



LABOR AND EMPLOYMENT LAW  
ON BEHALF OF MANAGEMENT  
AND RELATED LITIGATION

10 UNIVERSAL CITY PLAZA  
SIXTEENTH FLOOR  
UNIVERSAL CITY,  
CALIFORNIA  
91608-1097

TELEPHONE:                      FACSIMILE:                      E-MAIL:  
818-508-3700                      818-506-4827  
818-985-8167

November 2000

Dear Clients and Friends of the Firm:

In this final issue of the EMPLOYMENT LAW UPDATE in the year 2000, we focus on several extremely important new developments in labor and employment law in California. Our lead article analyzes the new Wage Orders which were adopted this summer by the California Industrial Welfare Commission and which are effective immediately, as well as upcoming increases in our state's minimum wage. We also summarize several new labor and employment laws which were passed by the California Legislature and signed into law by Governor Gray Davis. Most of these new laws will take effect January 1, 2001, except for a bill allowing certain qualified computer professionals to be exempted from our state's overtime requirements, which took effect when it was signed in September. In addition, we discuss a landmark decision by the California Supreme Court favorable to employers concerning claims for job bias and breach of so-called implied contracts.

**We are pleased to advise you that future issues of the EMPLOYMENT LAW UPDATE will be available via subscription e-mail and on line by visiting our website at [www.brgslaw.com](http://www.brgslaw.com). Please complete the enclosed postcard if you would like to receive future issues via e-mail in PDF (Adobe Acrobat) format. Also new for 2001 will be our weekly Management Bulletin. This value added service is provided free of charge to all clients of Ballard, Rosenberg, Golper & Savitt. Each week, the Management Bulletin will bring you up to the minute legislative and court developments in employment law. All we need is your e-mail address on the enclosed card to include you in this service.**

All of us at Ballard, Rosenberg, Golper & Savitt wish you and yours a joyous Holiday Season and prosperous New Year. We look forward to being of service in 2001.

**Richard S. Rosenberg, Editor**

## **CLIENT ALERT**

**Future issues of the EMPLOYMENT LAW UPDATE will be available via subscription e-mail and on line by visiting our website at [www.brgslaw.com](http://www.brgslaw.com). Please complete the enclosed postcard if you would like to receive future issues via e-mail in PDF (Adobe Acrobat) format.**

**Also new for 2001 will be our weekly Management Bulletin. This value added service is provided free of charge to all clients of Ballard, Rosenberg, Golper & Savitt. Each week, the Management Bulletin will bring you up to the minute legislative and court developments in employment law. All we need is your e-mail address on the enclosed card to include you in this service.**

## NEW IWC WAGE ORDERS

As discussed in several previous issues of the UPDATE, the “Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999” (AB 60) went into effect on January 1, 2000. AB 60 made sweeping changes to California wage and hour law. AB 60 mandated that the Industrial Welfare Commission (“IWC”) issue new regulations embodied in a series of “Wage Orders” to implement the law. The IWC issued an Interim Wage Order earlier this year while it held public meetings over its final regulations.

On October 1, 2000, the IWC issued its long-awaited Wage Orders implementing AB 60. These new Wage Orders are effective *immediately*. Below we provide a summary of the most significant changes affecting employers. We also discuss the IWC’s recent decision to raise California’s minimum wage from its current level of \$5.75 per hour to **\$6.25** per hour effective January 1, 2001, and to **\$6.75** per hour effective January 1, 2002.

### NEW PENALTIES

- **Meal Periods.** The new Wage Orders impose a new penalty equal to one hour’s pay for *every* work day that the employer fails to comply with existing meal period requirements. Under the Wage Orders, an employer must provide an unpaid one-half hour meal period every work day. The meal period must be an uninterrupted period of at least 30 minutes for an employee who is scheduled to work for five hours or longer. Notably, the meal period may be waived by mutual consent if the employee works no longer than six hours. A second meal period must be provided if the employee works for more than 10 hours. This second meal period may be waived if the employee works no longer than 12 hours, provided the employee did not waive the first meal period. Additionally, unless an employee is relieved of *all* duty during the meal period, the meal period must be compensated. An “on duty” meal period is permissible only when the nature of the work prevents an employee from being relieved of all duty and when the employer and employee have agreed in writing to the arrangement. When permissible, the written on duty meal agreement must indicate that the employee may revoke his or her consent at any time. In light of the new fine (**200%** of the meal period), it is advisable to keep accurate daily time records of all meal periods.

- **Rest Periods.** The new Wage Orders also impose a penalty equal to one hour’s pay for *every* work day on which an employer fails to comply with IWC-mandated rest period requirements. Under the law, an employer must provide a paid 10-

minute rest period for every four hours of scheduled work. Most employers do not ordinarily keep track of rest periods. However, since the new fine is equal to **600%** of the rest period, it is advisable for employers to devise a reliable record of all rest breaks taken.

