

Labor and Employment Update For 2007 And Preview For 2008

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OVERVIEW

- 2007 Significant Case Review
- New Statutes & Regulations
- Other Developments to Watch in 2008

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2007 CASE REVIEW

- Wages For Missed Meal & Rest Breaks
- Class Action Issues
- Business Expense Reimbursements
- Bonuses Tied To Company Expenses
- A Disabled Employee's Burden Of Proof
- A Sexual Harasser's Burden Of Proof
- A "Bizarre" Standard For FMLA Notice
- Company-to-Company Covenants Not To Compete Clauses
- The Right To Control & Independent Contractors
- USERRA Releases
- Waiting Time Penalties

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Wages And Not Penalties

- One additional hour of pay at the employee's regular rate of pay for failing to provide a meal or rest break under Labor Code 226.7(b) is a wage and not a penalty
- Impact: three-year statute of limitations

Murphy v. Kenneth Cole, 40 Cal.4th 1094 (2007)

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Class Actions: Employment Class Action Waiver Found Unenforceable

- Putative class action for unpaid overtime
- Circuit City's Dispute Resolution Rules and Procedures:
"The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action"

Gentry v. Sup. Ct. (Circuit City Stores), 42 Cal.4th 443 (2007)

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Class Actions: Employment Class Action Waiver Found Unenforceable

- Motion to compel arbitration granted at the trial court level, but pre-*Discover Bank* - App. Ct. Affirmed
- Key Concern: Would a class action waiver lead to a de facto waiver of statutory rights given modest amounts of individual recovery in wage and hour class actions?

Gentry v. Sup. Ct. (Circuit City Stores), 42 Cal.4th 443 (2007)

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Class Actions: Employment Class Action Waiver Found Unenforceable

- The trial court must consider:
 - the modest size of the potential individual recovery
 - the potential for retaliation against members of the class
 - the fact that absent members of the class may be ill informed about their rights
 - other real world obstacles to the vindication of a right to, e.g. overtime pay through individual arbitration

Gentry v. Sup. Ct. (Circuit City Stores), 42 Cal.4th 443 (2007)



Class Actions: Another Employment Class Action Waiver Found Unenforceable (After Gentry)

- Motion to compel arbitration in misclassification putative class action of salaried retail managers
- Dispute Resolution Agreement provided:
 - “neither you nor we may join or participate in a class action or representative action” and that “you and we agree that an arbitration firm may not arbitrate a Covered Claim as a class action or representative action”

Murphy v. Check 'N Go Of California, Inc., 156 Cal.App.4th 138 (2007) (1st DCA)



Class Actions: Another Employment Class Action Waiver Found Unenforceable (After Gentry)

- Invoking *Discover Bank* and *Gentry*, the Court of Appeal found the class action waiver “patently one-sided”
- Unconscionable:
 - Contract of adhesion
 - Agreement received through interoffice mail (not told it was optional)
 - Advice to consult attorney not persuasive

Murphy v. Check 'N Go Of California, Inc., 156 Cal.App.4th 138 (2007) (1st DCA)



Class Actions: Pre-Class Action Certification Disclosure Of Contact Information And Names

- Affirming grant of motion to compel names, addresses, and telephone numbers of putative class members in wage and hour class action

Belaire-West Landscape, Inc. v. Sup. Ct. (Rodriguez), 49 Cal.App.4th (2007)



Class Actions: Pre-Class Action Certification Disclosure Of Contact Information And Names

- Trial court ordered that notice be sent requiring putative class members to affirmatively object to having their contact information disclosed:

“Plaintiffs’ counsel has already provided your names. ... You may elect not to provide your address and/or telephone number to Plaintiffs’ counsel on the grounds of privacy. Plaintiffs’ counsel would like to have your address and telephone number to help in their investigation.”

