

FALL 2005



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## HUMAN RESOURCES ACTION REMINDERS

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### Spaces Still Left at Sexual Harassment Training Seminar on December 2

On December 2, Howard Rice will offer a seminar providing training to employers with supervisors who have not yet fulfilled the training required by AB 1825. By January 1, 2006, the California law requires a minimum of two hours of formal, interactive supervisor training on sexual harassment prevention at companies and organizations with 50 or more employees (which may include certain independent contractors). AB 1825 also requires covered employers to provide two hours of training to each new supervisory employee within six months of their starting date in that position. After January 1, 2006, covered employers are required to provide this training to all supervisory employees once every two years.

The seminar will run from 10 a.m. - 12 p.m. and the cost to attend is \$100/person (lunch will be served following the session). Reserve your space at the seminar by contacting Rory Smith at [rsmith@howardrice.com](mailto:rsmith@howardrice.com) or (415) 399-7830 by Friday, November 18.

### Notice of USERRA Rights

Beginning in 2005, employers were required by the Veterans Benefits Improvement Act to provide qualifying employees with notice of their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). This means that those employees granted employment protections under USERRA – such as reservists and national guard members – must be advised of their rights and the employer's duties under USERRA. The Department of Labor provides a poster on its website called "Your Rights Under USERRA" that satisfies the posting requirement if placed in the area where the employer posts other such notices, such as wage and hour posters. The employer may also provide this notice in other ways, as long as the required content is directed to the affected employees. Click [here](#) to access the poster.

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## CALIFORNIA LEGISLATIVE UPDATE

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The 2005 legislative session in California resulted in very little activity impacting employers' legal obligations to employees. Although 16 employment-related bills were in play going into the final month of the legislative process in September, Governor Schwarzenegger vetoed all but four. Employers should be aware of each of the four, however, they have limited potential for impacting employers.

### Direct Deposit Upon Termination (AB 1093)

Labor Code Section 213 formerly provided that employee direct deposit authorizations ended upon termination of employment, precluding direct deposit of final paychecks. AB 1093 amends this provision to permit such direct deposits, provided the employer complies with all other requirements for final paychecks,

such as the requirement that the paycheck be provided within 24 hours of involuntary terminations and within 72 hours of voluntary terminations.

### **Overtime for Computer Software Employees (AB 1093)**

The California Labor Code and the Fair Labor Standards Act both provide overtime exemptions for computer software workers meeting certain wage level and expertise requirements. Previously, there was a disconnect between state and federal law, however, in that California law required that the workers be paid hourly in order to take advantage of the exemption, while the FLSA required payment on a salary basis. AB 1093 amended the California requirement to permit pay on either an hourly basis or an equivalent annualized salary.

### **Extension of FEHA Filing Period for Minors (AB 1669)**

AB 1669 grants minors an extension of the one-year statute of limitations for filing FEHA charges. A person who has not attained majority and who is allegedly subject to an unlawful action under FEHA has up to one year from the date that person achieves his or her age of majority in which to file an administrative charge with the Department of Fair Employment and Housing.

### **Limited Exemption from Meal Period Rules for Motion Picture and Broadcasting Industry (AB 1734)**

Labor Code Section 512 imposes substantial obligations on employers with respect to providing meal periods to hourly employees. Like many wage and hour provisions of the California Labor Code, the meal period statute does not recognize a waiver in a collective bargaining agreement, meaning that a union cannot negotiate an exception. AB 1734 provides that employees in the motion picture and broadcast industry may qualify for such an exception, however, where they are subject to a collective bargaining agreement that both (a) requires meal periods and (b) provides for a remedy where a meal period is not provided.

### **Procedural Change for Employee Identification Numbers (SB 101)**

Labor Code Section 226 currently imposes certain requirements regarding the use of social security numbers ("SSN") on paychecks, for example that no more than the last four digits of the SSN may be included. SB 101 clarifies Section 226 by expanding the types of identification numbers that may be used in lieu of the SSN changing the location of the numbers so that they are to be included on the itemized pay statement instead of on the paycheck itself.

