Welcome to Northstate SHRM's July 2011 Edition of its electronic Employment Law Update. During the months that have passed since I last updated this portion of Northstate SHRM's website, several significant cases were decided. Notwithstanding my delay in updating this page, the California Supreme Court has yet to issue a ruling in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* concerning the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest periods to hourly employees.

While I consider all developments important, I found four cases to be particularly interesting: *(1) Willis v. Superior Court of Orange* County (the facts of this case are incredible, including the former employee threatening to add one of her co-workers to her "Kill Bill" list); (2) *Dukes v. Wal-Mart* (U.S. Supreme Court reversed the Ninth Circuit Court of Appeals granting the plaintiffs class certification; sounding the death knell for one of the most expansive class actions in history that included approximately 1.5 million current and former female Wal-Mart employees who claimed gender discrimination under Title VII of the Civil Rights Act of 1964); (3) *Sullivan v. Oracle Corp.* (California Supreme Court held that the California Labor Code's overtime provisions apply to work performed in California by nonresidents, such that overtime pay would be required for work in excess of eight hours per day or in excess of 40 hours per week.); and (4) *Arechiga v. Dolores Press, Inc.* (A California Appeals Court declined to follow DLSE's interpretation that mutual explicit wage agreements are impermissible).

- Benjamin L. Kennedy, Legislative Director for Northstate SHRM

Benjamin L. Kennedy is an attorney with the law firm of Carr, Kennedy, Peterson & Frost in Redding, California. This Employment Law Update is provided as a service to Northstate SHRM. For questions relating to this document or any other employment or labor law issue, contact Mr. Kennedy at (530) 222-2100.

Wage & Hour

Sullivan v. Oracle Corp. - The California Supreme Court addressed questions about the applicability of California law to plaintiff nonresident employees who worked both in California and in other states for defendant, a California-based employer, at the request of the United States Court of Appeals for the Ninth Circuit. The Supreme Court held that the California Labor Code's overtime provisions apply to work performed in California by nonresidents, such that overtime pay would be required for work in excess of eight hours per day or in excess of 40 hours per week. The relevant laws of each of the potentially affected jurisdictions were different, but the circumstances revealed no genuine basis for concluding a true conflict existed. The potentially affected jurisdictions did not have a legitimate interest in shielding the employer from the requirements of California wage law as to work performed in California. The general interest of the potentially affected jurisdictions in providing hospitable regulatory environments to businesses was not perceptibly impaired by requiring the employer to comply with California overtime law for work performed in California. The employer's alleged violations of the state's overtime law constituted potentially unlawful acts triggering liability under the state's Unfair Competition Law (UCL). The California Labor Code's overtime provisions apply to claims for compensation for work performed in California, and the same claims can serve as predicates for claims under the UCL. However, claims for overtime compensation under the FLSA for performed in other states cannot serve as predicates for UCL claims.

Hodge v. Aon Insurance Service **-** Plaintiff employees appealed a judgment from the Superior Court of Los Angeles County (California), which ruled that defendant employers had not violated overtime regulations because the administrative exemption in former IWC Wage Order No. 4 applied. The employees were claims adjusters currently or previously employed by a third party administrator that contracted with self-insured businesses, governmental agencies, and insurance companies to adjust claims involving those entities. The court held that substantial evidence supported the trial court's conclusion that the administrative exemption applied because the adjusters performed work related to managerial policies or general business operations, regardless of whether the test applied was the administrative/production worker dichotomy set forth in the case law or the test articulated in the federal regulations incorporated into Wage Order No. 4. Adjusters who worked for a single, self-insured client not in the business of insurance exercised discretion and independent judgment, within the meaning of section (1)(A)(2)(b) of the Wage order and performed with minimal direct supervision work that required special training, experience, or knowledge. Other adjusters who handled claims for insurance-related entities were performing work such as setting reserves that was of substantial importance to the general business operations of these clients. The court affirmed the judgment of the trial court that the adjusters were exempt.

