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A Publication of the  
Employer Advisory  
Council of Orange  
County in partnership  
with the Employment  
Development Department,  
State of California

## Supreme Court Finds California Class Action Arbitration Waiver Enforceable

by

Henry Lederman, Esq. • Littler Mendelson, LLP

Can a state declare that an arbitration agreement covered by the Federal Arbitration Act ("FAA") violates public policy because it disallows classwide proceedings? In *AT&T Mobility LLC v. Concepcion*, No. 09-893 (Apr. 27, 2011), the United States Supreme Court answered "No." Such laws, the Court held, whether made by a state legislature or court, stand as an obstacle to the enforcement of arbitration agreements in accordance with their terms, which is the primary requirement of the FAA. As such, those laws are preempted.

### The Supreme Court's Decision

The Court's decision in *Concepcion* overrules the California Supreme Court's decision in *Discover Bank v. Superior Court*.<sup>1</sup> In that case, the California court found a consumer arbitration agreement that forbade class arbitrations was unconscionable because individual bilateral arbitration was not an adequate substitute for the deterrent effects of class actions where, as in that case, the amount of damages was predictably small. In effect, the California Supreme Court held, by requiring individuals to arbitrate their small individual claims only, and not classwide, in an agreement that was nonnegotiable, the company was imposing an illegal exculpatory contract on the weaker party.

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## Thank You For Not Smoking

by

Teresa Burlison, Esq. • Morrison & Foerster, LLP

By now most people in the United States are accustomed to working in mandatory smoke-free environments. No smoking in the workplace has become such a cultural norm that seeing otherwise can be weirdly startling. Take the hit TV show *Mad Men*, for example. Its office scenes of chain-smoking ad men and prettily puffing secretaries have inspired scores of articles, blog posts, and commentary. To imagine a time when the hallways of work were clouded with cigarette smoke seems, to entire generations in the job force, well, unimaginable. The irony is that most of the actors on *Mad Men* are smoking herbal cigarettes on set instead of tobacco<sup>1</sup> — and that's, of course, because they work in modern-day California, which, like most states,



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**EAC-OC Office – Barbara Bivens, Administrator**  
16033 Bolsa Chica Road #104-615  
Huntington Beach, CA 92649  
Phone: 714/846-2510 • Fax: 714/844-4779  
email: info@eacorangelcounty.com

**EAC-OC/EDD COORDINATOR – Nicole Gregory**  
1000 E. Santa Ana Blvd. Ste 220  
Santa Ana, CA 92701  
Phone – 714/565-2664 • Fax – 714/5439355  
nicole.gregory@edd.ca.gov

## ***President's Message . . .***

***by Stewart Lerner***

**I**t is hard to believe that we have already reached the mid-point of our program year. As we go to press, we will have completed five of our ten workshops. Once again, we are grateful for the continued support of our members and the positive evaluations that our programs have received.

We are also getting ready for our annual planning session which will take place in June. During this meeting, our hard-working Board of Directors will spend a full day reviewing topics for the 2012 workshops, discussing other important EAC activities, and going over the coming year's budget. By getting an early start, we are able to deal with emerging issues and line up the best possible speakers for our workshops.

As the year moves on, we will be reporting to you – through our *Advisor* newsletter and e-mail Alerts – breaking news and updates on legislation, court decisions and agency activities that will affect you during this year and next. We pledge to continue providing the quality and breadth of services that make your EAC membership the best bargain in the human resources arena.

### **HOT BREAKING NEWS AND SPECIAL BREAKFAST BRIEFING**

On May 9, the U.S. Department of Labor's Wage and Hour Division announced the launch of its first application for smartphones. This is a timesheet that will allow employees to track the hours that they work, independently determine the wages they are owed, and then – quite possibly – use this information to challenge the payroll records maintained by their employer.

Your EAC believes that this new device poses very significant dangers for employers and for that reason, we sent out a special Alert shortly after this announcement. Please see page 7 of this newsletter for a copy of this Alert.

After consultation with Jim Hart (*Advisor* Editor) and Robert Orozco (Program Chair), two high-level attorneys we are proud to have serving on our EAC Board, we have decided to schedule a special breakfast briefing. During this meeting, we will review the specific areas that employees may target in wage claims against your company and provide you with preventative strategies that will help you to defend against these charges. Because of the critical nature of this topic, we will have a panel of three attorneys presenting the material and sharing their ideas

This briefing will be held on **Thursday, July 21<sup>st</sup> at the Hyatt in Garden Grove**. More information will be provided via e-

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# Court Clarifies Rules Regarding “Workweeks” and Compensability of Off-Duty On-Call or Standby Time

by

Christopher S. Andre, Esq. and Sun Hi Ahn, Esq.  
Atkinson, Andelson, Loya, Ruud & Romo, LLP

**I**n *Seymore v. Metson Marine, Inc.*, the California Court of Appeal reversed a trial court decision in favor of the employer and held (1) an employer cannot avoid obligations to pay overtime by designating a workweek in order to deprive employees of overtime compensation they would be entitled to, and (2) that off-duty on-call or standby time was compensable time based on the facts of the case.