### **ALTERNATIVE WORKWEEKS**

Under existing California law, an employer must pay an overtime premium equal to one-and-a-half times the employee's regular hourly rate for all hours worked beyond eight in a day, or for the first eight hours on the seventh consecutive day in the workweek. The overtime premium is increased to twice the hourly rate for work in excess of 12 hours in a day, or after eight hours on the seventh day of work in the workweek. (This differs from federal law, under which overtime premium pay is not required until the employee has worked 40 hours in a week.) The new law allows employers to avoid paying "daily" overtime under certain limited circumstances if a properly established "alternative workweek" arrangement is established. The new Wage Orders severely restrict how an employer may implement these alternative workweek arrangements.

- ***Ten Hour Per Day Limitation.*** The most significant restriction found in the new Wage Orders is the limit on the length of a scheduled workday in an alternative workweek. IWC has stated that a valid alternative arrangement could consist of no more than 10 hours per day or no more than 40 hours in a workweek. If the employer regularly schedules the employee for a longer workday, the arrangement will not pass muster with the enforcement authorities.

- ***Election Required To Adopt Alternative Workweek.*** To have a valid alternative workweek, certain procedures *must* be followed. This arrangement must be ratified in a secret ballot election by at least two-thirds of the affected employees in the work unit. No less than 14 days prior to an election, the employer must provide employees with written disclosures detailing the effect of the proposed arrangement on the employees' wages, hours, and benefits, the number of hours to be worked per day and the number of days to be worked per week under the proposed alternative workweek. (The days must be regularly scheduled, although the actual days to be worked need not be specified in the disclosure.) Additionally, at least one meeting must be scheduled no less than 14 days prior to the election to discuss these matters. Disclosure must be provided in languages other than English if at least five percent of affected employees speak such languages, and must be mailed to employees who do not attend the meeting(s). Moreover, employees may not be disciplined for their opposition to an alternative workweek arrangement. Once such an arrangement is in place, if one-

third of the affected employees sign a petition to repeal an alternative workweek, the employer must hold an election to do so within 30 days. However, the employer need not honor a request to repeal the arrangement within the first year following the election in which the employees voted in the alternative workweek. The results of any election must be reported to the Division of Labor Statistics and Research within 30 days. Notably, the employer may not reduce an employee's regular rate of pay as a result of adoption or repeal of an alternative workweek arrangement.

- ***Existing Alternative Workweek Arrangements.*** Certain arrangements in place prior to January 1, 2000 may continue if the employees were voluntarily working under an alternative workweek as of July 1, 1999 (based on an agreement that went into effect after January 1, 1998), which provides for a workday not exceeding 10 hours. These arrangements may continue ***without an election***, if the employees requested to do so in writing, prior to May 30, 2000, and the employer approved such a request. All such arrangements must be reported to the Division of Labor Statistics and Research no later than January 1, 2001.

- ***Accommodating Employees Who Don't Wish To Work Alternative Workweek.*** The employer must explore reasonable accommodations for any employee who is eligible to vote on the arrangement, but is unable or unwilling to work an alternative workweek. The accommodation process is described in our state's job bias law, the Fair Employment and Housing Act. The employer must attempt to accommodate these employees by scheduling them on an eight hour per day schedule. Employees hired ***after*** the establishment of an alternative workweek may request similar accommodation, but the employer need not honor this request.

- ***Make-Up Time.*** An employee who requests time off to attend to a personal obligation may ask the employer to make up the time on another day within the same week without paying daily overtime on the longer workday. The enforcement authorities will permit such an arrangement so long as the employee works no more than 11 hours in any single day, or a total of 40 hours in any week. As a practical matter, the make-up time will have to occur within the same workweek as the time off. Every request for make-up time must be in writing. The new law allows the employer to inform employees of this benefit, but in no case may the employer solicit or encourage employees to use it.

### **NEW OVERTIME EXEMPTIONS**

- ***Computer Professionals.*** Under a new law which went into effect on September 19, 2000 (SB 88), ***certain*** highly paid employees who work with computers

are now exempt from overtime provisions of the Wage Orders under the so-called professional exemption. Several criteria must be met for the exemption to apply. The employee must be *primarily* engaged in intellectual or creative work requiring the exercise of discretion and independent judgment, and the employee's duties must consist of at least one of the following: (1) application of systems analysis techniques and procedures, including consultation; (2) design, development, analysis or testing of computer programs; or (3) programming work related to the design of software or hardware for computer operating systems. The employee also must be highly skilled and proficient in theoretical and practical application of specialized information to computer systems analysis, programming and software engineering. Finally, the employee must be paid no less than \$41.00 per hour (this threshold is to be adjusted annually for inflation.) Careful attention must be paid to actual job duties when evaluating the application of this exemption. Most MIS and other computer functions in a typical office setting, for example, will *not* meet these requirements.

- ***Nurses.*** Certified nurse midwives, certified nurse anesthetists, and certified nurse practitioners are now exempt as professionals from the new Wage Orders. The professional exemption applies only if the employees in question meet all existing criteria for the exemption, including a monthly salary equivalent to twice the minimum wage, based on a 40-hour work week.

- ***Pharmacists No Longer Exempt.*** Pharmacists are no longer covered by the professional exemption to the Wage Orders.

