Employment Law Developments: Review of 2012 California Supreme Court Decisions and New Legislation

By Kenneth J. Rose

The California Supreme Court devoted a portion of its 2012 docket to the interpretation of the state's legislatively enacted wage and hour laws. Governor Jerry Brown and the California Legislature were busy in 2012 enacting new employment laws that will impact business beginning in 2013 and perhaps will become the subject of future rulings by the Supreme Court.

DURING THE PAST YEAR, THE CALIFORNIA Supreme Court decided three important wage and hour law cases. The court addressed the elusive administrative exemption to California's overtime pay requirements, our state's unique meal and rest period laws and entitlement to prevailing party attorney's fees in meal and rest period cases. Each of these decisions is summarized below, followed by a list of important employment law cases now on the court's docket.

Harris v. Superior Court (Liberty Mutual Ins. Co.), 53 Cal.4th 170 (December 29, 2011)

Section 1(A) of various California Industrial Welfare Commission (IWC) Wage Orders provides an exemption—from the daily and weekly overtime, minimum wage and meal/rest break requirements—applicable to employees who are properly classified as professionals, executives or administrative employees. The administrative exemption applies to employees who: (1) are paid at least twice the minimum wage; (2) perform administrative work, defined as office or non-manual work "directly related to management policies or general business operations of his/her employer or his/her employer's customers;" (3) have primary duties that involve that administrative work; and (4) discharge those primary duties by "customarily and regularly exercising discretion and independent judgment."

At issue in *Harris v. Superior Court* was the exempt status of a class of insurance claims adjusters, who the Court of Appeal found were not exempt as a matter of law under the administrative exemption. The Supreme Court held that the Court of Appeal misapplied the "administrative/production dichotomy." The court remanded the case to the Court of Appeal for reconsideration in light of its ruling.

In July 2012, on remand, the Court of Appeal again held that the company's insurance claims adjusters are not exempt administrative employees. The Court of Appeal determined that the adjusters' day-to-day tasks of investigating and estimating claims, making coverage determinations, setting reserves, negotiating settlements and making settlement recommendations are all part of the day-to-day operations of their employer's business, which did not satisfy the administrative exemption test because none of that work is carried out at the level of management policy or general business operations. Not surprisingly, the employer insurance company filed a Petition for Review (on September 4, 2012). As of the writing of this article, the court had not decided whether to grant review.

Brinker Restaurant Corp. v. Superior Court (Hohnbaum), 53 Cal.4th 1004 (April 12, 2012)

Under California law (IWC Wage Orders and Labor Code sections 226.7 and 512), all non-exempt employees are entitled to uncompensated meal periods of 30 minutes when working shifts of more than five hours (a second 30 minute meal period kicks in if employee's shift exceeds ten hours), and a ten minute paid rest period for each four hours worked (or major fraction thereof). The penalty for failure to provide a mandated meal and rest period is one hour's pay at the employee's regular hourly rate.

In *Brinker Restaurant Corp. v. Superior Court*, the Supreme Court provided long-overdue guidance on the proper interpretation of California's meal and rest period laws. The court's decision also addressed certification issues in wage-hour class action lawsuits, especially where meal and rest period violations are claimed.

Meal Periods

The court determined that to comply with California's meal period statute, absent the limited waivers permitted, employers must provide employees with a 30-minute uninterrupted meal period by relieving employees "of all duty for the designated time period." However, employers do not have to ensure that the employee does no work when allowed to take a meal period. Thus, an employer complies with its meal period obligations by relieving the employee of all duty, whether the employee continues to work or not.

If the employer knows or reasonably should know that the employee of his/her own volition continued to work through the meal period, the employer will have to compensate the employee for the time actually worked, but will not have to pay the one hour of wages penalty that is required when an employer violates the meal period requirement.

With respect to the required timing of meal periods, the court concluded that, "absent waiver, section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." As such, the employer is not barred from requiring employees to take their meal periods early in their shifts.

Rest Periods

The court also held that California law requires employers to "authorize and permit rest breaks." Determination of the appropriate rest period is based on the total hours worked in a day at a rate on ten minutes net rest for every four hours, or major fraction thereof, worked. Thus, to comply, employers must authorize and permit its employees to take one rest period every four hours or major fraction thereof, unless the daily work time is less than 3 ½ hours. Effectively then, employees are entitled to 10 minutes rest for shifts from 3 ½ to 6 hours in length, 20 minutes for shifts of more than 6 hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, etc.

Class Certification in Wage-Hour Class Actions

The court clarified what a trial court's approach must be in determining whether to certify meal period and rest break class action claims. The court explained that in many instances, whether class certification is appropriate or inappropriate may be determined irrespective of which party is correct on the merits. The court held that in such circumstances, it is not an abuse of discretion for the trial court to postpone resolution of the disputed issues.

