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## Brinker Restaurant v. Superior Court (Hohnbaum)

### STOP ENFORCING MEAL AND REST PERIODS? THIS MAY BE ON THE HORIZON.

*By Stacey M. Cooper*

Employers throughout California are applauding the recent decision in Brinker Restaurant v. Superior Court (Hohnbaum) wherein the California Court of Appeals recently held that although employers are required to provide meal and rest periods, they are not necessarily required to force their employees to take those breaks. While the Brinker decision is certainly a positive development for employers faced with meal and rest period class actions, the decision does not, from a practical standpoint, eliminate an employer's risk of liability from relaxed meal and rest period enforcement policies. Effective enforcement policies remain a critical aspect of risk management for employers statewide.

The Brinker decision arises from a class action in which former and current employees sued Brinker restaurants at 137 locations for failure to require its employees to take meal and rest periods as required by California law. The Brinker Court made three important clarifying rulings: (1) an employer is required to provide meal and rest periods, but is not required to force its employees to take them; (2) an employer is not required to provide a meal period for every five consecutive hours worked, but must provide a reasonable 30 minute meal break when it is anticipated that an employee will work more than five hours in any given day; and (3) the employer may not need to provide 10 minute rest periods in the *middle* of each four hours worked, but rather, merely within each four hour period. Acknowledging the practical impact of rigid meal and rest period schedules, the court noted that requiring a restaurant to provide rest periods in the middle of a four hour shift, and thus, possibly in the middle of a mealtime rush would create an unworkable situation not anticipated by the Labor Code. Based on these rulings, the Brinker court reversed class certification. In reversing class certification, the Court noted it would be required to review each of the employees' claims to determine whether or not the employees had voluntarily chosen not to take advantage of the employer's meal and rest period policy, thus resulting in hundreds of mini trials. Such individualized questions of fact destroyed the commonality of claims thus rendering class treatment of the claims impractical. The Department of Labor Standards Enforcement has acknowledged the *Brinker* decision and has instructed its enforcement agents to immediately comply with the principles set forth in the decision. A full copy of the DLSE's memo regarding changes to its enforcement practices may be found at: http://www.dir.ca.gov/DLSE/Brinker_memo_to_staff-7-25-08.pdf

At first blush, the Brinker decision appears to provide employers substantial justification to relax their meal and rest period enforcement policies. However, employers should continue to protect themselves through the vigilant enforcement of meal and rest period policies. An employer will still likely bear the burden to prove that meal and rest periods were provided for their employees. Also, employers will need to be positioned to prove that employees were not discouraged from taking their meal and rest periods. A claim by an employee of a "policy and practice" through which the employer affirmatively discouraged meal and rest periods would likely be sufficient to avoid the specific result in *Brinker* and potentially justify class certification on the issue of wage and hour violations. Active enforcement policies, adequate supervisory training on the enforcement of meal and rest periods, and proper documentation will go far in preventing (or successfully defending) costly meal and rest period litigation.

While the *Brinker* case is certainly a positive step forward in curbing the tide of meal and rest period class actions, it in no way forecloses such litigation altogether. Thus, even if plaintiffs face greater challenges in surviving class certification, the very real risk of litigation for wage and hour claims persists. From a practical perspective, the cost of litigation and exposure for attorneys' fees remain the largest risks in defending wage and hour class litigation. Employers should continue to maintain proper enforcement policies to aid in protecting themselves against the risk of potentially unnecessary litigation fees and costs.

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### LIABILITY OF SUPERVISORS FOR DISCRIMINATION AND RETALIATION

*By Joel Glaser*

In 1998, the California Supreme Court in *Reno v. Baird* (1998) 18 Cal.4th 640, decided that non-employer individuals could not be personally liable for claims of discrimination under California's Fair Employment and Housing Act (FEHA).