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## **LATEST WAGE AND HOUR NEWS**

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The California Supreme Court recently issued an important decision regarding individual liability for violations of California wage and hour law. See *Reynolds v. Bement*, 36 Cal. 4th 1075 (Sept. 7, 2005). In *Reynolds*, an individual sued under California Labor Code Section 1194, alleging that he had been misclassified as a supervisory employee and erroneously paid on a salary basis. Relying on the longstanding interpretation of the term "employer" by the California Department of Labor Standards Enforcement (DLSE), the employee claimed that he was owed a substantial amount of overtime and named numerous individual officers and directors as defendants.

The California Supreme Court rejected a broad definition of "employer," holding that the plain language of the applicable regulations indicated that a traditional theory of corporate liability should apply. Since individual corporate managers generally are not legally liable for corporate misfeasance, and since no contrary intention was expressed in the California wage and hour statute or regulations, the court held that it could not read such liability into the statutory and regulatory scheme. Therefore, the court declined to impose liability on individual corporate officers, directors or other corporate agents for wage and hour violations by the corporation.

The holding did not directly address whether key equity stakeholders might be held accountable under an "alter ego" theory. It appears, however, that individuals acting as corporate agents should be able to argue that the corporate shell protects them, even where they exercise a great deal of equity-based control over the corporation.

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### **U.S. Supreme Court Decides Disparate Impact Theory Available in Age Discrimination Cases – *Smith v. City of Jackson***

The U.S. Supreme Court resolved the long-open question of whether plaintiffs in age discrimination cases may rely on a “disparate impact” theory instead of pursuing only “disparate treatment” claims. Unlike a disparate treatment claim, which alleges intentionally discriminatory conduct based on the plaintiff’s protected status, a “disparate impact” claim turns on the end-result impact on the protected status group of a rule or policy that is facially neutral. According to a disparate impact theory, even where the employer’s intent is neutral or innocent, a policy or practice may unfairly exclude members of the protected class. For example, it is generally unlawful to exclude applicants for positions based strictly on past felony arrests, since studies have shown that some minorities are disproportionately affected by police arrests. The disparate impact theory has been recognized for most protected statuses, such as race, gender, and disability discrimination.

Over the past two decades, disparate impact theories in age discrimination cases became a focus of controversy, as employers implemented policies designed to cut costs, while incidentally impacting older workers. For example, layoffs directed at high-salary jobs can appear as facially neutral efforts affecting the highest-earning employees, with the legitimate business goal of reducing personnel costs. Yet such efforts often have a disproportionate impact on older workers occupying positions of seniority, since senior positions held by long-tenured employees tend to be highly compensated.

The Court’s decision in *Smith* took a compromise position designed to accommodate the similarities of the Age Discrimination in Employment Act to Title VII of the Civil Rights Act of 1964, which has long been interpreted to incorporate the disparate impact theory. First, the Court found that the relevant language of the ADEA regarding decisions affecting workers 40 and older “is identical” to the language in Title VII permitting disparate impact recoveries. The Court also noted, however, that the ADEA contains a critical section unlike any language in Title VII – language authorizing “differentiation based on reasonable factors other than age.” That language, combined with certain legislative history from the changes to Title VII made by Congress in the Civil Rights Act of 1991, led the Court to hold that an employer decision or policy that disparately impacts employees protected by the ADEA is still lawful if the decision or policy is based on reasonable factors other than age.

The Court then held that the employer in *Smith*, the City of Jackson, Mississippi, had implemented a pay plan that disproportionately impacted the plaintiffs, ADEA-protected employees who received a lower percentage raise from their employer than many younger workers. Based on market data, the City of Jackson gave greater percentage raises to many entry-level positions in order to make those salaries competitive with comparable positions in the job market. The data indicated that such higher raises were not needed for more senior positions. As a result, the higher percentage raises tended to favor younger workers. The Court ruled, however, that it was reasonable for the City of Jackson to rely on market data to achieve competitive results, even if there was an incidental impact on older workers as a result.

The Court in *Smith* reached a logical result that, while requiring careful thought by employers in implementing policies, still permits employers to take reasonable actions to achieve legitimate business ends. While *Smith* theoretically confirms another arrow in the quiver of plaintiff’s attorneys’ legal theories, *Smith* also provides an easy-to-use shield to employers: Prior taking action likely to impact older workers, employers should ensure that they have tangible data supporting the business utility of the action to be taken.

