

or accident. It should be noted, however, that an employer may deduct from an exempt employee's salary for a sick day or days if the exempt employee has used up his or her allotted paid sick days. In no event, however, can an employer deduct any wages from the salary when the exempt employee worked part of the day.

According to the California Labor Commissioner, if an employer requires ("directly or indirectly") that an exempt employee perform work on any day when he has ostensibly absented himself for a full day, the exempt employee's salary may not be reduced. In the case that was presented to the Labor Commissioner, the employee picked up voice-mail and e-mail for approximately 10 to 15 minutes each day during his entire vacation week. In his opinion letter to the employer, the Labor Commissioner noted that the employer could dock the pro-rata amount of the exempt employee's salary for the full-day absence, *unless* the employer requires that the exempt employee perform some work on a day the exempt employee absented himself. In the fact situation presented to the Labor Commissioner there was no indication whether the employer requested or required the employee to pick-up voice mails and e-mails while on vacation, or whether the employee did so on his own initiative.

Court Finds Employees Should Have Been Paid For Time Spent Getting Into and Out Of Protective Gear

Meat packing employees of IBP, Inc., the world's largest producer of fresh beef, pork and related products, filed a class action under the federal Fair Labor Standards Act (FLSA) seeking compensation for the time spent "donning and doffing"

protective gear that they were required to wear while working in the meat packing facilities. The Court of Appeals for the Ninth Circuit - in *Alvarez v. IBP, Inc.* - agreed that the employees were entitled to compensation for the time spent putting on and taking off protective gear that was unique to their work at IBP (e.g., liquid-repelling sleeves, aprons and leggings, Kevlar gloves, mesh aprons, etc.) and for time walking between the dressing area and the work station, but *not* for the minimal time spent donning and doffing non-unique protective gear such as hard hats and safety goggles. Since IBP was on notice of the FLSA's requirements, its violation was "willful," resulting in an extension of the applicable statute of limitations period from two to three years and an award of liquidated damages.

Employee Did Not "Trespass" By Sending Mass E-mails To Former Employer

Former Intel engineer Kourosh Hamidi formed a group entitled "Former and Current Employees of Intel" ("FACE-Intel") to disseminate information and views critical of Intel's employment and personnel policies and practices. Over a 21-month period, Hamidi sent as many as 35,000 messages to e-mail addresses at Intel. The trial court granted Intel's request to permanently enjoin Hamidi "from sending unsolicited e-mail to addresses on Intel's computer systems," and the Court of Appeal affirmed. The California Supreme Court in *Intel Corp. v. Hamidi* reversed in a 4-to-3 vote, declining to extend the common law tort of trespass to property to "an otherwise harmless electronic communication whose contents are objectionable."

Good Cause Was Not Required To Terminate Independent Contractors Of Insurance Company

Several State Farm Insurance agents alleged that the company had terminated them in breach of their independent contractor agreements. The district court granted summary judgment in favor of State Farm, and the Court of Appeals for the Ninth Circuit in *Appling v. State Farm Mut. Auto. Ins. Co.* agreed, holding that the termination provision in the contracts did not require good cause and, in fact, expressly permitted termination at will by either party. The Ninth Circuit refused to allow the agents to introduce oral evidence concerning the written at-will provisions in the contract since the agents sought to vary rather than merely interpret the terms of a written contract. The court further held that State Farm had not violated the "implied covenant of good faith and fair dealing," because the covenant cannot be used to impose substantive limits on the contracting parties beyond those incorporated in the specific terms of the agreement itself.

California Supreme Court Decision Addresses Discrimination In Workers Compensation Context

For twenty-five years, employers have been hounded by a California Supreme Court decision that defined discrimination under the workers compensation laws as any action that "adversely affects" an employee with a work-related injury. This summer, however, the Supreme Court corrected this misapplication of the law. With barely a backward glance at its 1978 *Judson Steel Corp.*

opinion, the Court concluded in *Department of Rehabilitation v WCAB (Lauher)* that an employee - who was forced to use his accumulated sick and vacation leave for the time he was away from work seeing his physician for his work-related injury - was not treated differently than any other employee who visited his or her doctor during the workday. Consequently, the employee's Labor Code § 132a discrimination claim was rejected by the Court because, "although his injury was industrial, nothing suggests his employer singled him out for disadvantageous treatment because of the industrial nature of his injury."

Unfortunately, the court refused to reverse, or to even address, its previous ruling in *Judson Steel Corp.* where the court found that the employer discriminated against an employee who lost his seniority (just as any other employee would) because he was off work for over 12 months due to an injury at work. Given the Court's newest decision, however, it appears that employers can safely assume that they are *not* discriminating against an employee with a work injury merely because they apply their rules and policies to all employees equally. Given that *Judson Steel Corp.* is still on the books, however, employers should insure that their policies are indeed applied equally, including the exceptions. For example,

the misguided and overly expansive *Judson Steel Corp.* decision might have been avoided if the employer had simply asked the union, as it had on several other occasions, to extend its seniority rules for the injured employee.

EDD To Adopt Regulations Pertaining To Paid Family Care Leave Program

The Employment Development Department ("EDD") is proposing to adopt regulations for the new Paid Family Care Leave Program, which is also called the Family Temporary Disability Insurance ("FTDI") program. The law was enacted in September 2002; it becomes operative January 1, 2004, for leaves commencing on or after July 1, 2004. It provides for up to six weeks of partial wage replacement benefits within any 12-month period when employees take leave from work to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a new child. For further information, contact Lewis Janowsky or Marion Quesenbery of *Rynn & Janowsky, LLP*. Required notice forms to employees can be downloaded from EDD website, www.edd.ca.gov/airep/aipub.htm.

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