This year, the California Supreme Court extended that ruling to FEHA retaliation claims in the case of *Jones v. The Lodge at Torrey Pines* (2008) 42 Cal.4th 1158. The *Jones* Court held that even when an employer is liable for retaliation under the FEHA, non-employer individuals are not personally liable for their role in that retaliation.
In both *Reno* and *Jones*, the Court determined that sound reasons existed for not imposing individual liability, including that: (1) supervisors can avoid harassment, but they cannot avoid personnel decisions; (2) it is incongruous to exempt small employers from discrimination and retaliation claims, but not non-employer individuals;
(3) public policy favors avoiding conflicts of interest and the chilling of effective management; (4) employers often make decisions collectively; and (5) policy does not support subjecting supervisors to liability or to the threat of litigation every time they make a personnel decision.

Notwithstanding these rulings, two Justices wrote strong dissenting opinions in *Jones* arguing that the plain language

of the FEHA's retaliation provision (California Government Code section 12940(h)) imposes liability on any employer, labor organization, employment agency or "person" who retaliates. Thus, the dissents contend the statute unambiguously imposes liability on any individual who retaliates. As a result of the strong dissenting opinions in *Jones*, the United States District Court for the Southern District of California recently limited the application of *Jones* in *Boone v. Carlsbad Community Church* (2008) 2008 U.S. Dist. LEXIS 44675. In *Boone*, the court cited the *Jones* dissenting opinions and declined to extend the limitation against individual liability for FEHA retaliation to retaliation claims under the California Labor Code. Rather, the court ruled that *Jones* does not exclude individual liability under California Labor Code section 6310.[1]

However, courts are generally following the *Jones* decision. In *Gordon v. Prudential Financial, Inc.* (2008) 2008 U.S. Dist. LEXIS 56941, the United States District Court for the Southern District of California followed *Jones* and granted the individual defendants' motion for summary judgment on plaintiff's FEHA discrimination and retaliation claims. In *Miklosy v. The Regents of the University of California* (2008) 2008 Cal. LEXIS 9370, the California Supreme Court followed the *Jones* decision and held that a non-employer individual cannot be liable for the tort of wrongful discharge in violation of public policy.[1]

Accordingly, the law appears to be clear. Non-employer individuals cannot be held liable for discrimination or retaliation under the FEHA, and cannot be held liable for the common law tort of wrongful termination in violation of public policy. Although *Boone* declined to expand *Jones* to certain whistleblower claims under the California Labor Code, even that court reserved its right to re-examine the issue as the California courts continue to interpret California laws in light of *Jones*. We fully expect other California courts to do just that, and will keep you informed.

This article provides a brief summary of California law regarding the liability of supervisors for retaliation in light of *Jones*. Please call one of our employment lawyers for a more detailed discussion of the FEHA, *Jones*, and their potential impact on your business

[1] California Labor Code section 6310 precludes employment retaliation against an individual who has complained regarding health or safety issues to a governmental agency.

[1] Notably, in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176, the California Supreme Court held that "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages [against the employer]." Thus, since 1980 a cause of action for wrongful termination in violation of public policy has required an employment relationship between the parties.

## Covenants Not to Compete in California Remain Void, But Trade Secrets May Be Protected

*By Jim McMullen*

In the recent case of *Edwards v. Arthur Andersen* (2008 Cal. LEXIS 9618), the California Supreme Court strongly reaffirmed the principle that covenants not to compete are void in California. In the case, the employee (Edwards) had signed a noncompetition agreement that mandated a forfeiture of his pension rights if he violated the agreement that prohibited him for 18 months from performing any professional services for clients for whom he had provided services while working at Arthur Andersen, and prohibited him for 12 months from "soliciting" clients of Arthur Andersen's Los Angeles office.. The Supreme Court struck the agreement as void because it restrained Edwards' ability to practice his profession.