### **Atmosphere of Sexual Favoritism Can Constitute Hostile Work Environment Under California Law – *Miller v. Dept. of Corrections*, 36 Cal. 4th 446 (July 18, 2005)**

While courts have historically interpreted gender discrimination laws not to prohibit favoritism on the basis of “paramour” status, the California Supreme Court recently held that a work environment where sexual favoritism was commonplace could constitute a hostile work environment altering an employee’s terms and conditions of employment in violation of the California Fair Employment & Housing Act. In *Miller*, female employees complained of widespread sexual favoritism in the California Department of Corrections, pointing to a system in which corrections officials awarded promotions and other tangible job benefits to subordinates based on sexual relationships. As a result, even if the plaintiffs were never approached sexually, female employees still were faced with the prospect of limited opportunities for advancement if they did not participate in such relationships. The California Supreme Court held that where an employee shows sufficient evidence of a change in his or her opportunities because of sexual favoritism, sexual harassment may be proven if the conduct is severe and pervasive.

Modern employers frequently find it challenging or even impossible to police the work environment to prevent romantic relationships from intruding. Nevertheless, as *Miller* shows, it is imperative that employers forbid even the appearance that romantic entanglements or sexual relationships are driving tangible decisions regarding terms and conditions of employment.

**Repeated “Westernization” of Arabic Name Sufficient to Create Hostile Work Environment – *El-Hakem v. BJY, Inc.*, 415 F.3d 1068 (9th Cir. July 21, 2005)**

Rejecting the idea that ethnic harassment must be based on distinguishing physical characteristics, the Ninth Circuit recently upheld a jury verdict against an employer for a hostile work environment based on the company CEO’s repeated insistence on Westernizing an Arabic employee’s name. Claiming customers might find employee Mammoth El-Hakem’s name difficult to pronounce, the CEO began referring to El-Hakem by the nickname “Manny” in marketing meetings and e-mails. El-Hakem repeatedly objected to the nickname. Although no other direct evidence of race discrimination was provided, the court held that the frequent misuse of the employee’s proper name was (1) sufficient to create a hostile work environment and (2) indicative of a discriminatory intent by favoring a Western nickname over an Arabic given name.

*El-Hakem* demonstrates that employers must promptly and seriously review employee objections to words or conduct directly or indirectly related to ethnicity. Friendly, good-natured banter between employees of different ethnicities is common and probably unavoidable in the workplace. Employers must be vigilant, however, for the time when good-natured banter crosses into an ethnic affront, particularly when the recipient of the affront makes it clear that he or she objects.

**Monocular Vision Qualifies As Disability Under California Law, But Delivery Service Properly Denied Driver Positions to Such Applicants – *EEOC v. United Parcel Service, Inc.*, 424 F.3d 1060 (9th Cir. Sept. 15, 2005)**

The Ninth Circuit recently agreed with the EEOC that delivery driver applicants with monocular vision are disabled under the FEHA because the condition impairs depth perception and therefore limits the major life activity of seeing. The court disagreed with the EEOC, however, regarding whether UPS was liable to such applicants for discrimination. The court ruled that UPS had a legitimate need to prohibit such applicants from driving in order to protect other employees and the public, since monocular vision could compromise driving safety through reduced peripheral vision and potential loss of vision while driving. The court emphasized that UPS had proven that the company carefully examined the safety issue and made a reasonable, supported determination, as opposed to a knee-jerk decision based simply on a sight limitation.

**Five-Month Delay Between Cessation of Harassment and Employee Resignation Precludes Constructive Discharge Claim — *Hardage v. CBS Broadcasting, Inc.*, Dkt. No. 03-35906 (9th Cir. Nov. 1, 2005)**

Longstanding precedent states that an employee may state a claim for discriminatory “constructive” discharge where the employee resigns in the face of severe and intolerable working conditions as a result of sexual harassment. The Ninth Circuit recently ruled, however, that the timing of the employee’s resignation must support the concept that working conditions were actually beyond tolerating. In *Hardage*, the employee experienced a number of sexual advances from his supervisor, which ceased when the employer learned of the problem and corrected it. Following the cessation of the conduct, the employee received a legitimate reprimand — but was not fired — for insubordination and failure to meet sales goals. Five months after the cessation of the sexual harassment, the employee resigned, claiming the workplace was intolerable. The court held that the legitimate disciplinary action did not create intolerable working conditions and that the employee’s resignation was too far removed from the harassing conduct to qualify as a constructive discharge.