Belaire-West Landscape, Inc. v. Sup. Ct. (Rodriguez), 49 Cal.App.4th (2007)



Class Actions: Pre-Class Action Certification Disclosure Of Contact Information And Names

- Court acknowledged privacy interests in the contact information
- But court determined that information “was not particularly sensitive” and “current and former ... employees [can] reasonably be expected to want their information disclosed to a class action plaintiff who may ultimately recover for them unpaid wages that they are owed”

Belaire-West Landscape, Inc. v. Sup. Ct. (Rodriguez), 49 Cal.App.4th (2007)



Class Actions: Pre-Class Action Certification Disclosure Of Contact Information And Names

- Options to Consider:
 - Conducting an early interaction with current and former employees and obtain their declarations prior to commencement of discovery
 - Ensure that the notice represents employer's position and encourages responses from recipients
 - If the class is small, try to fashion an agreement where class members must opt in to having their information disclosed



Class Actions: Certification Of Meal and Rest Period Claims

- *Brinker Restaurant Corp. v. Sup. Ct.*: Court of Appeal found the trial court's order certifying a class in a meal and rest break class action was erroneous because:
 - Order rests on improper criteria and incorrect assumptions with respect to the rest break claims
 - Order relies on improper criteria with respect to rolling 5-hour meal period claims

Brinker Restaurant Corp. v. Sup. Ct., 2007 Cal. LEXIS 12247 (2007) (vacated and remanded)



Class Actions: Certification Of Meal and Rest Period Claims

- *Brinker Restaurant Corp. v. Sup. Ct.*: Court of Appeal found the trial court's order certifying a class in a meal and rest break class action was erroneous because:
 - Order rests on incorrect assumption that meal period claims were based on the theory that the employer had a duty to ensure that its hourly employees took the meal periods it provided to them
 - Trial court incorrectly assumed it did not have to examine the elements of the employees' off the clock claims

Brinker Restaurant Corp. v. Sup. Ct., 2007 Cal. LEXIS 12247 (2007) (vacated and remanded)



Class Actions: Certification Of Meal and Rest Period Claims

- "At the request of the Court of Appeal ... [t]he cause is transferred [back] ... Fourth Appellate District ... with directions to vacate its opinion and reconsider the matter as it sees fit"
- In other words, the Court of Appeal is evaluating its decision further

Brinker Restaurant Corp. v. Sup. Ct., 2007 Cal. LEXIS 12247 (2007) (vacated and remanded)



Labor Code 2802 Expense Reimbursement: Lump Sum Compensation For Business Expenses

- Outside sales representatives sued seeking indemnification for costs of using their own cars for work related duties
- Labor Code 2802 provides that an "employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her [employment] duties"
- Employer argued it had satisfied obligation to pay for business expenses by paying the outside sales representatives higher base salaries and higher commission rates

Gattuso v. Harte-Hanks Shoppers, Inc., ___ Cal.4th ___, 67 Cal.Rptr.3d 468 (2007)



Labor Code 2802 Expense Reimbursement: Lump Sum Compensation For Business Expenses

- Holding: An employer may satisfy its statutory reimbursement obligation by paying employees enhanced compensation in the form of increases in base salary or increases in commission, or both
- However, there must be a means or method to apportion the enhanced compensation to determine what amount is being paid for labor performed and what amount is reimbursement for business expenses
- The amounts allocated to reimbursement must be at least reasonable, if not absolutely compensatory

Gattuso v. Harte-Hanks Shoppers, Inc., ___ Cal.4th ___, 67 Cal.Rptr.3d 468 (2007)



Labor Code 2802 Expense Reimbursement: Lump Sum Compensation For Business Expenses

Types of Reimbursement Methods

- **Actual expense method** is the most accurate, but the most burdensome for employee and employer.
- **Mileage reimbursement method** also permitted, but employee may challenge sufficiency of the reimbursement to capture complete reimbursement.
- **Lump-Sum Payment**, where an employer pays a fixed amount, is also permitted so long as it is "sufficient to provide full reimbursement for actual expenses necessarily incurred."

Gattuso v. Harte-Hanks Shoppers, Inc., ___ Cal.4th ___,
67 Cal.Rptr.3d 468 (2007)



Wages/Benefits: Employers And Employees Can Share In Profits

- Ralph's Incentive Compensation Plan: Bonuses tied to profitability of individual stores, taking into account expenses such as workers' compensation claims, cash shortages, merchandise shortages, utilities, etc.

Prachasaisoradej v. Ralphs Grocery Co., 42 Cal. 4th 217 (2007)



Wages/Benefits: Employers And Employees Can Share In Profits

- Question Presented:
Does an employee bonus plan based on a profit figure that is reduced by a store's expenses, including the cost of workers' compensation insurance and cash and inventory losses, violate statutes prohibiting an employer from shifting costs to employees through deductions from wages and earnings?