The court ruled that a trial court can resolve threshold legal or factual issues that are necessary to a determination whether class certification is proper. But a trial court is not required to resolve the merits of the dispute in all instances, only when the issues affecting the merits of a case are intertwined with class action requirements. According to the court, the trial court's analysis should be to determine whether the elements necessary to establish liability are susceptible of common proof, and, if not, whether the proof of elements that may require individualized evidence can be effectively managed.

Kirby v. Immoos Fire Protection, Inc., 53 Cal.4th 1244 (April 30, 2012)
The availability (or not) of prevailing party attorney's fees are an important consideration in litigating wage and hour lawsuits. California attorneys are well aware that, as a general matter, a prevailing party may recover attorney fees only when a statute or a fee-shifting agreement so provides. California Labor Code section 218.5 provides that the court "shall" award attorney's fees and costs to the "prevailing party" in any "action brought for the nonpayment of wages." And Labor Code section 1194 allows successful plaintiffs to recover attorney's fees in actions for the "legal minimum wage or the legal overtime compensation."

In *Kirby v. Immoos Fire Protection, Inc*. the Supreme Court considered whether a prevailing defendant in an action for meal and rest period compensation under Labor Code section 226.7 can recover its attorney fees pursuant to Labor Code section 218.5. The court held that the answer is neither defendant nor prevailing plaintiffs are entitled to statutory attorney's fees in an action brought under Labor Code section 226.7.

The court decided that claims under section 226.7 are not "action[s] brought for the nonpayment of wages" within the meaning of section 218.5. Rather, section 226.7 is "primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods as mandated by the [Industrial Welfare Commission]." Thus, an action brought under section 226.7 is for the "nonprovision of meal and rest periods, not for the 'nonpayment of wages.'"

Pending Cases

As of the writing of this article, the following employment law cases and issues are pending decision by the California Supreme Court.

Iskanian v. CLS Transportation of Los Angeles, 206 Cal.App.4th 949 (2012)
Petition for review was granted on September 19, 2012 after the Court of Appeal affirmed an order granting a motion to compel arbitration and dismissing class claims. This case presents the following issues: Did AT&T *Mobility LLC v. Concepcion* (2011) 563 U.S. __ , 131 S. Ct. 1740, 179 L.Ed.2d 742], impliedly overrule *Gentry v. Superior Court* (2007) 42 Cal.4th 443 with respect to contractual class action waivers in the context of non-waivable labor law rights? Does the high court's decision permit arbitration agreements to override the statutory right to bring representative claims under the Labor Code Private Attorneys General Act of 2004 (Labor Code section 2698 et seq.)? Did defendant waive its right to compel arbitration?

Duran v. U.S. National Bank Association, 203 Cal. App 4th 212 (2012)
Petition for review granted on May 16, 2012 after the Court of Appeal reversed the trial court judgment. This case presents issues concerning the certification of class actions in wage and hour misclassification litigation and the use of representative testimony and statistical evidence at trial of such a class action.

Harris v. City of Santa Monica, 181 Cal. App. 4th 1094 (2010)
Petition for review granted on April 22, 2010 after the Court of Appeal reversed the trial court judgment. This case presents the following issue: Does the "mixed-motive" defense apply to employment discrimination claims under the California Fair Employment and Housing Act (Govt. Code section 12900 et seq.)?

Salas v. Sierra Chemical Co., 198 Cal.App.4th 29 (2011)
Petition for review granted on November 16, 2011 after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: Did the trial court err in dismissing plaintiff's claims under the Fair Employment and Housing Act (Govt. Code section 12900 et seq.) on grounds of after-acquired evidence and unclean hands, based on plaintiff's use of false documentation to obtain employment in the first instance? Did Senate Bill No. 1818 (2001-2002 Reg. Session) preclude application of those doctrines in this case?

Sonic-Calabasas v. Moreno, 51 Cal.4th 659 (2011)
This case initially came before California Supreme Court via a petition for review after the Court of Appeal reversed an order denying a motion to compel arbitration and presented the following issues: Can a mandatory employment arbitration agreement be enforced prior to the conclusion of an administrative proceeding conducted by the Labor Commissioner (a "Berman" hearing) concerning an employee's statutory wage claim? Was the Labor Commissioner's jurisdiction over employee's statutory wage claim divested by the Federal Arbitration Act?

On February 24, 2011, the California Supreme Court held that requiring employees to waive their right to an administrative hearing before the California Labor Commissioner was against public policy and, therefore, unconscionable. The defendant filed a Petition for Writ of Certiorari with the U.S. Supreme Court. The U.S. Supreme Court granted the petition.

On October 31, 2012, the U.S. Supreme Court vacated the California Supreme Court's decision and remanded to the California Supreme Court for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S.__, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011). In Concepcion, the U.S. Supreme Court ruled that the Federal Arbitration Act preempts California case law prohibiting arbitration agreements that exclude class actions.