The Court specifically rejected the employer's arguments that Business & Professions Code section 16600 and related statutes implemented a rule of reasonableness to evaluate competitive restraints. Arthur Andersen argued that the statutes only prohibited broad restraints that effectively prevented a person from engaging in his chosen business, trade, or profession. Arthur Anderson argued that, to be void, an agreement must "restrain" and/or "prohibit" an employee's ability to practice his or her vocation. Accordingly, the employer argued, limitations or restrictions on competition are permitted so long they are "reasonable." The Court soundly rejected this argument.

The Court noted that since 1872, California has enforced a public policy in favor of open competition and rejected a common law rule that would permit enforcement of even limited and reasonable restrictions on competition. The well-settled "legislative policy in favor of open competition and employee mobility" is currently codified in Business & Professions Code section 16600, which states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in lawful profession, trade, or business of any kind is to that extent void."

The Court did recognize, however, that the specific exceptions to section 16600 (contained in sections 16601, 16602, and 16602.5) allowing restraint after the sale of the goodwill of a business, partnership, or LLC were subject to a "rule of reasonableness." The Court also suggested that covenants in employment agreements and similar documents necessary to protect the employer's trade secrets are also a valid exception to the general prohibitions of section 16600. This statement is particularly significant in view of the Court's invalidation of the non-solicitation provision in the Arthur Andersen agreement, because non-solicitation provisions of various sorts were previously thought distinguishable from covenants not to compete. Nevertheless, the question of whether a covenant "necessary to protect the employer's trade secrets" will be enforceable is an important question and employers seeking to

protect their business from competition may see this as an exception large enough to drive a truck through.

Generally, trade secret protection is only available for information which has not yet been ascertained by others in the industry.[1] Obviously, based on California courts' policy analyses, an employer and employee cannot simply agree that company information is a trade secret if it does not meet the statutory definition. However, the parties' agreements may constitute important evidence establishing the employer's practices with respect to secrecy and the value the employer places on particular information.
California employers should develop and enforce strong policies to protect their confidential and trade secret information, maintain confidentiality, and monitor the actual use of trade secrets especially in relation to employee terminations. Actual evidence of disclosure or intent to disclose trade secrets will be necessary to a claim of misappropriation of trade secrets as California courts have refused to adopt the Inevitable Disclosure Doctrine utilized in some states to find that disclosure would occur despite precautions or good faith.

In summary, limitations on a former employee's competition with the employer are generally void outside of sales transactions unless they are determined to be fairly and legally necessary to prevent trade secrets [THIS JUST SEEMS TO END; WHAT IS MISSING "to prevent dissemination of an employer's trade secrets."??]

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[1] The Uniform Trade Secrets Act (Civil Code §§ 3426, *et seq.*) defines "trade secret" as:

> Information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> > 1. derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and,
> >
> > 2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Civil Code § 3426.1.)

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## PROPOSED ADDITION TO DISCRIMINATION LAW – PROTECTING MEDICAL MARIJUANA USERS

*By Joel Glaser*

On February 21, 2008, the California State Assembly introduced Assembly Bill 2279 (AB 2279) to amend the Compassionate Use Act of 1996 (California Health & Safety Code Section 11362.5) and declare it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or to otherwise penalize the person, if the discrimination is based on a person's status as a qualified patient or their positive drug test for marijuana, except for persons employed in safety-sensitive positions.[1] AB 2279 also contains an exception permitting the termination of or corrective action against impaired employees.

On May 28, 2008, AB 2279 passed through the State Assembly and moved on to the State Senate. On June 24 and July 2, 2008, the State Senate amended the bill to exclude protections for primary caregivers of medical marijuana users. Now following its third reading, it still awaits a vote.

The current version of the Compassionate Use Act, provides immunity from conviction for a patient or a patient's primary caregiver who possesses or cultivates marijuana for personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. AB 2279 was intended to expand these protections to preclude discrimination in employment.