Prachasaisoradej v. Ralphs Grocery Co., 42 Cal. 4th 217 (2007)



Wages/Benefits: Employers And Employees Can Share In Profits

- No. Ralph's Plan is not "illegal .. simply because, pursuant to normal concepts of profitability, ordinary business expenses ... were figured in, along with such other store expenses ... to determine the store's profit, upon which the supplementary incentive compensation payments were calculated. By doing so, Ralphs did not illegally shift those costs to employees."

Prachasaisoradej v. Ralphs Grocery Co., 42 Cal. 4th 217 (2007)



Disability Discrimination: Disabled Employees Must Show They Are Qualified To Perform The Job

- FEHA – like the ADA – requires disabled employees to prove in a discrimination claim that they have the ability to perform the essential functions of the job with or without reasonable accommodation:

"This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations." Cal. Gov't Code § 12940(a)(1)

Green v. State of California, 42 Cal. 4th 254 (2007)



Disability Discrimination: Disabled Employees Must Show They Are Qualified To Perform The Job

- "Drawing distinctions on the basis of physical or mental disability is not forbidden discrimination *in itself*. Rather, drawing these distinctions is prohibited *only if* the adverse employment action occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation."

Green v. State of California, 42 Cal. 4th 254 (2007)



Sexual Harassment: What is Severe and Pervasive Sexual Harassment

- County employee alleged, among other things, sexual harassment against a county board member (non-supervisor) for:
 - 1st Incident (Jan. 2003)
Comment that plaintiff was the “aging nun”

Mokler v. County of Orange, ___ Cal.App.4th ___, 2007 Cal.App.LEXIS 1933 (2007)



Sexual Harassment: What is Severe and Pervasive Sexual Harassment

- 2nd Incident (Feb. 2003):
“Did you come here to lobby me?”
“These women are lobbying me.”
“Nice legs”
Looking plaintiff up and down
- 3rd Incident (March 2003):
Commenting on plaintiff’s appearance
Asking for plaintiff’s address
Rubbing arm against breast
Profane racial comment

Mokler v. County of Orange, ___ Cal.App.4th ___, 2007 Cal.App.LEXIS 1933 (2007)



Sexual Harassment: What is Severe and Pervasive Sexual Harassment

- Test: Whether the conduct is sufficiently pervasive to create a hostile or offensive work environment
- Plaintiff must prove interference with work performance, psychological well-being seriously affected, and actually being offended

Mokler v. County of Orange, ___ Cal.App.4th ___, 2007 Cal.App.LEXIS 1933 (2007)



Sexual Harassment: What is Severe and Pervasive Sexual Harassment

- No sexual harassment found:

“Acts of harassment fall short of establishing a pattern of continuous, pervasive harassment” and “taken as a whole, the foregoing acts demonstrate rude, inappropriate, and offensive behavior,” not sexual harassment

Mokler v. County of Orange, ___ Cal.App.4th ___, 2007 Cal.App.LEXIS 1933 (2007)



FMLA Leave: Bizarre Behavior May Serve As Constructive Notice Of Need For FMLA

- Triable issue of fact whether employer was placed on constructive notice of plaintiff’s need for FMLA leave:
 - Good employee with no record of misconduct
 - Agitation and cursing after stray dog entered work space; spraying room deodorizer afterward
 - Yelling and cursing at supervisor two days later over the incident

Stevenson v. Hyre Electric Co., ___ F.3d ___, 2007 WL 2990937 (7th Cir. 2007)



FMLA Leave: Bizarre Behavior May Serve As Constructive Notice Of Need For FMLA

- Triable issue of fact whether employer was placed on constructive notice of plaintiff’s need for FMLA leave:
 - Filing OSHA claim regarding stray animals
 - Calling the police after belongings were moved to a different area to accommodate fear of stray animals
 - Calling in sick multiple times afterward

Stevenson v. Hyre Electric Co., ___ F.3d ___, 2007 WL 2990937 (7th Cir. 2007)



