

# REISH & LUFTMAN PRACTICAL GUIDE TO EMPLOYMENT LAW

## Message From The Firm

According to one survey of reported California jury verdicts in employment cases, employers win about half the time. If those odds are not humbling enough, the survey also reports that in 1999 employers lost 50 percent of sexual harassment, 52 percent of retaliation for asserting a protected right, 60 percent of negligent hiring/supervision, nearly all whistleblower, and 61 percent of wrongful termination jury trials. The reported good news is that the average 1999 jury verdict in employment lawsuits was under \$400,000 — the lowest in many years. Compared to 1998, when the average jury verdict was \$2.5 million, employers are actually doing better at trial.

Yet, these statistics also confirm that employers must continue to manage their businesses to reduce the risk of employee claims and more importantly the risk of a big jury verdict. An employer's defense begins well before a lawsuit erupts. Take great care in hiring decisions and check references and background. Implement understandable written personnel policies and procedures and follow them. Clearly communicate expectations to employees and don't put off dealing with problems. Provide awareness training for management and supervisors to avoid discrimination and sexual harassment. Immediately investigate internal claims. Make fair decisions. Document everything. Consult with experienced employment law counsel.

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## Wage and Hour: White Collar Overtime Pay Exemptions to Change

by Mark Terman, Esq. (markterman@reish.com)

**Significance:** New rules, targeted to be effective on October 1, 2000, will determine whether a worker can be classified as exempt from overtime pay under the "executive," "administrative," or "professional" exemptions. California employers should review the job functions of the employees they treat as exempt to make sure those employees really are exempt.

**Discussion:** The California Industrial Welfare Commission (IWC) at its June 30, 2000 meeting ordered the "white-collar" exemption rules changed. Exemption issues have been and will continue to be fodder for the California Labor Commissioner and for Plaintiffs' attorneys, given the three-year statute of limitations, the potential monetary liability of employers who may run afoul of the rules (even innocently), steep monetary statutory penalties for non-compliance, and the rise in class action lawsuits in this area.

Our article *Are Your Employees Properly Classified?*, discussing the current rules, can be found on our Employment Law Practice page on our web site at <http://www.reish.com>.

The new exemption rules and related wage and hour rules that are effective October 1, 2000 can be found at <http://www.dir.ca.gov/IWC/Amendedagenda6302000.html>. A summary of the new white-collar exemption rules follows.

**Executive Exemption.** A person employed in an executive capacity (typically executives, managers and supervisors) means any employee:

- (1) Whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and
- (2) Who customarily and regularly directs the work of two or more other employees; and
- (3) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

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# Supreme Court Gives Green Light for Arbitration of Employment Claims —with Limitations

by Gary Wexler, Esq. ([garywexler@reish.com](mailto:garywexler@reish.com))

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**Significance:** On August 24, 2000, the California Supreme Court ruled that employers may require that employees agree to arbitrate future employment claims, if the written agreement to arbitrate meets minimum standards of fairness. Employers who mandate that employees arbitrate claims must now review such agreements for compliance with the new ruling and make necessary changes so that the agreements will be held enforceable. Employers who have not considered implementing arbitration agreements before may want to do so now.

**Discussion:** A common strategy used by employers to reduce the risk of huge jury verdicts is to require employees, as a condition of employment, to sign a written agreement to arbitrate any employment claims. The courts have struggled over the validity of these agreements, balancing the employee's right to jury trial embedded in the state and federal constitutions against a knowing waiver of these rights, in the context of the public policy favoring arbitration as an expedient way to resolve disputes and relieve congested court dockets. The federal courts have carved out statutory employment discrimination claims as exempt from any arbitration agreement. Yet, both the federal and state courts have enforced most arbitration agreements unless something in the agreement caused the employee to sign away rights to litigation discovery or certain types of damages, long before an actual claim emerges.

The California Supreme Court's decision in *Armendariz v. Foundation Health* will be remembered as the seminal case on enforceability of arbitration agreements in California. The case is a good example

of an employer who overreached in its effort to truncate and predetermine issues that are ordinarily resolved over the course of a litigation.

In *Armendariz*, two employees filed a lawsuit for wrongful termination and employment discrimination. Employment forms signed by both employees included an arbitration clause. The clause provided: (1) that employees were required to arbitrate all their claims against the employer; however, the employer was free to sue the employees in court; (2) that employees could only obtain back pay (i.e. pay from the date of termination until the date of the arbitration) if they won the arbitration; and (3) that the employees had to share equally the cost of the arbitration with the employer. In essence, the Supreme Court found that this particular arbitration agreement was so unconscionable that it could not be enforced.

More importantly, however, the Supreme Court ruled that, in general, an employer may require non-union employees to sign an agreement to arbitrate future employment claims. The Court ruled that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement:

- Must provide for arbitration of the employer's future civil claims too. The court characterized as unconscionable the situation in which an employee terminated for stealing trade secrets is compelled to arbitrate wrongful termination claims if the employer is not, in turn, obligated to arbitrate its trade secrets claims against the employee. (As a practi-

cal matter, both California and Federal law already permit access to the courts to obtain interim injunctive relief where the rights sought through arbitration would be lost – this is common in cases involving trade secrets or other alleged misappropriation by employees).