- ***Exempt Status.*** The Wage Orders expressly adopt more favorable federal regulations, developed under the federal Fair Labor Standards Act, for determining exempt status under the so-called executive, administrative, and professional exemptions to the overtime law. The Wage Orders indicate that federal regulations are to be followed in determining whether an employee's duties meet the applicable exemption requirements. Careful attention should be paid to individuals who are classified by the employer as exempt for overtime purposes. Except for the limited exemption for certain highly paid computer professionals (see above), every hourly paid employee must be paid overtime, even if that position would be exempt had the employee been paid a weekly salary.

### **COLLECTIVE BARGAINING AGREEMENT EXEMPTION**

Employees covered by a collective bargaining agreement ("CBA") are exempt from the Wage Orders (except for provisions requiring overtime premium pay for minors, and hot food and drink or heating equipment for employees working a

“graveyard shift”) if the CBA provides for the wages, hours and working conditions of the employees. The CBA also must provide for wages at least 30% higher than the minimum wage and *some* overtime premium pay.

### **EMPLOYERS SUBJECT TO DIFFERENT REGULATIONS**

- ***Ski Establishments.*** Operators of ski establishments, as defined in Wage Order 10-2000, must pay overtime to employees who work more than 10 hours in a day or 48 hours in a week during any month that skiing activities are conducted.

- ***Health Care Industry Employers.*** Employers in the health care industry, as defined by Wage Orders 4-2000 and 5-2000, may establish an alternative workweek schedule under which employees work up to 12 hours per day. Employers may only require employees to work more than 12 hours in a day in case of a “health care emergency.” In such case, they must pay double time for all hours beyond 12. Additionally, they must make a reasonable effort to find alternative employment for existing employees who are unable to work 12-hour shifts. Health care employers also may establish a 14-day pay period, and pay overtime only for hours worked beyond 80 in such period.

- ***Employers Of Personal Attendants And Resident Managers.*** Wage Order 5-2000 does not apply to employers of personal attendants (such as baby sitters and employees who work for non-profit organizations and who care for children or the aged), employees with direct responsibility for children receiving 24-hour care, and resident managers of homes for the aged with fewer than eight beds, unless their employees work more than 40 hours or six days in a week. Such employees may be required to work beyond these thresholds only in an “emergency,” which is defined as “an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.” All such work must be compensated at time-and-a-half.

- ***Organized Camps.*** Employers of organized camp counselors are not subject to Wage Order 5-2000 unless their employees work more than 54 hours or six days in a week. In case of emergency, employees may work more than 54 hours or six days in a week, provided they are paid time-and-a-half. Minors, other than those who are at least 16 years old and not required to attend school, must be compensated at time-and-a-half for all hours worked beyond 40 in a week.

These new Wage Orders add additional exposure in the form of penalties for not complying with day-to-day wage-hour guidelines. Since these penalties can add up, it is incumbent on employers to maintain records demonstrating compliance. Also, be

aware that any sort of retaliation against an employee who demands compliance or speaks out for others is illegal and could form the basis of an expensive civil action as well.

### **MINIMUM WAGE INCREASE**

On October 23, the IWC unanimously voted to increase California's minimum wage to \$6.25 per hour effective January 1, 2001, and to \$6.75 per hour effective January 1, 2002. The current minimum wage is \$5.75 per hour. The latest increases will directly impact more than one million employees who earn the minimum wage or close to it. California will join with Washington, Oregon and Massachusetts as the states with the highest minimum wage rates. However, organized labor leaders had sought to increase the minimum wage to \$8 per hour, and have vowed to seek more increases next year. The IWC also voted to eliminate exemptions from the minimum wage for several groups of employees, including professional actors and carnival ride operators. However, the IWC rejected a bid to eliminate the minimum wage exemptions for shepherds who tend sheep in California, and instead voted to create a panel to study the issue.

### **LEGISLATIVE UPDATE**

The California Legislature recently ended its 1999-2000 session by passing several new labor and employment bills. Many of these bills were signed into law by Governor Gray Davis. As discussed above on page 3, one of these new laws (SB 88) exempts certain computer professionals from our state's overtime requirements. SB 88 took effect immediately when it was signed by Governor Davis in September. The other new labor and employment laws summarized below will take effect on January 1, 2001. For the most part, these new laws will further increase the legal obligations of California employers.

- ***Remedies For Labor Code Violations.*** On the heels of the IWC's new Wage Orders, Governor Davis has signed yet another bill, AB 2509 (Shelley), which increases the burdens our state's wage-hour laws place on employers. Among other things, AB 2509 provides that: (1) employers appealing an award by the Division of Labor Standards Enforcement ("DLSE") must post a surety bond or cash deposit; (2) employers ***cannot*** recover attorneys' fees and costs in direct civil actions brought for unpaid minimum wages or overtime; (3) employers cannot receive any part of a gratuity belonging to ***any*** employee, regardless of the employee's base wage rate, and all gratuities paid by credit card must be paid to the employee by the following regular payday; (4) all employers are liable for a penalty of up to 30 days' wages and fringe

benefits for dishonored wage checks, unless the employer can show that the violation was unintentional; (5) employers must reflect the hourly rate and hours worked for hourly workers in itemized pay statements, but need not do so for salaried employees who are exempt from overtime pay requirements; and (6) employers are subject to enhanced penalties for violations of wage-hour, meal period and recordkeeping requirements. The original version of AB 2509 which we discussed in our May 2000 UPDATE contained additional stringent provisions which were deleted before the final version of the bill was approved.