FMLA Leave: Bizarre Behavior May Serve As Constructive Notice Of Need For FMLA

- "Lengthy encounters of yelling and swearing at one's superiors so severe that a company locks out an employee with a previously unblemished record for safety concerns, coupled with employee's calling the police because her belongings have been moved to another desk, are undeniably unusual and could be viewed by a trier of fact as unusual enough to give [employer] notice of a serious mental health condition"

Stevenson v. Hyre Electric Co., ___ F.3d ___, 2007 WL 2990937 (7th Cir. 2007)



Restrictive Covenants: Broad No-Hire Contract Unenforceable

- Short term computer consulting agreement between plaintiff (computer consulting company) and defendant (buyer of services):
 - "If, during the term of, or within (12) months after the termination of ... this agreement, buyer hires directly, or indirectly contracts with, any of seller's personnel for the performance of systems engineering and/or related services hereunder, buyer agrees to pay seller sixty percent (60%) of either the new annual compensation payable to such personnel or fees paid to ... as liquidated damages."

VL Systems, Inc. v. Unisen, Inc., 152.App.4th 818 (2007)



Limited No-Hire Contract Possibly Enforceable

- B&P 16600 applied:
 - Employee who went to work for defendant was not even working for plaintiff at the time of the contract
 - Employee did not provide services under the contract
- "Perhaps a more narrowly drawn clause limited to soliciting employees who had actually performed work for the client might pass muster."

VL Systems, Inc. v. Unisen, Inc., 152.App.4th 818 (2007)



Independent Contractors: Agreeing To Independent Contractor Status Is Not The Same As Being One

- Affirming verdict after class action trial that FedEx's drivers were employees, and not independent contractors
- "FedEx's control over every exquisite detail of the drivers' performance ... supports the ... conclusion that the drivers are employees, not independent contractors."

Estrada v. FedEx Ground Package Sys., Inc., 154 Cal.App.4th 1 (2007) (review denied Nov. 28, 2007)



Independent Contractors: Agreeing To Independent Contractor Status Is Not The Same As Being One

- FedEx's Pick-up and Delivery Contractor Operating Agreement:

Truck drivers are "independent contractor, and not "employee[s] ... for any purpose"

FedEx officer or employee "shall have the authority to impose any term or condition contrary to this understanding"

Estrada v. FedEx Ground Package Sys., Inc., 154 Cal.App.4th 1 (2007) (review denied Nov. 28, 2007)



Independent Contractors: Agreeing To Independent Contractor Status Is Not The Same As Being One

- Under "control of details" test (*Borello* case), FedEx failed to establish independent contractor status because FedEx controlled color of driver's socks:
 - Style of hair (no ponytails for men)
 - Look of driver's uniforms
 - Use of specific scanning equipment and forms
 - Required attendance at regular times to sort and pack

Estrada v. FedEx Ground Package Sys., Inc., 154 Cal.App.4th 1 (2007) (review denied Nov. 28, 2007)



USERRA Releases

- Judgment against employee for wrongful termination and breach of contract reversed
- "We determine that because USERRA directs that its provisions may not be eliminated by contract, the release of rights in the severance agreement may not be enforced to the extent it deals with the claims of termination based on plaintiff's membership in the military or his military service"

Perez v. Uline, Inc., ___ Cal.App.4th ___, 2007 Cal.App.LEXIS 1996 (December 6, 2007)



Waiting Time Penalties

- Putative class action for waiting time penalties alone (underlying wages were paid in full on the next scheduled pay day)
- Court of Appeal upheld trial court's order striking portions of the complaint seeking penalties beyond the one-year statute of limitations
- But "we agree with plaintiff ... [that] section 203 applies to actions for waiting time penalties sought in conjunction with back wages."