AB 2279 is a direct response to the January 24, 2008, California Supreme Court decision *Gary Ross v. Ragingwire Telecommunications, Inc.* (2008), 42 Cal.4th 920. In *Ragingwire*, the Court held that California's anti-discrimination law, the Fair Employment and Housing Act (FEHA), does not prohibit the termination of an employee on the basis of their status as a medical cannabis patient. In so ruling, the Supreme Court stated that neither the text nor history of the voter-approved Compassionate Use Act indicates any intent to adopt any policy concerning marijuana in the employment context, let alone any requirement that California employers accommodate marijuana use by their employees.
The primary argument supporting AB 2279 is that the California Supreme Court ignored the will of the voters and Legislature by invalidating the rights of over 250,000 patients and allowing discrimination in employment. This view argues that it makes little sense to allow marijuana use to control pain and provide immunity from criminal liability, but then deprive the patient the opportunity to work and be self-supporting merely because employment is not specifically mentioned in the text or legislative history of Compassionate Use Act.

The main arguments opposing AB 2279 are voiced by the National Federation of Independent Business (NFIB). The NFIB contends that this bill puts the employer inan untenable position with regard to state-mandated safety laws because, though the bill allows employers to take corrective action against impaired employees, it ignores the possibility that accidents and fatalities may occur prior to any realization that an employee's use of medicinal marijuana has caused impairment. For employers, this could result in costly workplace citations and higher workers' compensation insurance premiums. The Association of California Health Care Districts (ACHD) also opposes the bill on the ground the term "safety-sensitive position" lacks sufficient definition and could be construed to exclude many hospital positions.
Notwithstanding the arguments opposing AB 2279, this bill has passed the State Assembly and will likely pass the State Senate. Furthermore, from the California Supreme Court's extensive discussion of legislative history in the *Ragingwire* case, the

Court appears to have left the door open for the Legislature to amend the Compassionate Use Act to prohibit employment discrimination.

The impact of this legislation on employers may be severe. To avoid liability, employers will need to increase the supervision of medical marijuana users to prevent endangering the health and safety of others, especially for positions that do not fall squarely or neatly within the definition of a safety-sensitive position. Employers will also likely face exposure to claims for employment decisions or corrective action taken against an employee who is a medical marijuana user, as is presently the case for other employees who are protected by the FEHA (e.g., race, religion, sex, age, etc.). Employment practices liability insurance premiums and workers' compensation insurance premiums may also increase, and employers may face increased risk of expensive OSHA citations if an injury is caused by an impaired medical marijuana user.

This bulletin provides a brief summary of the proposed changes to the Compassionate Use Act of 1996. A full copy of the proposed bill may be found at http://www.leginfo.ca.gov/bilinfo.html. Please call one of our employment lawyers for a more detailed discussion of the proposed changes to the Compassionate Use Act and their potential impact on your business.

[1] "Safety-sensitive positions" is defined as a position with the following characteristics: (1) duties involve a greater than normal level of trust, responsibility for, or impact on the health and safety of others; (2) errors in judgment, inattentiveness, or diminished coordination, dexterity, or composure while performing its duties could clearly result in mistakes that would endanger the health and safety of others; and (3) an employee in a position of this nature works independently, or performs tasks of a nature that it cannot be safely assumed that mistakes could be prevented by a supervisor or other employee. Safety-sensitive position also includes a work that involves the performance of a safety-sensitive function as defined in the federal regulations (49 C.F.R. § 655.4) and a position in law enforcement as defined in California Government Code section 13951(d).

## A WIN FOR THE REGENTS: UC EMPLOYEES' WHISTLEBLOWER CLAIMS BARRED

*By Guillermo A. Escobedo*

The California Supreme Court recently ruled that the Whistleblower Protection Act precludes a plaintiff's lawsuit for damages against the Regents of the University of California (the "Regents" or "UC") if the Regents timely decided the plaintiff's retaliation complaint through the Regent's own administrative procedures.

