes sense to do otherwise, the Supreme Court's decision is welcome news.

Richard S. Rosenberg is a founding partner of the Universal City based management side labor law firm Ballard Rosenberg Golper & Savitt, LLP and can be reached at rrosenbeerg@bgrslaw.com.