- ***Disability Discrimination.*** Governor Davis has dealt California employers a stunning setback by signing AB 2222 into law. As reported in our May 2000 UPDATE, AB 2222 (authored by Assembly Member and Senator-Elect Sheila Kuehl) drastically expands the California laws which prohibit job bias based on disability and require “reasonable accommodations” of disabled persons. As a result of AB 2222, our state’s disability bias provisions are now much broader than the federal Americans with Disabilities Act (“ADA”). Specifically, AB 2222 eliminates the existing requirement that a disabling condition “substantially limit” one or more “major life activities.” Instead, under AB 2222, *any* “limitation” will do – presumably even minor or trivial limitations, such as very mild nearsightedness. In addition, AB 2222 states that the term “‘major life activities’ shall be broadly construed and includes physical, mental, and social activities and working.” AB 2222 also provides that mitigating measures (such as eyeglasses) shall *not* be considered in determining whether a person is “disabled.” Taken together, these provisions suggest that *virtually every Californian* may now claim to have at least one physical or mental “disability” protected under state law. AB 2222 also specifically requires require employers to conduct a “timely, good faith interactive process” to determine “reasonable accommodations” for “disabled” employees.

Lastly, AB 2222 prohibits employers from making any medical, psychological, or disability related inquiries of employees or job applicants, unless the inquiry is job related and consistent with business necessity. This provision is also far more restrictive of employers than existing state or federal law.

- ***Workplace Harassment.*** AB 1856 (Kuehl) makes non-supervisory employees personally liable for committing workplace harassment in violation of our state’s job bias law, the Fair Employment and Housing Act (“FEHA”). This bill overrules last year’s unanimous decision by the California Supreme Court in the *Carrisales* case which found against co-employee liability for harassment. It should be noted that the new law does not expand *employer* liability for co-employee harassment. Employers still are not liable for harassment committed by non-supervisory co-employees unless they knew or should have known of the harassment and failed to take

corrective action. This means there may be cases where an individual co-employee is liable for harassment but the employer is not liable because it lacked knowledge of the harassment or took appropriate action to correct it. In addition, AB 1856 likely will increase the expenses employers pay to *indemnify* co-employees who can now be sued personally for harassment. Under the California Labor Code and the Court of Appeal's decision earlier this year in *Jacobus v. Krambo Corp.*, employers must indemnify employees for legal fees and other costs of defending harassment lawsuits, except where the individual is actually found liable for harassment. Under a separate bill, SB 1305, these indemnity awards must also include interest at a specified rate – currently 10% annually. AB 1856 and SB 1305 will thus make it more expensive for employers to defend against bogus harassment lawsuits.

- ***Leaves Of Absence For Domestic Violence Victims.*** AB 2357 (Honda), titled the Victims of Domestic Violence Employment Leave Act, increases the rights of employees who are domestic violence victims to take time off from work. Such employees now have the right to take leaves of absence to seek medical attention, recover from injuries, obtain services from a domestic violence program and/or counseling or participate in safety planning. This is in addition to previous law which allowed employees to take a leave to go to court in connection with a domestic violence case. Employers are prohibited from discharging, discriminating or retaliating against employees who take time off for any of these reasons. Employees must give reasonable advance notice of their need for this type of leave.

- ***Reserve Peace Officers and Emergency Rescue Personnel.*** Since 1989, it has been a misdemeanor for any California employer to discharge or discriminate against an employee for taking time off to perform emergency duty as a volunteer firefighter. SB 1353 (Rainey) now extends these protections to reserve peace officers and emergency rescue personnel.

- ***Influencing Unionization.*** AB 1889 (Cedillo) prohibits employers from using state funds or state facilities to discourage or encourage employees to support unionization. The same prohibition also applies to state contractors that receive \$50,000 or more under a state contract. In addition, AB 1889 includes onerous paperwork requirements and civil penalties of \$1,000 per violation.

- ***Inspection Of Personnel Files.*** SB 1327 (Escutia) revises the law relating to employee inspection of personnel files. Under SB 1327, every California employee has the right to inspect personnel records relating to their performance or to any employee grievances. Employers must make these personnel records available to employees at reasonable times and intervals. Employers must either: (1) keep a copy of

each employee's personnel records at the employee's place of work; (2) make the records available at the employee's place of work within a reasonable time after the employee's request; *or* (3) allow the employee to inspect the records at some other location where they are stored, with no loss of pay to the employee. These requirements do *not* apply to records relating to investigations of possible criminal offenses, letters of reference, or certain records obtained prior to the employee's employment and obtained in connection with a promotional examination. For the first time, public employees also have the right to inspect their personnel files. Additional inspection rights apply to employees of public school and community college districts. Fortunately for employers, the Legislature rejected an earlier version of SB 1327 (discussed in our May 2000 UPDATE) which would have given employees the right to ask for certain corrections and deletions of materials in their personnel files, and would have required employers to remove any adverse material from a personnel file that had not been used within the previous two years.