People of California ex rel. Harris v. Pac Anchor Transportation, Inc. - Plaintiff, the State of California, appealed a judgment from the Superior Court of Los Angeles County (California),

which granted judgment on the pleadings in favor of defendants, a trucking company and its owner, in an action to enforce California labor and unemployment insurance laws. The complaint alleged that the trucking company and its owner had violated California's unfair competition law, Business & Professions Code § 17200 *et seq*., by misclassifying drivers as independent contractors. The alleged acts of unfair competition included violations of Labor Code §§ 226 (pay stubs), 1194 (minimum wage), 2802 (duty to indemnify employees), and 3700 (workers compensation), as well as various provisions of the Unemployment Insurance Code. The trial court ruled that the Federal Aviation Administration Authorization Act (FAAAA) preempted the action. The court held that the preemption provision of the FAAAA did not preempt the action under the supremacy clause of the United States Constitution because the action was not related to the price, route, or service of any motor carrier. The action was based on alleged violations of statutory obligations concerning employees, which was a matter falling within the broad authority of states under their police powers to regulate the employment relationship to protect workers. Thus, the enforcement action was not related to the trucking company's prices, routes, or services, even though it might indirectly affect the prices, routes, or services that the company provided. The court reversed the judgment.

Areso v. CarMax, Inc. - Plaintiff salesperson appealed a judgment from the Superior Court of Los Angeles County, which granted summary adjudication to defendant employers in a class action lawsuit alleging wage and hour violations, including a failure to pay compensation for overtime. The salesperson received payments based on the products and services she sold, with a minimum guaranteed base pay. She was classified as a commissioned exempt salesperson and was not paid overtime. She received a payment in the same amount for each used vehicle she sold, regardless of the sale price of the vehicle. The court noted that although the trial court had ordered dismissal without prejudice of a cause of action alleging failure to reimburse for uniforms, the salesperson had indicated that she no longer wished to pursue that claim; thus, the court exercised its discretion to give the judgment finality and preserve the appeal by amending the judgment to reflect a dismissal with prejudice. The court held that the employee was exempt under section (3)(D) of the applicable IWC Wage Order and Labor Code section 510 because more than half her compensation represented commission wages. Although a line of cases had described commission wages as a percentage of the sale price, the plain language of Labor Code § 204.1 also allowed wages based on the number of items sold to be considered commission wages.

Kelley v. The Conco Companies - An Alameda county trial court dismissed claims by plaintiff employee for sexual harassment and retaliation and related claims against her employer and supervisor for termination in violation of public policy, failure to prevent discrimination, and infliction of emotional distress. The employee, who had been an apprentice ironworker, appealed. The court of appeal held, as to the retaliation claim under California's Fair Employment & Housing Act (FEHA) that the employer was potentially liable for harassing comments by coworkers because the employee raised a fact issue as to the employer's knowledge of the improper conduct. The employee averred that he complained about the conduct two or three times a week, that a supervisor was within earshot when some of the comments were made, and that he was told that the coworker conduct was just the way the ironworker trade was. However, a single incident in which same-sex coworkers used graphic, vulgar, and sexually explicit

language did not support a sexual harassment claim, even though the literal statements expressed sexual interest and solicited sexual activity. The fact that the comments were not intended to be taken literally was shown by the fact that sexual taunting, including gay innuendo, was commonplace in that environment. There was not a hostile or abusive working environment due to sexual harassment, within the meaning of FEHA because the employee admitted that, after the single incident, he had no issues with the particular coworker involved. The court reversed the trial court's dismissal as to retaliation. The court affirmed dismissal of all other claims.