McCoy v. Sup. Ct. (Kimco Staffing Serv., Inc.), ___ Cal.App.4th ___, 2007 Cal.App.LEXIS 1946 (November 27, 2007)



NEW STATUTES & REGULATIONS

- Increase In Mileage Reimbursement Rate
- Military Spouses Leave Law
- Revised Sexual Harassment Regulations Adopted
- Computer Software Professionals
- New EEO-1 Reporting Requirements
- New I-9 Forms



Increase In The Mileage Reimbursement

- Effective January 1, 2008, the standard mileage reimbursement rate for business use of a car will be increased to 50.5 cents per mile (up from 48.5 cents per mile)

<http://www.irs.gov/newsroom/article/0,,id=176030,00.html>



Military Leave: New Leave Law For Spouses Of Military Members

- Effective October 2007, provides 10 days of unpaid leave of absence for spouses of U.S. Armed Forces, National Guard, or Army while such personnel are on leave of absence from deployment from military conflict

Cal. Mil. & Vet. Code § 395.10



Military Leave: New Leave Law For Spouses Of Military Members

- Employers of 25 or more employees
- Employee must work an average of 20 hours or more per week
- Employee must provide notice of taking the leave
 - Notice must be no later than two business days after "receiving official notice" that spouse will be on leave from deployment
- "Written documentation" certifying that the spouse will be on leave from deployment

Cal. Mil. & Vet. Code § 395.10



**Sexual Harassment:
New Training Regulations Adopted**

- Training Requirements:
Only supervisors within California must be trained
- Supervisors defined:
Among other things, power to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline
- Covered "Employer":
50 or more employees, contractors, or persons acting as its agents, not all of whom have to be in California
- Length and Frequency of Training:
Two hours (but need not be consecutive) and every two years

C.C.R. § 7288



**Sexual Harassment:
New Training Regulations Adopted**

- Option to expand sexual harassment training:

"The training and education required by this section is intended to *establish a minimum threshold* and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment."
 Cal. Gov't Code § 12950.1(a)



**Changes To Overtime Exemption For
Computer Software Professionals**

- Salary Basis Test:
Effective January 1, 2008, the baseline hourly rate of employees in the "computer software field" who are exempt from overtime will be reduced from \$41 to \$36 per hour.

Labor Code § 515.5



**Changes To Overtime Exemption For
Computer Software Professionals**

- Other Criteria for Exemption (highlights):
 - Intellectual or creative work that requires exercise of discretion and independent judgment
 - Highly skilled and proficient in theoretical and practical application
 - Engaged in duties of one or more of the following:
 - Application of systems analysis
 - Design and development of systems or programs
 - Documentation and testing of programs related to design of software or hardware for operating systems

Labor Code § 515.5



New EEO-1 Reporting Requirements

Report now includes new and revised categories

- Two or more races (biracial)
- "Asian and Pacific Islander" now divided into: (1) "Asian" and (2) Native Hawaiian or other Pacific Islander
- "Black" renamed to "Black and African American"
- "Hispanic" renamed to "Hispanic and Latino" (no race data needed)
- Other changes made to job categories

www.eeoc.gov/ee01



Section D - EMPLOYMENT DATA

Employers at this establishment - Report all permanent full- and part-time employees including operations and on-call basis workers (unless specifically excluded as set forth in the instructions). Enter the appropriate figure in each cell. Blank spaces will be considered as zeros.

Job Categories	Number of Employees (Report employees in only one category)													
	Hispanic or Latino		Not-Hispanic or Latino											
	Male	Female	Male						Female					
White			Black or African American	Hispanic or Latino	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Hispanic or Latino	Asian	American Indian or Alaska Native	Two or more races	
	A	B	C	D	E	F	G	H	I	J	K	L	M	N
Executive/Senior Level Officials and Managers	1	1												
First/Mid-Level Officials and Managers	1	2												
Professionals	2													
Technicians	3													
Sales Workers	4													
Administrative Support Workers	5													
Craft Workers	6													
Operatives	7													
Laborers and Helpers	8													
Service Workers	9													
TOTAL	10													
PREVIOUS YEAR TOTAL	11													

Source: U.S. Department of Labor, Bureau of Labor Statistics, Office of Federal Contract Compliance Programs (OFCCP). (Click on the "Download Reports" link.)

Employment Eligibility Verification Form I-9

- Primary Changes to Documents Establishing Identity and Work Eligibility
- Removed From List A (Sampling):
 - Certificate of U.S. Citizenship
 - Certificate of Naturalization
 - Alien Registration Receipt Card
 - Unexpired Reentry Permit
- Added To List A (Sampling):
 - U.S. Passport (unexpired or expired)
 - Permanent Resident Card (I-551)



Employment Eligibility Verification Form I-9



DEVELOPMENTS TO WATCH IN 2008

- Supreme Court Cases
- Legislation



United States Supreme Court

- *Chamber of Commerce v. Brown*
Whether California may prohibit an employer from using money received from the state to oppose or support unionization efforts?