In *Miklosy v. Regents of University of California*, two computer scientists (plaintiffs Leo Miklosy and Luciana Messina) were employed by the Regents and worked at the Livermore National Laboratory's National Ignition Facility. They alleged they were retaliated against for reporting problems on a project designed to determine the safety and reliability of the nation's nuclear weapons stockpile. After raising their safety concerns, Miklosy was fired for unsatisfactory work performance. Approximately one week later, Messina resigned following concerns that she would be fired.

In August 2003, plaintiffs filed complaints of retaliation with the Regents under the California Whistleblower Protection Act. Pursuant to the Regent's internal procedures, the complaints were investigated and findings were submitted within 90 days. The investigation revealed that the laboratory management had not reacted adversely to plaintiffs' reports of safety problems and that it had not retaliated against plaintiffs.

In February 2004, plaintiffs filed a damages action against the Regents and three supervisory employees alleging unlawful retaliation in violation of the Whistleblower Protection Act, wrongful termination in violation of public policy, wrongful constructive termination, and intentional infliction of emotional distress. The trial court dismissed the suit, which was affirmed by the Court of Appeal in 2005. That court held that the Whistleblower Protection Act bars damage claims against the Regents if the Regents made a timely decision on an individual's claim of retaliation – regardless of whether the decision is unfavorable. In this instance, plaintiffs did not dispute that the Regents complied with its internal policies of completing its investigation and submitting its findings within the prescribed deadlines.

The California Supreme Court agreed with the appellate court's ruling. The Court acknowledged that the Whistleblower Protection Act generally imposes liability on any person who retaliates against a state employee for disclosing unsafe conditions. The Whistleblower Protection Act provides three separate sets of rules for employees complaining of whistleblower retaliation: one for Regents employees; one for California State University ("CSU") employees; and one for all other state employees. As to CSU employees and other state employees, they can sue for damages after first seeking relief through their respective administrative entities (CSU employees can do so only if there was not a satisfactory resolution within 18 months). The Whistleblower Protection Act, however, provides an important limitation with respect to the Regents – an action for damages is not available unless the plaintiff first filed a complaint with the Regents and the Regents failed to reach a decision on the complaint within particular time limits.

In recognizing the Whistleblower Protection Act's specific language as to the Regents, the Supreme Court stated that "as long as the university completes in a timely fashion its own internal dispute-resolution process, the alternative remedy of a damages action in state court is unavailable." As such, a plaintiff can only pursue an action for damages under the Whistleblower Protection Act if the Regents fail to conduct and complete its investigation in a timely manner. The Court explained that its ruling not only comports with the literal language of the Whistleblower Protection Act, but it also supports the semi-autonomous nature of the Regents. It stressed that the Regents function similarly to a "sovereign

entity" with a unique constitutional status that gives it "a degree of control over the terms and scope of its own liability."

In a concurring opinion, Justice Werdegar urged state legislators to revisit the Whistleblower Protection Act to determine whether the Regents should have been included in the statutory amendments that allowed employees of other state agencies and the California State University system to seek retaliation damages through a civil action. Justice Kennard, who wrote the Court's majority opinion, also suggested that a damage action in state court could give UC employees a "more favorable forum" because of various procedural protections, including evidentiary rules, testimony under penalty of perjury, and cross-examination of witnesses. "But the appropriateness of granting these procedural protections to a university whistle-blower is a matter of policy that is not for this court to decide."

Though the ruling was clearly a win for the Regents, change may be on the horizon. In response to the Court's ruling, state senator Leland Yee (D-San Francisco/San Mateo) introduced legislation earlier this month to provide UC employees with the same whistleblower protections and legal standing as all other state employees.

The proposed legislation, SB 1199, will be considered by the State Assembly and State Senate within the next few weeks. A full copy of the proposed bill may be found at http://www.leginfo.ca.gov/bilinfo.html. Please call one of our employment lawyers for a more detailed discussion of the Whistleblower Protection Act, SB 1199, and their impact on your business.