Campbell v. PriceWaterhouseCooper - Unlicensed junior accountants filed a class suit against their employer, an accounting firm, seeking unpaid mandatory overtime under California law. The trial court found that the employer could not exempt them as a matter of law under the professional or administrative exemptions of IWC Wage Order 4. The accountants helped perform audits for the firm's clients. The parties sharply disagreed about the nature of this work. The accountants claimed that their work was predominately routinized and menial, and that compliance with strict instructions, comprehensive computer auditing software, and an extensive work-review system precluded them from exercising any significant degree of discretionary judgment or analytical thinking. The firm countered that the accountants performed analytical work integral to its client services. The district court found that unlicensed accountants were categorically ineligible for the professional exemption under and that the firm had not established a triable fact issue on whether the accountants' work was performed under only general supervision to establish the administrative exemption. On appeal, the court found that the firm had viable defenses under both exemptions, neither of which was inapplicable to unlicensed accountants as a matter of law. The court further found that the firm established material fact questions as to whether the accountants fell under either exemption, which required resolution by a jury. The Ninth Circuit Court of Appeals reversed the district court's decision.

UPS Wage & Hour Cases - Employees brought 32 coordinated actions against their employer, seeking compensation for, among other things, the employer's alleged failure to provide meal and rest periods. The employer appealed after the trial court concluded that Labor Code § 226.7 allowed up to two premium payments per work day. The Appeals Court held that Labor Code § 226.7 permitted up to two premium payments per work day — one for failure to provide one or more meal periods, and another for failure to provide one or more rest periods. Allowing an employee to recover one additional hour of pay for each type of violation per work day was not contrary to the "one additional hour" and "per work day" wording in Labor Code § 226.7(b). The court concluded that the employees in the instant case could recover up to two additional hours of pay on a single work day for meal period and rest period violations based on (1) the wording of Labor Code § 226.7(b); (2) the California Industrial Welfare Commission's wage orders; and (3) the principle that courts were to construe Labor Code § 226.7 broadly in favor of protecting employees.

Seymore v. Metson Marine, Inc. - Employees appealed a trial court's dismissal of their claims in favor of their former employer in the employees' action to recover unpaid overtime wages. The trial court found that the employer's compensation practices complied with the requirements of

the California Labor Code. The employees had worked consecutive 14-day "hitches" on the employer's ships providing emergency cleanup of environmentally hazardous discharges off the California coast. The court held that it was not permissible for the employer to artificially designate the workweek in such a way as to circumvent the requirement of Labor Code §§ 500 and 510 to pay overtime rates for the seventh consecutive day worked in a workweek. The restrictions placed on the employees during their on-call hours, including the requirement that they sleep aboard the ships and remain within no more than 45 minutes of the ship at all times, subjected the employees to the employer's control for the full 14-day hitch, so that the on-call hours constitute time worked. However, the employees were not entitled to compensation for 24 hours a day. California law authorized employers to enter into an agreement with their 24-hour employees to exclude from compensation eight hours of sleep time in each 24-hour period, and the employees and the employer had such an understanding. Accordingly, the employees were entitled to compensation for an additional four, but not 12, hours in each 24-hour period.

Price v. Starbucks - Employer not liable for reporting time pay violations when it called employee to work for express purpose of firing him. After an absence, the employee was told that he was not scheduled to work for the rest of the week. The manager told him to come in for a meeting later that week, at which time he was terminated. He received two hours of reporting time pay for that meeting and was paid for all work prior to that date. Because the complaint alleged that the employee was terminated on the same day he received his last paycheck, the trial court did not err in accepting that date and rejecting the employee's contention that he should have been paid his final paycheck when he was taken off the schedule. The minimum two-hour reporting time pay amount under the applicable IWC Wage Order was the proper amount for an employee who was not scheduled to work but reported to work for a meeting, without the expectation of working a scheduled shift. Because the claims for unfair competition and civil penalties were derivative, the failure of the underlying causes of action meant that they could not be maintained.