- ***Whistleblower Protections.*** AB 2472 (Romero) protects employees of public school and community college districts from retaliation for filing a written complaint about "improper governmental activity." Persons who violate this new law may be held individually liable and may be subject to a fine of up to \$10,000 for intentional violations.

- ***Vetoed Bills.*** Governor Davis vetoed a few bills which would have even further increased the burdens faced by California employers. For example, SB 546 (Solis) would have increased weekly unemployment insurance benefits from \$230 to \$300 and imposed an automatic adjustment for inflation in subsequent years. SB 996 (Johnston) would have increased workers' compensation benefits and made a variety of other changes to workers' compensation laws. SB 1149 (Speier) would have made several changes to the California Family Rights Act, including a provision making the law applicable to all businesses with 20 or more employees, instead of 50 or more employees as is the case under current law. In addition, SB 1822 (Bowen) was the Legislature's latest attempt to prohibit employers from secretly monitoring employees' e-mail. Despite the Governor's vetoes of each of these bills, we expect the Legislature to try again on these issues next year.

## **PROPOSITION 36**

On Election Day, California voters overwhelmingly approved Proposition 36. This new law provides that first and second-time offenders convicted of "nonviolent" drug possession crimes shall be sentenced to probation and drug treatment, rather than incarceration. Employers should be aware that a little-noticed provision of Proposition

36 gives special protection to persons who successfully complete an approved drug treatment program. The law now prohibits employers from using any record pertaining to an arrest or conviction resulting in successful completion of a drug treatment program under Proposition 36 in any way that could result in the denial of any employment or benefit. In addition, persons who complete such treatment programs are allowed to represent that they were not arrested or convicted for the underlying drug offense. These provisions do not apply to persons applying for public office, for peace officer positions, for licensure by any state or local agency, for contracting with the California State Lottery or for jury duty.

## **CALIFORNIA SUPREME COURT UPDATE**

The California Supreme Court recently issued its long-awaited decision in *Guz v. Bechtel National, Inc.* This case sets new legal standards for wrongful termination lawsuits in California. The case before the Supreme Court was brought by John Guz, who was laid off at age 49 after 23 years of employment by Bechtel. Bechtel laid off numerous employees for economic reasons. However, Guz claimed that *he* was laid off because of his age and in breach of an “implied contract” not to terminate his employment without “good cause.” Guz also alleged that his termination violated the “implied covenant of good faith and fair dealing.” A lower court judge dismissed Guz’s entire lawsuit without a trial by granting Bechtel’s motion for summary judgment. The Supreme Court ruled that Guz’s age bias and implied covenant claims were correctly dismissed, but that Guz might have a valid claim for breach of contract. The Court therefore sent Guz’s contract claim back to the lower courts for further proceedings. The standards set forth by the Supreme Court in its decision in *Guz* will give California employers some additional guidance on what they need to do to avoid similar lawsuits in the future.

- ***Implied Contract Claims.*** Bechtel claimed that Guz was an at-will employee. Bechtel relied in part on a written company policy which stated that “Bechtel employees have no employment agreements guaranteeing continuous service and may resign at their option or be terminated at the option of Bechtel.” The Supreme Court ruled that this written at-will policy, while relevant, did not *necessarily* defeat Guz’s claim that he and Bechtel had an implied agreement that Bechtel could only be terminated for “good cause.” The Court specifically noted that “other provisions in the employer’s personnel documents” could “suggest limits on the employer’s termination rights.”

In this case, Bechtel had other written policies which stated that: (1) employees could be terminated for poor performance, provided they “have been advised of the

specific shortcomings and given an opportunity to improve their performance”; and (2) employees who were selected to be laid off for economic reasons may be placed on “holding status” for possible reassignment for three months, depending on whether any openings are available. Bechtel also had written “guidelines” for supervisors to use in making layoff decisions. These guidelines stated, among other things, that layoff decisions ordinarily were to be based on a “forced ranking” of employees, with the rankings to be “based on the fair, objective, and consistent evaluation of employees’ comparative job-relevant skills and performance.” The guidelines contained additional details on how to rank employees and what benefits employees had while they were on “holding status.” The Supreme Court ruled that a *jury* must decide whether Guz had an enforceable employment contract with Bechtel ***based on the specific language in Bechtel’s written policies***. If such a contract is found to exist, the jury must then determine whether Bechtel breached the contract by failing to comply with its written policies.

The Supreme Court’s decision in *Guz* indicates that the employer’s written policies usually will be the most important factor in determining whether its employees are at-will. Bechtel’s policies were insufficient to prevent Guz’s contract claim from going to a jury. However, the Court left open the possibility that at-will disclaimers which are “more clear, prominent, complete, consistent, and all-encompassing” than Bechtel’s policy might conclusively prove that the company is an at-will employer. The Court also appeared to endorse previous cases which have stated that “an at-will provision in an ***express written agreement***, signed by the employee, ***cannot*** be overcome by proof of an implied contrary understanding” requiring “good cause” for termination.