Chamber of Commerce of the United States v. Lockyer, 463 F.3d 1076 (9th Cir. 2007) (cert. granted Nov. 20, 2007)



United States Supreme Court

- California's Gov't Code §§ 16645.2 and 16645.7 prohibits a private employer receiving state grants or program funds over \$10,000 from using those funds to assist, promote, or deter union organizing
- Chamber successfully challenged statute on NLRA preemption grounds on summary judgment
- 9th Cir. found no NLRA preemption, reversing the district court

Chamber of Commerce of the United States v. Lockyer, 463 F.3d 1076 (9th Cir. 2007) (cert. granted Nov. 20, 2007)



United States Supreme Court

- *Sprint/United Mgt. Co. v. Mendelsohn*:
Must a district court admit so-called "Me Too" evidence?

Mendelsohn v. Sprint/United Mgt. Co., 466 F.3d 1223 (10th Cir. 2007) (cert. granted Oct. 15, 2007)



United States Supreme Court

- Plaintiff claimed age discrimination after being terminated as part of a RIF
- Plaintiff sought to establish pervasive atmosphere of age discrimination with “me too” evidence -- evidence that other employees – supervised by a different manager – felt they were discriminated as well
- At trial, district court excluded “me too” evidence because employees were not similarly situated
- 10th Cir. reversed

Mendelsohn v. Sprint/United Mgt. Co., 466 F.3d 1223 (10th Cir. 2007) (cert. granted Oct. 15, 2007)



California Supreme Court

- *Harris v. Sup. Ct. (Liberty Mutual Ins.)*: Whether insurance company’s claims adjusters were exempted from overtime compensation under Wage Order 4-2001?

Harris v. Sup. Ct. (Liberty Mutual Ins.), 156 Cal.App.4th 164 (2007) (review granted Nov. 28, 2007)



California Supreme Court

- Class action by insurance adjusters, seeking overtime compensation
- Court of Appeal found that adjusters’ work falls on the production side of the administrative work/production dichotomy
- Adjusters performed day-to-day tasks such as investigations, making coverage determination, and negotiate settlements
- No work at the management policy level

Harris v. Sup. Ct. (Liberty Mutual Ins.), 156 Cal.App.4th 164 (2007) (review granted Nov. 28, 2007)



Federal Legislation To Watch

- The Non-Discrimination Employment Act (H.R. 3685)

Prohibits workplace discrimination based on sexual orientation

Already prohibited in California



Legislation To Watch

- Familial Status As A Protected Group (S.B. 836)

Vetoed by Governor in 2007



Labor and Employment Update For 2007 And Preview For 2008

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RECON 2008

A YEAR LATER -- IMPACT OF E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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ACC AMERICA
Association of Corporate Counsel
Southern California Chapter (ACC/SCC)
December 12, 2007

Agenda

- Overview of Amended FRCP
 - Rule 34(a)** – Electronically stored information (“ESI”) expressly recognized as document category
 - Rule 16** – Early court orders about discovery of ESI
 - Rule 26** – Mandated early discussion and disclosure of ESI; two-tiered approach to the production of accessible v. inaccessible ESI; cost-shifting
 - Rule 37** – Sanctions and good faith
- Case Law Interpreting and Applying Amended FRCP
- Lessons Learned: Action Items to Ensure Compliance with Amended FRCP Going Forward

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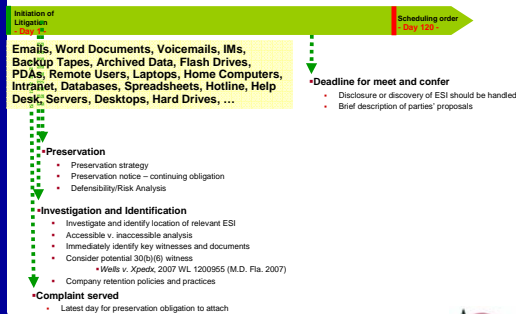
Rules 16 and 26(f)

Mandate Early Discussion of ESI And Impose A Compressed Timeline On Parties

- Amended Rule 16:** Scheduling orders may address both “disclosure or discovery of electronically stored information” and the parties’ agreement regarding the assertion of “claims of privilege or of protection as trial preparation material after production” of ESI.
- Amended Rule 26(f):** Parties must confer “as soon as practicable” – typically within the first four months of litigation – to develop a proposed discovery plan that considers “any issues” relating to the preservation, disclosure, and discovery of ESI.