Heritage Residential Care, Inc. v. DLSE - Court of Appeals affirms wage-statement penalties assessed by Labor Commissioner. The employer treated workers who lacked social security numbers as independent contractors and did not provide itemized wage statements to those workers, although it provided the required statements to other workers. At the administrative hearing, the employer argued that its noncompliance was inadvertent because it had made a good faith mistake of law. The hearing officer rejected the employer's argument. The court held that the employer's failure to issue itemized wage statements was not an inadvertent mistake. Construing the term "inadvertent" to mean unintentional, accidental, or not deliberate, the court concluded that no particular mental state had to be shown. Because an employer's subjective belief about the law was irrelevant to determining inadvertence, the hearing officer was not required to consider such evidence. The hearing officer considered the employer's proffered evidence and did not err in concluding that the employer's asserted good faith mistake of law did not constitute inadvertence. The failure to provide itemized wage statements was an intentional act, as to which there was no basis for exercising discretion to reduce or eliminate the penalty

assessment.

Arechiga v. Dolores Press, Inc. - An employee sought a substantial amount of unpaid overtime, claiming that the parties' written agreement to pay him $880 per week did not include the overtime he worked. He claimed he was owed twenty-six hours per week of overtime at a rate of $33.00 (one-and-a-half times the $22.00 hourly rate resulting from dividing $880 by 40). The employer countered that the parties written agreement constituted an "explicit mutual wage agreement," which lawfully compensated the employee both for his regular hourly rate of $11.14 and provided an hourly overtime wage of $16.71. Both the trial court and the court of appeals ruled in the employer's favor, concluding that the parties' agreement constituted an enforceable explicit mutual wage agreement that remains valid under California law, notwithstanding the contrary conclusion reached by the Division of Labor Standards Enforcement (DLSE). In particular, the court concluded that an employer and employee may lawfully agree before the employee starts work to pay the employee a guaranteed salary so long the employee receive appropriate overtime pay as part of the guaranteed salary and the agreement provides: (1) the days the employee will work each workweek; (2) the number of hours the employee will work each workday; (3) the specific amoun6 of the salary the employee is guaranteed to be paid; (4) the employee is informed and agrees to the basic hourly rate of pay upon which the guaranteed salary is based; (5) the employee is informed and agrees that the agreed-upon salary covers the employees straight time hours and overtime hours; and (6) the agreement is reached before the work is performed.

Discrimination

Dukes v. Wal-Mart - The plaintiffs (female employees at the nation's largest employer, Wal-Mart) filed a class action lawsuit against Wal-Mart alleging sex discrimination in pay and promotions. The employees alleged that the employer was liable for disparate impact and disparate treatment under Title VII because it gave local managers discretion over pay and promotions, which the employees claimed was exercised disproportionately in favor of men. The Supreme Court held that the employees' class could not be certified because the action did not satisfy the commonality requirement for certification of the case for treatment as a class action; overruling the Ninth Circuit Court of Appeals. The employees failed to offer significant proof that the employer operated under a general policy of discrimination. An expert who testified that the employer had a strong corporate culture that made it vulnerable to gender bias did not determine how often stereotypes played a meaningful role in employment decisions. The employees' statistical and anecdotal evidence did not show that a common mode of exercising managerial discretion pervaded the entire company.

Wills v. Superior Court of Orange County - Former clerk of Orange County Superior Court was terminated from her employment after she told co-workers that she was going to add them to her "Kill Bill" list and sent disturbing and threatening e-mails and voice mails to co-workers. The court of appeal held that the employee failed to exhaust her administrative remedies as to five of her six causes of action. Although she filed an administrative complaint and obtained a right-to-sue notice, she did not specifically enumerate the alleged incidents of discrimination (retaliation, hostile work environment, harassment, and failure to accommodate mental disability), instead

marking only a box for discrimination based on denial of family/medical leave. The result was not changed by information provided by the employer in its response or by the employee's verbal notice to the Department of Fair Employment and Housing that she wanted to pursue a disability discrimination claim. As to the claim for disability discrimination, the court held that the FEHA authorized an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. Therefore, the employer had a legitimate, nondiscriminatory reason for terminating the employee after she sent threatening e-mail to other employees, in violation of the employer's written policy against threatening conduct in the workplace.