Wisdom v. Accentcare, Inc., 202 Cal.App.4th 591 (2012)
Petition for review granted on March 28, 2012 after the Court of Appeal affirmed an order denying a motion to compel arbitration. This case includes the following issue: Is an arbitration clause in an employment application that provides "I agree to submit to binding arbitration all disputes and claims arising out of the submission of this application" unenforceable as substantively unconscionable for lack of mutuality or does the language create a mutual agreement to arbitrate all such disputes? (See *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462.)

New California Employment Laws

Below is a summary of noteworthy employment-related legislation signed into law by Governor Brown that take effect on January 1, 2013.

SB 1038: Eliminating California Fair Employment and Housing Commission and Transferring Duties to California Department of Fair Employment and Housing

SB 1038 was signed by the Governor on June 27, 2012 and takes effect on January 1, 2013. This bill eliminates the Fair Employment and Housing Commission (FEHC), transfers its duties to the Department of Fair Employment and Housing (DFEH) and makes certain other changes to the Fair Employment and Housing Act (FEHA). DFEH will now be able to go directly to court (rather than being limited to seeking administrative relief through the now defunct FEHC) and seek all remedies available there without a specified cap of actual damages, but must first engage in mandatory dispute resolution through DFEH's internal Dispute Resolution Division, free of charge. The bill also establishes a Fair Employment and Housing Enforcement and Litigation Fund in the State Treasury for purposes of depositing attorney's fees and costs awarded to the DFEH in certain civil actions, which will then be appropriated by the Legislature to offset the costs of the Department.

AB 1964: Workplace Religious Freedom Act of 2012
AB 1964 was signed by the Governor on September 8, 2012 and takes effect on January 1, 2013. This bill, which amends California Government Code sections 12926 and 12940, specifies that religious dress and grooming practices shall be considered a protected religious observance or belief under FEHA. The bill broadly defines "religious dress practice" to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts and any other item that is part of the observance by an individual of his or her religious creed, and "religious grooming practice" to include all forms of head, facial and body hair that are part of the observance by an individual of his or her religious creed.

The bill specifies that an accommodation of an individual's religious dress practice or religious grooming practice that would require that person to be segregated from the public or other employees is not a reasonable accommodation.

AB 1844: Limits Employer Access to Employee Social Media Accounts
AB 1844 was signed by the Governor on September 27, 2012 and takes effect on January 1, 2013. This bill prohibits an employer from requiring or requesting an employee or applicant for employment to (1) disclose a username or account password to access a personal social media account; (2) access personal social media in the employer's presence; or (3) divulge any personal social media. However, the bill permits employers to request that an employee divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, as long as the social media is used solely for that or a related investigation or proceeding.

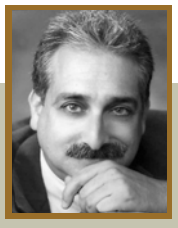
The exception for employee investigations applies if the employer reasonably believes that the personal social media is relevant to the investigation or to a related proceeding, and does not use the personal social media for any other purpose. Also, AB 1844 will not restrict an employer from requesting or requiring an employee disclose username, password or other method of accessing an employer-issued electronic device. AB 1844 expressly prohibits retaliation against an employee or applicant who declines to comply with a request that violates its terms. AB 1844 will be codified as new California Labor Code section 980.

AB 2386: Expansion of Definition of Sex Discrimination under California Fair Employment and Housing Act
AB 2386 was signed by the Governor on September 28, 2012 and takes effect on January 1, 2013. This bill, which amends California Government Code sections 12926, expands and/or clarifies the definition of protected status based on "sex" under the FEHA. Under the FEHA, it is unlawful to engage in specified discriminatory practices in employment on the basis of sex. Under existing law, "sex," for purposes of the FEHA, has included gender, pregnancy, childbirth and medical conditions related to pregnancy or childbirth. This bill provides that, for purposes of the FEHA, the term "sex" also includes breastfeeding or medical conditions related to breastfeeding. This bill also states that it is declaratory of existing law.

AB 1396: Written Commission Agreements
This bill was signed into law on October 7, 2011, but the effective date was postponed until January 1, 2013. The bill provides that an employer who enters into an employment contract with an employee for services to be rendered in California and that provides for commissions as a method of payment must put the employment contract in writing and set forth the method by which the commissions will be computed and paid. The bill states that the employer shall give a signed copy of the contract to the employee and shall obtain a signed receipt for the contract from the employee.

In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party. The bill excludes from its definition of commissions "short-term productivity bonuses such as are paid to retail clerks and it does not include bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed." This bill amended Labor Code section 2751 and repealed former Labor Code section 2752.