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COMPRESSED TIMELINE



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Discussion Topics for a Rule 26(f) Conference

- What ESI is available and where it resides
- Ease/difficulty and cost of producing information
- Schedule and forms of production
 - Williams v. Sprint/United Management Co.*, 2006 WL 3691604 (D. Kan. Dec. 12, 2006)
 - DE Technologies, Inc. v. Dell, Inc.*, 2007 WL 128966 (W.D. Va. Jan. 12, 2007)
- Preservation of information
- Agreement about privilege or work-product protection

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Preparing for the Rule 26 Conference: What Is ESI?

- Columbia Pictures Ind. v. Bunnell*
2007 U.S. Dist. Lexis 46364 (C.D. Cal. Jun. 17, 2007)
- Plaintiffs seek Server Log Data that includes user IP addresses and the dates and times of user requests
- RAM = Random Access Memory - a form of “temporary storage”
- Plaintiff's Position:** Server Log Data is ESI because the data is copied to the RAM while website user requests are processed
- Defendant's Position:** Server Log Data is not ESI because the data has not been stored on the website or fixed in tangible form such as on hard drive

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Columbia Pictures Ind. v. Bunnell, 2007 U.S. Dist. Lexis 46364
(C.D. Cal. Jun. 17, 2007)

Caveat:

- This ruling “should not be read to require litigants in all cases to preserve and produce ESI that is temporarily stored only in RAM.”
- This decision is based on the facts of the particular case.

Lesson Learned: ESI is a flexible term that will continue to develop and evolve as technology changes.

**Preparing for the Rule 26 Conference:
What ESI Must Be Produced?**

- **Two-Tiered Approach:** “A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost.” [Rule 26(b)(2)(B)]
- **Accessible Data – Identify, Preserve, Search and Produce**
- **Inaccessible Data – Identify and Preserve; Search and Produce Only Upon Showing Of Good Cause**

**What ESI Is Accessible v.
Inaccessible?**

- **No bright line test:** The producing party bears burden of showing inaccessibility
- Media-based analytical approach to ESI format plus case-by-case analysis of other data factors

**What ESI Formats Have Generally Been
Treated As Accessible v. Inaccessible?**

- | <u>“Accessible” Format</u> | <u>“Inaccessible” Format</u> |
|--|---------------------------------------|
| 1. Active On-Line Data (e.g., hard drives) | 4. Back-up Tapes |
| 2. Near-Line Data (e.g., optical disks) | 5. Erased, Fragmented or Damaged Data |
| 3. Off-Line Storage/Archives (e.g., removable optical disks or magnetic tape media that can be labeled and stored) | |
- W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007)

**If ESI Is In A Reasonably Accessible Format
Is It Always Considered Accessible? NO**

Courts consider other data factors on a case-by-case basis

- Method of storage of data
 - Index
 - Search function
- *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007)

**When Will Courts Order The
Production of “Inaccessible” ESI?**

- When “good cause” exists
- Courts apply a balancing test 
- Requesting party bears burden of showing “good cause”
- *Disability Rights Council of Greater Wash. v. Wash. Metro Area Transit Auth.*, 242 F.R.D. 139 (D.D.C. 2007); *W.E. Aubuchon*, 245 F.R.D. 38.

When Will Courts Allocate Costs Under Rule 26(b)(2)(B)?

- No mandatory cost-shifting
- Require showing of inaccessibility
 - **Peskoff v. Faber, 240 F.R.D. 26 (D.D.C. 2007)** ("cost-shifting does not even become a possibility unless there is first a showing of inaccessibility")
 - **Caveat: Quinby v. WestLB AG, 2006 WL2597900 (S.D.N.Y. Sept. 2006)** (if party creates its own burden/expense by converting foreseeably discoverable ESI to inaccessible format, then it is not entitled to shift costs of restoring and searching)

Cost Allocation Under Rule 26(b)(2)(B)

- Remember The Seven Factors Under Zubulake
 - Request is specifically tailored to discover relevant information?
 - Information available from other sources?
 - Total cost of production compared to the amount in controversy?
 - Total cost of production compared to the parties' relative resources?
 - Relative ability of each party to control costs and its incentive to do so?
 - Importance of the issues at stake in the litigation?
 - Relative benefits to the parties of obtaining the information?