Staub v. Procter Hospital - Former employee sued former employer, alleging that his discharge violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). A jury found for the employee. The United States Court of Appeals for the Seventh Circuit reversed, determining that the employer was entitled to judgment as a matter of law. The employee sought review from the United States Supreme Court. While employed by the employer, the employee was a member of the United States Army Reserve. The employee's immediate supervisor and the supervisor's supervisor were hostile to his military obligations. The immediate supervisor issued the employee a corrective action disciplinary warning for purportedly violating a company rule. The supervisor's supervisor accused the employee of violating the corrective action. A human resources vice president relied on this accusation and fired the employee. The Court determined that the employer was not entitled to judgment as a matter of law regarding the employee's "cat's paw" discrimination claim under the USERRA because (1) both supervisors were acting within the scope of their employment when they took the actions that allegedly caused the vice president to fire the employee, (2) there was evidence that the supervisors' actions were motivated by hostility toward his military obligations, (3) there was evidence that the supervisors' actions were causal factors underlying the vice president's decision to fire him, and (4) there was evidence that both supervisors had the specific intent to cause him to be terminated.

Kasten v. Saint-Gobain Performance Plastics - Mr. Kasten alleged that is former employer terminated his employment because he orally complained to Saint Gobain about the location of its time cloacks, which prevent workers from receiving credit for the time spent putting on and taking off work clothes in violation of the Fair Labor Standards Act (FLSA). The sole question presented in this case is whether Mr. Kasten’s verbal complaint of a FLSA violation constituted a “protected activity’ under the FLSA’s anti-retaliation provisions. The phrase "any complaint" suggested a broad interpretation that would include an oral complaint, but, the text alone did not provide a conclusive answer. Limiting coverage to written complaints would undermine the Act's basic objectives, as prior to the Act’s passing illiteracy rates were particularly high among the poor and the workers most in need of the Act's help. To limit the scope of the anti-retaliation provision to the filing of written complaints could prevent agencies from using hotlines, interviews, and other oral methods of receiving complaints. A fair notice requirement did not necessarily mean that notice had to be in writing. The Secretary of the Department of Labor, and the EEOC had consistently held the view that the words "filed any complaint" covered oral, as

well as written, complaints. The statutory term "filed any complaint" under the FLSA included oral as well as written complaints within its scope.

Thompson v. North American Stainless - Employees can sue for retaliation under Title VII without engaging in protected activity. In February 2003, the Equal Employment Opportunity Commission (EEOC) notified the employer that Mr. Thompson's fiancee had filed a charge alleging sex discrimination. Three weeks later, the employer fired the Mr. Thompson. The Sixth Circuit reasoned that because the employee did not engage in any statutorily protected activity, either on his own behalf or on behalf of his fiancee, he was not included in the class of persons for whom Congress created a retaliation cause of action. The Court concluded that if the facts alleged by the fired employer were true, then the employer's firing of him violated Title VII because Title VII's anti-retaliation provision had to be construed to cover a broad range of employer conduct. The Court thought it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancee would be fired. The Court declined to adopt a categorical rule that third-party reprisals do not violate Title VII or to identify a fixed class of relationships for which third-party reprisals are unlawful. The employee could sue because he fell within the zone of interests protected by Title VII.

DFEH v. Lucent Technologies, Inc. - California Department of Fair Employment and Housing (DFEH) sought review of trial court's ruling which dismissed former employee's action against his employer alleging violation of the California Fair Employment and Housing Act (FEHA). The appeals court held that the trial court did not err in concluding that the employer's interaction with the employee was sufficient under FEHA-imposed obligation to engage in good-faith interactive process with employees. The evidence did not support a finding that the employer failed to provide the employee with a reasonable accommodation under FEHA. When the employee was no longer physically able to perform the functions of a telecommunications installer, the employer's plan afforded him a disability period to rehabilitate.