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## ARMENDARIZ WAS ONLY THE BEGINNING: CALIFORNIA COURTS EXHIBIT CLEAR TREND OF INVALIDATING PRE-EMPLOYMENT ARBITRATION AGREEMENTS

*By E. Sean Arther*

For many California employers, the use of mandatory arbitration agreements to resolve employment-related disputes has been a standard practice for years, and by its very nature the practice invited little judicial scrutiny. However, as employers began tailoring their agreements to not only choose the forum in which the disputes were heard, but also to limit the scope of their potential liability, the courts began to establish procedural and substantive safeguards to protect the legal rights of employees while respecting the limitations of California and federal laws favoring the enforcement of such agreements.

The California Supreme Court addressed these competing interests in 2000 with the seminal case of *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. The case affirmed the vitality and importance of private arbitration agreements, but also established clear minimum requirements that the agreements must meet to be enforceable, including:

- No limitation of the statutory remedies authorized by the California Fair Employment and Housing Act ("FEHA") or Title VII, such as punitive damages or attorneys' fees;
- Availability of adequate discovery, including access to documents and witnesses essential to the employee's claims;
- A neutral arbitrator;
- A written arbitration award subject to judicial review;
- No fees or costs greater than those the employee would be required to pay if the action were in court; and
- Mutuality, meaning that any claims the employer may have against the employee must also be subject to arbitration.

*Armendariz* remains the law today; however, recent California decisions have made it clear that the points listed above are, in fact, *minimum* requirements, and an agreement's compliance with *Armendariz* will not immunize it from rigorous judicial scrutiny concerning the manner in which the employer obtained its employees' assent to the agreement or the practical effect its provisions have on the employees' statutory rights.

### *Gentry v. Superior Court*

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, the California Supreme Court held that pre-employment arbitration agreements containing class action waivers are not enforceable where it is determined that a class arbitration "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." In *Gentry*, the plaintiff sought damages against his employer for conversion and violations of state statutes, filing suit on behalf of salaried customer service managers such as himself whom his employer had allegedly misclassified as "exempt" and arguing entitlement to overtime compensation.

When hired, plaintiff received a packet that included an "Associate Issue Resolution Package" and a copy of the employer's "Dispute Resolution Rules and Procedures," pursuant to which employees are afforded various options, including arbitration, for resolving employment-related disputes. By electing arbitration, the employee agreed to "dismiss any civil action brought by him in contravention of the terms of the parties' agreement." The agreement to arbitrate also contained a class arbitration waiver, that provided: "The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action." Additionally, the packet included a form that gave each employee 30 days to opt out of the arbitration agreement by mailing the employer a form. The plaintiff did not do so.

The Court began its analysis of the agreement by noting that under California law, claims for unpaid overtime wages are not waivable; hence, an arbitration agreement that acted as a *de facto* waiver would not be valid. The Court then determined that class action provisions such as the one at issue could act constitute such a waiver because: (1) amounts recovered in individual actions for unpaid wages were typically modest; (2)

individuals making claims to unpaid wages tend to be of "modest means," and unlikely able to pay their own attorneys' fees in cases where they did not prevail; (3) individual employees claiming unpaid wages were vulnerable to retaliation; and (4) individual employees might not even know their rights had been violated.

Accordingly, the Court opined that these and other "real world obstacles" needed to be considered to determine if a class action waiver operated to improperly deny individual employees their unwaivable rights. The Court remanded the case to the trial court to consider the class action waiver in light of these factors and stopped short of ruling that all class action waivers are categorically unenforceable. However, the message from the California Supreme Court was clear: any restrictions on the rights of employees imposed by pre-employment arbitration agreements will be subject to rigorous scrutiny, and the California courts have wide latitude to invalidate such agreements, even where imposing a procedural restriction forecloses "a significantly more effective practical means" of vindicating the rights of employees.

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