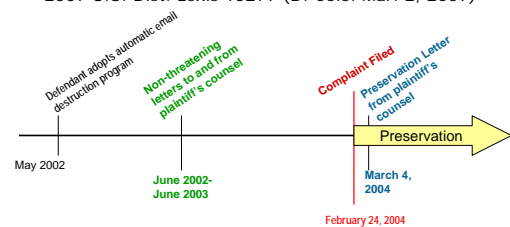
Lesson Learned: Understand the sources and location of electronic data and document your decisions.

Preparing for the Rule 26 Conference: Don't Forget Rule 37(e) "Safe Harbor"



- "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of electronic information system."
- Narrow exception: "under these rules"

Cache Le Poudre v. Land O' Lakes, Inc. 2007 U.S. Dist. Lexis 15277 (D. Colo. Mar. 2, 2007)



When Will Courts Impose Sanctions?

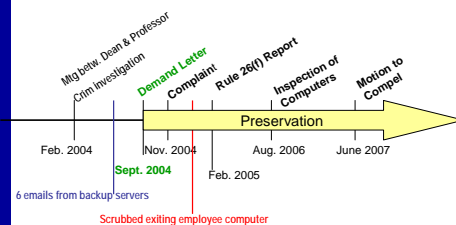
Cache Le Poudre v. Land O' Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007)

- A party's duty to preserve evidence in advance of litigation must be predicated on something more than an equivocal statement of discontent.
- Demand letters must be explicit and unequivocal for preservation obligation to be triggered. They cannot "hint[]" at the possibility of non-litigation resolution."
- However, once preservation obligation attaches, counsel cannot "turn a blind eye to a procedure he should realize will adversely impact" the discovery process.

Holding: No sanctions awarded based upon timing of "litigation hold," but monetary sanctions awarded for destruction of data after hold in place.

Rule 37(f) Safe Harbor Requires Routine System and Some Affirmative Action to Preserve Data

Doe v. Norwalk Com. College, 2007 WL 2066497 (D. Conn. July 16, 2007)



When Does The “Safe Harbor” Apply?

Doe v. Norwalk Com. College, 2007 WL 2066497 (D. Conn. Jul. 16, 2007)

Application of Rule 37(f) “Safe Harbor” Requires:

1. Party must “act affirmatively”
2. Party must have “one consistent, ‘routine’ system in place”

Rule 37(f) applies here? NO.

Holding: Sanction imposed in the form of adverse inference instruction against Defendant.



What Standard Applies To The Imposition Of Sanctions?

Escobar v. City of Houston, 2007 U.S. Dist. LEXIS 72706 (S.D. Tex. September 29, 2007)

- No adverse inference because no showing that relevant ESI was destroyed or that destruction occurred in bad faith.
- Sanction not proper if ESI destroyed in routine operation of computer system, and no evidence of bad faith in operation of system.



BUT *United Medical Supply Company v. United States*, 77 Fed. Cl. 257 (Fed. Cl. June 27, 2007)

- Bad faith is not required to impose sanctions, noting that Rule 37(f)'s “limited ‘good faith’ exception to the imposition of sanctions belies the notion such sanctions should be imposed only upon a more tradition finding of bad faith.”

Lesson Learned: Implement one, consistent document retention policy and act affirmatively to audit that policy.



Complying with FRCP Amendments: Action Items

- Form E-Discovery Response Team (attorneys, IT experts)
- Turn litigation response into a process that can be replicated, not an ad hoc fire drill
 - Data retention schedules
 - Data mapping
 - Efficient review process
- Assess preservation obligation when litigation is “reasonably anticipated” – scope and potential source of data
- Issue a Litigation Hold
- Collect data
- Monitor preservation efforts
- Document your preservation and collection decisions



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A YEAR LATER -- IMPACT OF E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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