Lopez v. Pacific Maritime Association - A rehabilitated drug addict's disability claim against his former union was properly dismissed. One of the association's policies was a one-strike rule, which eliminated from consideration any applicant who tested positive for drug or alcohol use during the pre-employment screening process. In 1997, Mr. Lopez had tested positive for marijuana. In 2004, he reapplied to be a longshoreman. He was rejected because the one-strike rule. He then sued, claiming that the association violated the ADA and the FEHA by discriminating against him on the basis of his protected status as a rehabilitated drug addict. He first argued that the one-strike rule facially discriminated against recovering or recovered drug addicts, but the triggering event for purposes of the one-strike rule was a failed drug test, not an applicant's drug addiction. The record belied the applicant's allegation that the association adopted the one-strike rule intentionally to exclude recovering and recovered drug addicts from its work force. The applicant's attempt to inform the association of his addiction after he had been disqualified could not have any bearing on whether he was disqualified because of his protected status. A disparate impact claim also failed from a lack of evidence.

Dawson v. Entek International - The employee, a male homosexual, alleged that coworkers and supervisors made derogatory comments about his sexual orientation. The employee took a day off from work in response to the stress from his negative work environment. The next day, the employee complained to human resources. Two days later, the employee was terminated, ostensibly because of his failure to call properly before missing work. The appellate court determined that the district court properly applied the burden-shifting framework to the employee's discrimination claims. Summary judgment was inappropriate as to the employee's retaliation claims because the protected activity occurred at most two days before the discharge and the treatment of the employee was a topic during both the protected activity and the discharge. The employee's sex hostile work environment claims failed because he did not experience a hostile work environment based on his gender since he was not being verbally harassed for appearing non-masculine or for otherwise not fitting the male stereotype. Summary judgment was inappropriate as to the sexual orientation hostile work environment claim.

Privacy

U.S. v. Nosal - The United States appealed from the judgment of a federal trial court, which dismissed several counts of an indictment charging defendant with numerous violations of the Computer Fraud and Abuse Act arising from Mr. Nosal's obtaining information from his employer's computer system for the purpose of defrauding his employer and setting up a competing business. Because the statute referred to an accesser who was not entitled to access information in a certain manner, whether someone had exceeded authorized access had to be defined by those access limitations. The plain language of the statute supported the government's interpretation, that an employee exceeded authorized access when he or she violated the employer's computer access restrictions, including use restrictions. As long as the employee had knowledge of the employer's limitations on that authorization, the employee exceeded "authorized access" when the employee violated those limitations. Although the court was mindful of the concerns raised by defense counsel regarding the criminalization of violations of an employer's computer use policy, the court was persuaded that the specific intent and causation requirements of the Computer Fraud and Abuse Act sufficiently protect against criminal prosecution those employees whose only violation of employer policy was the use of a company computer for personal (but innocuous) reasons.

Leaves of Absence

Sanders v. City of Newpart - Former employee sued defendant city, for violating the Family and Medical Leave Act of 1993 (FMLA) and other state and federal laws. A jury held in the city's favor on plaintiff's FMLA and other damages claims. Plaintiff's claims arose when the city refused to reinstate her after she took an approved medical leave occasioned by a severe allergic reaction to a low quality paper being used at her worksite. Her doctor signed a release for plaintiff to return to work conditioned on accommodation of her allergy by keeping her away from her allergen source. Stating that it could not meet the condition, the city terminated her employment. The Ninth Circuit Court of Appeals agreed that the trial court improperly instructed

the jury on the elements of her FMLA interference claim because the instructions improperly placed the burden on the employee to prove that she was denied reinstatement without good cause. Under the Department of Labor regulations, the burden is on the employer to show that it had a legitimate reason to deny an employee reinstatement.