**California Courts Split on Which Side Must Prove Whether Employee Can Perform Essential Elements of Job in Disability Cases — *Green v. State of California*, 132 Cal. App. 4th 97 (Aug. 24, 2005)**

In a decision that may have little day-to-day impact in the workplace, but substantial impact in the courtroom, a California Court of Appeal has departed from a contrary holding of a sister court regarding burdens of proof in disability claims under FEHA. In *Green*, the court ruled that an employee need not prove that he could perform the essential elements of the job in order to make a prima facie case of disability discrimination.

According to the court, the employee's burden is simply to prove that (1) he is disabled, i.e., suffering from an impairment that limits him in a major life activity and (2) that the employer took an adverse job action against him. The burden then shifts to the employer to prove that the adverse action was justified because the employee was unable to perform the essential functions of the job. If the employer succeeds, the employee then has the burden of proving that the employer's defense is a pretext for discrimination. In so holding, *Green* disagrees with a prior Court of Appeal decision, *Brundage v. Hahn*, 57 Cal. App. 4th 228 (1997), which held that the employee had the initial burden to prove that he could perform the essential functions of the job.

The *Green* court lacks the authority to overrule *Brundage* and could only disagree with that ruling. Thus, the effect of *Green* is to create uncertainty where before there was none. In the everyday world, employers simply should remain cautious in taking action against or refusing to hire or promote disabled workers, ensuring that the employer carefully examines the job requirements against the employee's stated limitations. Employment defense attorneys have a significantly different task, however, in preparing for litigation over disability discrimination claims — employers must be prepared to take the offensive on the "essential job functions" test.

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## FMLA NOTES

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*Bellum v. PCE Constructors, Inc.*, 407 F. 3d 734 (5th Cir. April 25, 2005): FMLA's "small operations" exception excuses employers from providing FMLA leave at worksites with fewer than 50 employees if the total number of employees within 75 miles of the worksite is fewer than 50. In *Bellum*, the Fifth Circuit upheld a Department of Labor regulation providing that the 75 miles is to be measured on available surface roads, not "as the crow flies," since most employees use surface transportation to get to work.

*Tellis v. Alaska Airlines, Inc.*, 414 F. 3d 1045 (9th Cir. July 12, 2005): An employee's trip out of state to replace an inoperative automobile did not constitute "caring for" his pregnant wife in order to qualify for FMLA protection. While obtaining the replacement vehicle may have benefited the employee's wife, the employee did not participate in providing medical care to his wife. Therefore, his unexcused absence from work was unprotected and the termination of his employment did not violate FMLA.

*Jones v. Denver Public Schools*, Case No. 04-1447 (10th Cir. Nov. 2, 2005): To qualify for a "serious health condition" under FMLA, an employee may claim two or more treatments by a health care provider related to the "period of incapacity" for which the employee seeks a leave of absence. In *Jones*, the employee's second doctor visit occurred after his incapacity had ended, and his absences were not protected by FMLA. Note that a single visit to a healthcare provider may qualify for FMLA protection where the treatment "results in a regimen of continuing treatment" – not the case in *Jones*.

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## MANAGING THE WORKPLACE: COMMENTARY ON EMPLOYEE RELATIONS

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### Communications with Third Parties Regarding Former Employees

California employers are protected by a qualified privilege allowing them to communicate negative information about former employees to third parties for legitimate reasons, even if the information turns out to be incorrect, as long as the employer acts without malice. Many employers are reluctant to do so, however, for fear of costly defamation claims by former employees. A recent Court of Appeal decision, *Fontani v. Wells Fargo Investments LLC*, 129 Cal. App. 4th 719 (May 19, 2005), provides another defense to such employers in some circumstances, extending the protection of California's anti-SLAPP legislation to employer communications of employee wrongdoing to official proceedings.