In addition, the Court rejected Guz’s argument that factors *other* than Bechtel’s written policies supported his claim for breach of implied contract. Guz specifically alleged that Bechtel agreed to such a contract “by retaining him for over 20 years, and by providing him with steady raises, promotions, commendations, and good performance reviews during his tenure.” However, the Court stated that such factors cannot simply be “shaken together in a bag” to support a “good cause” requirement for termination. “Absent other evidence of the employer’s intent, longevity, raises and promotions are their own rewards for the employee’s valued service; they do not, ***in and of themselves***, additionally constitute a contractual guarantee of future employment security.” Although the Court stated that such evidence is “not necessarily irrelevant” in all cases, it found nothing specific in Guz’s evidence (apart from Bechtel’s written policies) to support an implied contract requiring “good cause” for termination. The Court therefore ruled that the terms of any implied contract in this case ***could not be “broader than the specific provisions”*** of Bechtel’s written personnel policies.

- ***Implied Covenant Of Good Faith And Fair Dealing.*** The Supreme Court in *Guz* upheld the trial court’s dismissal of Guz’s claim for breach of the “implied covenant of good faith and fair dealing.” Guz’s attorneys, like many plaintiffs’ lawyers, argued that this “implied covenant” imposed a “good faith” requirement on the employer ***beyond*** any actual agreement of the parties. The Court flatly rejected this theory. Instead, it ruled that Guz’s implied covenant claim was “invalid” to the extent it sought to impose additional limits on Bechtel’s right to terminate Guz, and that it was “superfluous” to the extent it was based on the same agreement alleged by Guz as part of his contract claim. The Supreme Court’s decision in *Guz* should therefore put a stop to most of these “implied covenant” claims.

- ***Job Bias Claims.*** Lastly, the Supreme Court rejected Guz’s claim for age discrimination. The Court noted that Guz “largely conceded the truth, if not the wisdom,” of Bechtel’s stated reasons for laying off Guz. The testimony by Bechtel’s officials showed that the Company had economic reasons for eliminating the work unit where Guz was employed, and that the Company determined other employees were better qualified than Guz to fill other vacancies within the Company. The Court further noted that Guz had “little if any” evidence that Bechtel’s stated reasons for his layoff were false. However, the Court added that even if Bechtel’s officials were found to be “lying,” this still would not be enough for Guz to succeed on his age bias claim. Although evidence of falsity or lying is relevant, “there must be evidence supporting a rational inference that ***intentional discrimination***” based on age or some other illegal motive “***was the true cause*** of the employer’s actions.” The Court in this case found that “Guz’s evidence raised, at best, only a weak suspicion that [age] discrimination was a likely basis for his [layoff].” The Court pointed to several factors to support this conclusion, including: (1) the employee who assumed most of Guz’s former job duties after his layoff was ***older*** than Guz; (2) while two of the other employees retained by Bechtel were six to eight years younger than Guz, there was no independent evidence that Bechtel considered these slight gaps in age as a significant factor in its layoff decision; and (3) the evidence indicated that the employees retained by Bechtel were better qualified than Guz for the remaining openings within Bechtel. The Court therefore ruled that Guz was ***not*** entitled to a trial on his age bias claim, and upheld the summary judgment in favor of Bechtel as to this claim.

Overall, the *Guz* decision should be very helpful to California employers in defending against job bias claims. As for “implied contract” claims, the standards set forth by the Supreme Court will provide valuable guidance for employers, but the effect the *Guz* decision will have on such claims will largely depend on each employer’s individual written policies. **In light of the *Guz* decision, we strongly recommend that employers with handbooks or policy manuals consult labor counsel on how to**

**reduce the Company's exposure to implied contract lawsuits. Your contact at the Firm is ready to assist you in this task.**

## **DISABILITY DISCRIMINATION**

- ***Reasonable Accommodation And "Interactive Process" Requirements.***

The Ninth Circuit U.S. Court of Appeals in San Francisco has issued yet another ruling which drastically expands employees' rights under the federal Americans with Disabilities Act ("ADA"). In *Barnett v. U.S. Air*, the court ruled that the ADA requires an employer to engage in an "interactive process" with a disabled employee to determine what reasonable accommodations are available which would assist the employee to perform the essential functions of the job in question. The decision is particularly disturbing for employers because the Ninth Circuit had previously ruled in favor of the employer in this very same case. However, that earlier decision was recently overturned by an 11-judge panel of the Ninth Circuit in an 8-3 vote.

The plaintiff, Robert Barnett, injured his back while lifting cargo on the job. Barnett used his seniority rights with the company to temporarily transfer to a mail room position. However, Barnett later got "bumped" out of the mail room job by other employees with greater seniority. U.S. Air intended to transfer Barnett back to his cargo room position, even though Barnett's medical restrictions prevented him from performing the essential functions of that job. Barnett proposed several different accommodations, including that he stay in the mail room or that the company restructure his cargo room job or provide him with special lifting equipment. The company never engaged in any meaningful discussion of Barnett's proposals. Barnett sued U.S. Air for violation of the ADA. A lower court judge dismissed Barnett's lawsuit, but the Ninth Circuit has now ruled that Barnett's ADA claim should proceed to a jury trial.