- Cannot limit any remedies available by statute. In other words, the agreement cannot limit the employee's ability to recover statutory remedies such as front pay (i.e. future lost earnings), attorney's fees or punitive damages.
- Cannot require the employee to pay any type of expense that the employee would not be required to pay if an action were brought in court. In other words, the employer must pay the arbitrator's fees (usually at least \$300 per hour).
- Must permit the employee discovery sufficient to adequately prepare for and arbitrate statutory claims, such as discrimination claims brought under the California Fair Employment and Housing Act. The Court stated that, by agreeing to arbitrate discrimination claims, the parties implied consent to such discovery. While the court acknowledged that limited discovery is an important part of the comparatively simple and streamlined arbitration proceeding, arbitrators must balance desirable simplicity with the employee's need for discovery to prove his or her claims.
- Should include a provision requiring the arbitrator to issue a written decision reflecting the essential findings and conclusions upon which the award is based. Even if the arbitration agreement does not contain such a provision, it will be interpreted to require such findings and conclusions in order to provide for meaningful judicial review.

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## WAGE AND HOUR

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- (4) Who customarily and regularly exercises discretionary powers; and
- (5) Who spends more than 50 percent of his or her actual work time in these exempt functions; and
- (6) Who receives a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (*i.e.*, at least \$1,933.33 a month).

**Administrative Exemption.** The new IWC Order provides that a person employed in an administrative capacity and exempt from payment of overtime means any employee:

- (1) Whose duties and responsibilities involve either: (a) The performance of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer's customers, or (b) The performance of functions in the administration of a school system or department or in work directly related to academic instruction or training; and
- (2) Who customarily and regularly exercises discretion and independent judgment; and
- (3) (a) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity, or (b) Who performs work under only general supervision along specialized or technical lines requiring special training, experience or knowledge, or (c) Who executes under only general supervision special assignments and tasks; and

- (4) Same as the primary function and compensation items (5) and (6) required for the Executive Exemption.

**Professional Exemption.** Not every "Professional" is exempt. The new IWC rules provide that a person employed in a professional capacity means any employee:

- (1)(a) Who is licensed or certified by the State of California and is engaged in the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or (b) Who is engaged in an occupation commonly recognized as a learned or artistic profession (as further specified in the rules); and
- (2) Who customarily exercises discretion and independent judgment in the exercise of the duties listed in item (1) functions; and
- (3) Who earns a salary equivalent to no less than two times the state minimum wage.

**Conclusion:** Exemption classification is not easy. Even the new rules do not draw a bright line to distinguish who is or is not exempt in every case. It is likely that a number of low-level supervisors and administrative staff, and some in-house professionals are and will not be exempt under California law even though they might be exempt under federal law. As is often the case, the federal or state law affording the most employee protection governs. In almost every situation, California exemption law will govern. Counsel or an experienced human resources professional is needed to help most employers sort this out.

In addition, the two times minimum wage salary requirement (*i.e.*, at least \$1,933.33 a month) was effective January 1, 2000. Many part-time white collar employees may not meet this exemption requirement and be entitled to overtime pay. ❖

## SUPREME COURT

(Continued from page 2)

- Will be held unenforceable by the court if tainted with illegal terms. The Court did not provide any guidance as to whether a single illegal provision by itself would be sufficient to invalidate the agreement. However, the Court warned that agreements drafted by employers with knowledge of their illegality will likely be invalid.

**Conclusion:** All in all, *Armendariz* is a good case for employers. It validates the employer's right to require arbitration of employment claims as long as the arbitration agreement does not take away rights and remedies that an employee would have if the case were heard in the civil courts. Employers who have arbitration agreements with provisions specifically addressed by the Supreme Court must modify their agreements. The solution is simple for new hires; however, employers must be cautious and consult with counsel before seeking to require that existing employees sign new arbitration agreements as a condition of continued employment. In general, employers cannot fire or discharge existing employees for refusing to sign new arbitration agreements. New consideration may be needed to support enforceability of a revised agreement, even if existing employees agree to sign. ❖

## CHILD LABOR RULES ON THE INTERNET

If you employ workers under 18 years of age, the California Department of Industrial Relations' *Child Labor Law Pamphlet 2000*, found at <http://www.dir.ca.gov/DLSE/dlse.html>, outlines the rules you need to know and risks of non-compliance with them.

## Around the Firm

Mark Terman is chairing the upcoming California CPA Education Foundation's "Employment Practices Conference: Reducing Liability Risks to Your Firm and Clients." The Conference will be held on October 17 in San Francisco and November 1 in Anaheim. Mark will also speak at the conference on Confidentiality in the Workplace, including the impact of technology on employment practices, privacy rights and trade secret protection.

Mark has also been appointed to the Board of Directors of Children's Nature Institute, a non-profit organization that provides natural sciences education, including nature walks and outdoor experiences to thousands of families and inner city kids.

Sharyn Alcaraz recently graduated from the Riordan Volunteer Leadership Development Program, where she was trained for Board of Directors level involvement in charitable and other not-for-profit organizations.

Fred Reish was co-chair of the Ninth Annual Los Angeles Benefits Conference, held September 17-18 in Universal City, California. In addition, Fred was a member of panel discussions on "IRS Headquarters Q&A" and "Fiduciary Issues in 401(k) Plans." Bruce Ashton was a member of the Executive Committee for the conference and a panel speaker on "IRS Initiatives and Audit Activity." Nick White was also a speaker at the conference on "Correction of Disqualifying Defects."

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