In *Fontani*, Wells Fargo reported misconduct by a securities broker to the National Association of Securities Dealers (NASD). The broker sued for defamation, claiming the report contained false, negative statements about him. Wells Fargo sought to dismiss the claim under the anti-SLAPP law ("Strategic Lawsuit Against Public Participation"), legislation intended to prevent the use of litigation to suppress discourse on issues of public interest. The anti-SLAPP law precludes attacks on speech in connection with a public issue, including statements or writings made "before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law."

The Court of Appeal agreed with Wells Fargo that the official report on a form provided by the NASD was a communication to "an official body." Because the NASD operates under the auspices of federal securities law and exercises power delegated by the Securities Exchange Commission, the NASD is an official entity for purposes of the anti-SLAPP law, and Wells Fargo's communications with the NASD about the former broker were protected from attack. The court also found that because the report implicated the public interest in a

trustworthy securities industry, the anti-SLAPP law protected the report on that separate ground. The court therefore struck the broker's defamation claim against Wells Fargo as an attempt to suppress Wells Fargo's protected speech.

*Fontani* could have substantial importance in protecting employers in heavily regulated industries beyond securities brokerages. For example, various entities in the health care industry oversee segments of the workforce pursuant to regulatory standards – the Board of Registered Nursing (BRN) is the disciplinary body for Registered Nurses. Under *Fontani*, hospitals may proceed with some confidence in reporting nurse misconduct or misfeasance to the BRN, knowing that a subsequent defamation lawsuit by the nurse is likely to meet with dismissal under the anti-SLAPP law. Other employers with employees partially regulated by quasi-governmental bodies may have similar protection.

### **Managing Employee Exemptions and Use of Vacation Bank**

Partial Day Deductions from Vacation Bank Do Not Cause Exempt Employees to Become Non-Exempt – *Conley v. Pacific Gas & Elec. Co.*, 131 Cal. App. 4th 260 (July 21, 2005): Taking a position contrary to that of the California Department of Labor Standards Enforcement (DLSE), a California Court of Appeal has ruled that employers do not jeopardize their salaried employees' exempt status by making partial day deductions from an employee's vacation bank for a partial day absence. The DLSE has consistently taken the position that impacting salaried workers' pay in any unit smaller than one full workday would convert the employee into a non-exempt, hourly-paid worker entitled to overtime pay for hours worked beyond eight in a day or forty in a week. While employers should now have the leeway to make those deductions, it remains the law in California that docking a salaried worker's pay for a partial day absence, instead of making up the time with vacation or PTO pay, will cause the employee to lose exempt status.

### **Employee Relations in the Age of Medicinal Marijuana**

Despite State Protection of Medical Marijuana, Federal Prohibition Allowed Employer to Terminate Employee for Failing Drug Test — *Ross v. Ragingwire Telecom., Inc.*, 132 Cal. App. 4th 590 (Sept. 7, 2005): A California Court of Appeal recently ruled that an employer need not accommodate an employee's disability by not terminating him in response to his failing a drug test for marijuana. The plaintiff claimed that a muscle disorder needed treatment with marijuana under California's Compassionate Use Act (CUA), and that his termination violated the FEHA's prohibition on disability discrimination. The court held that even though the CUA permitted medicinal use of marijuana, federal law did not, specifically the federal Controlled Substances Act. The court found it unreasonable to require an employer to offer an accommodation that would permit employees to violate federal law. Further, the CUA imposed no obligation on the employer and created no public policy supporting a wrongful termination claim against the employer for firing employees using marijuana under the CUA.

*Ross* supports the commonsense notion that employers need not alter the way in which they deal with drug use by employees, as long as the employer's policies or decisions comply with existing legal prohibitions. For example, employees in recovery from substance abuse are generally protected as disabled under state and federal law. But California's narrow legalization of marijuana in some instances does not alter the employee's responsibilities to an employer that objects to ongoing usage during employment.

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**For further information, please contact:**

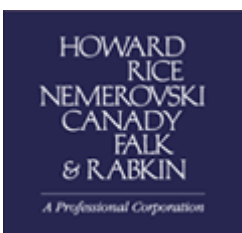
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