The appellate court found a factual dispute as to whether U.S. Air failed to engage in the "interactive process" required under the ADA. The court quoted regulations by the U.S. Equal Employment Opportunity Commission which outline four steps of the interactive process: "(1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position and; (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer." According to the court, Barnett triggered the

interactive process by telling U.S. Air that he needed accommodations for his disability and by proposing two different accommodations. However, U.S. Air rejected Barnett's proposals without even seriously considering them, and failed to offer any practical alternatives. The court ruled that because there was a factual dispute as to whether U.S. Air satisfied the required interactive process, the case must proceed to a jury trial.

The court also found a factual dispute as to whether Barnett's proposed accommodations were "reasonable" under the ADA. In particular, the court ruled that U.S. Air's seniority system did not *necessarily* prevent the company from being required to transfer Barnett to the mail room on a permanent basis as a "reasonable accommodation." Instead, the court stated that this was yet another factual question that must be decided by a jury. However, the court noted that the seniority system in this case was *not* based on a union contract, and cautioned that other cases have ruled that the ADA does not require an accommodation that conflicts with a union contract. Nevertheless, the court's decision in *Barnett* makes it even more difficult for employers to satisfy all of ADA's requirements and succeed in lawsuits brought under that law.

- ***Poor Performance Unconnected To Disability Dooms ADA Claim.*** Employers who discipline disabled employees for poor job performance face certain risks under the ADA. If the employee's poor performance is connected to a disability, the employer may be required to propose reasonable accommodations designed to improve the employee's performance. On the other hand, the Seventh Circuit recently ruled that an employee whose poor performance was *not* related to her disability could not proceed with her ADA claim. The case arose when a hospital terminated a nurse, Cheryl McPhaul, who suffered from fibromyalgia (a condition similar to chronic fatigue syndrome). The evidence was undisputed that McPhaul was unable to perform the essential functions of her job as a nurse, and McPhaul offered "no medical evidence to show that her performance deficiencies . . . were due to her alleged disability." The court also noted that McPhaul was not even diagnosed with fibromyalgia until a few days *after* her termination. Accordingly, the court ruled that McPhaul was not entitled to a jury trial on her ADA claim. (*McPhaul v. Board of Commissioners*)

## **UNFAIR COMPETITION**

We are pleased to tell you about the favorable outcome of a case handled by the Firm at the trial level. The California Court of Appeal has made it easier for companies to sue disloyal corporate officers for breach of fiduciary duty and unfair competition. The Court ruled that all corporate officers owe a fiduciary duty of loyalty to the corporation as a matter of law, so long as the officer has "some discretion in managing corporate affairs." This fiduciary duty requires a corporate officer not only to act

affirmatively to protect the corporation's interests, but also to avoid doing anything that would injure the corporation, or deprive it of profit or advantage which the corporation might obtain by virtue of the officer's skill and ability. In addition, a competitor company who cooperates in a corporate officer's breach of fiduciary duty, or reaps the benefits of such a breach, may be liable for unfair competition. The Court of Appeal ruled in favor of GAB Robins North America, Inc. (formerly known as GAB Business Services, Inc.) on its claim for breach of fiduciary duty against a former GAB officer, Randy Neal, and its claim for unfair competition against Neal and one of GAB's competitor companies, Lindsey & Newsom Claim Services, Inc. BRG&S founding partner Kenneth R. Ballard and senior counsel John J. Manier were among the attorneys who represented GAB in this lawsuit.

While still an officer of GAB, Neal solicited 17 top employees from GAB's western region to simultaneously defect from GAB and join Lindsey & Newsom. Neal met with each of these 17 employees and offered them raises of an average of 35 percent to leave GAB. Neal kept his plans secret from GAB until all 17 employees agreed to submit their resignations and join Lindsey & Newsom. The Court of Appeal flatly rejected Neal's argument that he did not owe any fiduciary duty to GAB at all. Neal claimed his authority within GAB had "virtually dissolved" because he had been stripped of many of his powers by GAB's corporate office in New Jersey. However, the court ruled that Neal could not relieve himself of his fiduciary duties unless and until he *resigned* from GAB. Because Neal committed his disloyal actions while he was still a corporate officer, the court found that Neal could be held liable to GAB for breach of fiduciary duty. In addition, the court stated that Lindsey & Newsom may have committed unfair competition because it hired the 17 employees solicited by Neal, and it thereby reaped the benefits of Neal's disloyal conduct. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*)

## **LABOR RELATIONS**

The outcome of the recent presidential election – which is still “too close to call” as we go to press – may determine whether the National Labor Relations Board continues to issue rulings favorable to labor unions. Unions are anxious to step up their organizing efforts, since union membership has dropped to just 10 percent of the American workforce in recent years. The NLRB's decisions have a major impact on the overall success or failure of union organizing campaigns. Three of the five seats on the NLRB, as well as the powerful position of NLRB General Counsel, will need to be filled by the time the new president takes office on January 20, 2001. It is expected that the Board will stay on a pro-union course if Vice President Al Gore wins the election, but that the Board may become more business-friendly if Texas Governor George W. Bush

assumes the presidency and appoints a Republican majority to the Board. A pair of recent decisions by the Board reflect its current pro-union leanings.