As with any new pronouncements by the California Supreme Court and newly passed legislation concerning the state's employment law landscape, businesses should be advised to take the appropriate steps to bring their employment policies and practices into compliance.



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Test No. 51

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. The California Wage Orders exempt employees who are properly classified as professionals, executives or administrative employees from the daily and weekly overtime, minimum wage and meal/rest break requirements.
❑ True ❑ False

2. The Court of Appeal in *Harris v. Superior Court*, 53 Cal.4th 170 (2011) ruled that the employer's insurance claims adjusters were exempt employees under California law and, therefore, not entitled to receive overtime pay.
❑ True ❑ False

3. Regardless of an employee's job duties, the California Wage Orders' administrative exemption for employee entitlement to overtime compensation does not apply to employees who are paid three times the California minimum wage.
❑ True ❑ False

4. All employees classified as non-exempt under the California Wage Orders are entitled to uncompensated meal periods of 30 minutes when working shifts of at least four hours.
❑ True ❑ False

5. To comply with California's meal period requirements, employers must relieve their employees of all duty during the scheduled 30 minute meal period and, furthermore, take affirmative steps to prevent those employees who voluntarily elect to work through the meal period from performing any work during their allotted meal period.
❑ True ❑ False

6. An employee, classified as non-exempt under the California Wage Orders, working a six hour shift is entitled to only one 10 minute rest period.
❑ True ❑ False

7. The penalty for failure to provide a mandated meal or rest period is payment of a $100 fine to the California Labor Commissioner.
❑ True ❑ False

8. Employees who work a shift in excess of 10 hours are entitled to two 30 minute meal periods.
❑ True ❑ False

9. An employer can require an employee who is entitled to a 30 minute meal period to take his/her meal period beginning just one hour after the employee's shift begins.
❑ True ❑ False

10. The California Supreme Court in *Brinker Restaurant Corp. V. Superior Court*, 53 Cal.4th 1004 (2012) ruled that trial courts have discretion to rule on motions for certification of a class action before ruling on the merits of the case except where the issues affecting the merits are intertwined with the class action requirements.
❑ True ❑ False

11. In an action brought by an employee alleging that the employer denied him meal periods as required by California law, the prevailing party has a statutory right to recover attorney fees.
❑ True ❑ False

12. One of the issues for which the California Supreme Court granted review in *Iskanian v. CLS Transportation of Los Angeles*, 206 Cal.App.4th 949 (2012) is whether a pre-dispute employment arbitration agreement trumps the employee's statutory right to bring representative wage law claims under the Private Attorneys General Act of 2004, Labor Code section 2698.
❑ True ❑ False

13. The U.S. Supreme Court affirmed the California Supreme Court's ruling in *Sonic–Calabasas v. Moreno*, 51 Cal.4th 659 (2011), which held that a pre-dispute employment arbitration agreement requiring employees to waive their statutory right to an administrative hearing before the California Labor Commissioner was against public policy and, therefore, unenforceable.
❑ True ❑ False

14. The Court of Appeal's decision in *Wisdom v. Accentcare*, Inc., 202 Cal.App.4th 591 (2012), now under California Supreme Court review, affirmed an order denying enforcement of a pre-dispute arbitration clause contained in the employment application signed by the employee.
❑ True ❑ False

15. SB 1038 transferred the responsibilities of the California Fair Employment and Housing Commission to the California Labor Commissioner.
❑ True ❑ False

16. Although California law prohibits employers from discriminating against employees based on their religious preferences, AB 1964 allows for employers to have uniformly enforced dress code policies that make no exception for employees whose religious beliefs mandate that they wear certain clothing.
❑ True ❑ False

17. An employer who refuses to hire new mothers who breastfeed their babies violates the California Fair Employment & Housing Act.
❑ True ❑ False

18. AB 1844 prohibits an employer from requiring a job applicant disclose his/her Facebook username and account password.
❑ True ❑ False

19. AB 1844 prohibits an employer from requiring an employee to provide it access to the employee's Facebook page even if the employer reasonably believes that the employee's Facebook page may have information relevant to an investigation of allegations of employee misconduct.
❑ True ❑ False

20. AB 1396 requires that, if an employee's compensation includes commissions, the method by which the commissions will be computed and paid must be set forth in a written employment contract.
❑ True ❑ False

MCLE Answer Sheet No. 51

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $15 testing fee for SFVBA members (or $25 for non-SFVBA members) to:

San Fernando Valley Bar Association
5567 Reseda Boulevard, Suite 200
Tarzana, CA 91356

METHOD OF PAYMENT:
❑ Check or money order payable to "SFVBA"
❑ Please charge my credit card for $_____.

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Credit Card Number Exp. Date

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Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

Name_____
Law Firm/Organization_____
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Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

ANSWERS:
Mark your answers by checking the appropriate box.
Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False