- ***Organizing Of Temporary Employees.*** A recent ruling by the NLRB will make it easier for unions to organize temporary employees. By a 3-1 vote, the Board ruled that temporary and regular employees may be included in the same collective bargaining unit *without* the advance permission of the employer and the temporary agency, if the employer and the temp agency qualify as “joint employers.” The Board overruled its own 1990 decision in the *Lee Hospital* case, which had required prior consent of the “user” employer and all “supplier” employers. According to the Board, multiemployer consent requirements do not apply to “units that combine jointly employed and solely employed employees of a single user employer,” although such units still would have to satisfy the “community of interests” analysis. The employer and the temp agency will have to bargain jointly with the union(s) representing the bargaining unit under the Board’s ruling. It is estimated that the percentage of temps in the workforce has doubled since 1990, to 2.2 percent. Business groups are concerned that the Board’s decision will make it more complicated and less cost-effective to use temps, especially for unionized employers. (*M.B. Sturgis Inc.*)

- ***Subpoena Of Anti-Union Videotape Upheld.*** The NLRB has allowed one of its regional directors to proceed with a document subpoena against Projections Inc., a firm that prepared an anti-union videotape which TCI Cablevision purchased to show to its employees during a union organizing campaign. The union claimed that certain statements on the tape violated the National Labor Relations Act on the grounds that the statements contained threats of reprisal or promises of benefits to employees. The Board agreed and stated that the videotape was relevant to the firm’s potential liability under the National Labor Relations Act as an agent of TCI. The firm will therefore be required to turn over the videotape. (*Projections Inc.*)

- ***Injunctions Against Labor Strikers.*** As we have previously reported in the UPDATE, a new California law which went into effect January 1, 2000 (AB 1268) makes it much more difficult for employers to obtain injunctions against labor strikers, even when they engage in violence or threaten to do so. One of these requirements is that the employer must demonstrate that the local police or other peace officers are either unable or unwilling to provide adequate protection. In a case which illustrates the wide reach of AB 1268, the California Court of Appeal recently overturned an injunction because the requirements of AB 1268 were not satisfied. The lawsuit was brought by Gigante U.S.A., a company that operates a chain of retail food stores. The United Food and Commercial Workers Union picketed one of Gigante’s newly-opened stores in May 1999. Gigante obtained an injunction which allowed only two picketers at a time to

come within 20 feet of the store's entrance, and barred all picketers from obstructing persons from entering the parking lot and store, from stationing pickets in a fire lane in front of the store and from threatening or assaulting Gigante's employees and customers. However, the union sought to overturn the injunction after AB 1268 went into effect. The trial court ruled in favor of Gigante, and stated that sheriff's deputies "may be unable to provide adequate protection to [Gigante's] property interest in customer access to the store." However, the Court of Appeal found this evidence was not enough to support the injunction under AB 1268. The court noted that sheriff's deputies had been able to keep things under control and that there was no evidence of injuries or property damage. Although there was an incident where protesters allegedly tried to grab the gun of a store security guard, shoved and pulled him and tore his shirt, the court emphasized that sheriff's deputies blocked the protesters and the guard was able to keep them from getting his gun. The court therefore found no evidence that law enforcement was unable or unwilling to provide adequate protection, and overturned the injunction. (*United Food and Commercial Workers Union, Local 324 v. Superior Court*)

## **ERGONOMICS STANDARDS**

Earlier this month, the federal Occupational Safety and Health Administration ("OSHA") formally implemented new ergonomics regulations, which are scheduled to take effect January 16, 2001. These standards will affect 102 million employees at 6 million work sites nationwide. They cover a wide variety of jobs that usually require lifting, repetitive arm movements or use of computer keyboards. OSHA estimates that 18 million jobs will have to be "fixed" over the next 10 years to conform to the new standards. Employers across the country will now be required to take steps to prevent employees from suffering musculoskeletal disorders, or repetitive strain injuries, such as carpal tunnel syndrome or back injuries caused by repetitive motion on the job. In addition, employers must advise their employees of possible injury risks and the importance of prompt reporting of symptoms. However, the federal OSHA standards stop short of requiring employers to actually change the way work is done, *unless* an employee is hurt on the job or has symptoms of a work-related injury. Business groups are vehemently opposed to the new federal standards and have already filed a lawsuit in a Washington, D.C. federal court to block the regulations. The business groups contend that the new ergonomics standards are a political payoff to labor unions and will cost employers a whopping **\$125.6 billion a year** on training, administration and workplace alterations. The federal government estimates that employers will spend "only" \$4.5 million in annual compliance costs, and that these costs will be offset by \$9.1 billion per year in savings on workers' compensation costs, increased productivity and worker savings. These new federal standards are in *addition* to the state ergonomics regulations passed in 1997 by Cal-OSHA, as reported in previous editions of the UPDATE.

\* \* \*

The Ballard, Rosenberg, Golper & Savitt Employment Law Update is published as a service for clients and business associates of the Firm. While every effort is made to ensure accuracy, it is not intended to serve as legal advice. Copyright 2000, Ballard, Rosenberg, Golper & Savitt LLP. All rights reserved. Additional copies of this publication are available upon request.

Editorial Staff: Richard S. Rosenberg, Jeffrey P. Fuchsman, John J. Manier, Adrian J. Guidotti and John P. Schaedel.