## Workweek Cannot Be Designated to Avoid Overtime Compensation

Metson’s employees worked 14-day hitches on Metson’s ships, which handle emergency clean up of oil spills and other hazardous materials off the California coast. Metson established for all of its employees a workweek beginning on Monday at 12:00 a.m., and ending on Sunday at 11:59 p.m., which is a relatively common workweek. However, all of Metson’s employees assigned to ships worked alternating 14-day hitches beginning on Tuesday at 12:00 p.m. and ending at 12:00 p.m. 14 days later. Under Metson’s workweek, the employees worked six days in the first workweek, seven days in the second workweek, and two days in a third workweek. Accordingly, Metson paid the employees the required premium pay for the seventh consecutive day worked during the second workweek only. The trial court determined that Metson properly paid employees under Labor Code section 500, which defines a “workweek” as “any seven consecutive days, starting with the same calendar day each week. ‘Workweek’ is a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods.”



On appeal, however, the Court of Appeal reversed the trial court decision and held an employer does not have complete discretion under Labor Code section 500 to designate the workweek as the employer sees fit. The Appellate Court held “an employer may not designate its

workweek in a manner that is designed primarily to evade overtime compensation.” The court went on to explain: “[F]or all employees working aboard its vessels Metson has established a single work schedule that begins on a Tuesday, while designating the ‘workweek’ to

begin on a Monday, accomplishing nothing apparent in the record other than the elimination of overtime.” Thus, “an employer may designate a workweek used to calculate compensation that differs from the work schedule of its employees only if there is a bona fide business reason for doing so, which does not include the primary objective of avoiding the obligation to pay overtime.”

## Off-Duty On-Call or Standby Time May Be Compensable

During their 14-day hitches, Metson’s employees were paid 12 hours each day for on-duty time regardless of whether the employees performed work for the full 12 hours, of which four hours was paid at the overtime rate. Metson deemed the remaining 12 hours as standby time, designating 8 hours for sleep on Metson’s ships and 4 hours as meal or free time.

The Court rejected this rationale as a basis for refusing to enforce an agreement in accordance with its terms. The 5-4 majority, in an opinion authored by Justice Scalia, dismantled the various rationales supporting the *Discover Bank* rule. The Court concluded that it was improper for the California court to impose class arbitration where the agreement did not permit it. These state law rules stood as an obstacle to the accomplishment of the FAA's objectives, primarily to enforce agreements as written, and simply cannot stand, as the main goal of arbitration is to "facilitate streamlined proceedings," and class arbitrations, the Court observed, were anything but. The Court concluded "[r] equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

Concomitantly, the Court also recognized another key feature of arbitration, which is "that parties may agree to limit the issues subject to arbitration . . . and to limit with whom a party will arbitrate its disputes. . . ." Thus, it is the "informality of arbitral proceedings [that] is itself desirable, reducing the cost and increasing the speed of dispute resolution." Class arbitration foisted upon unwilling parties was inconsistent with that goal.

In this regard, the Court found that the *Discover Bank* rule interfered with arbitration because it allowed a consumer after the fact of contract formation to demand a class arbitration even though the contract forbade it. It further rejected the dichotomy between adhesive and non-adhesive contracts that formed an underpinning of the California Supreme Court's rule because "the times in which consumer contracts were anything other than adhesive are long passed." As the Court observed, even without classwide arbitration, consumers were "free to bring and resolve their disputes on a bilateral basis," but with the availability of classwide arbitration as mandated by the *Discover Bank* rule, the Court found there was "little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process." In sum, "[t]he conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."



## What Does This Mean for Employment Arbitration Agreements?

Employers therefore will ask what does this case mean for us? *Concepcion*, after all, was a consumer case, not an employment case. In short, however, it appears that *Concepcion* could be a game-changer in the area of employment class actions.

In *Gentry v. Superior Court*,<sup>2</sup> the California Supreme Court applied and expanded upon the now preempted *Discover Bank* rule in determining that individual wage and hour claims and associated penalties were likely too small to justify enforcement of an express class action waiver. In addition to the *Discover Bank* "size of claim" factor, however, *Gentry* required consideration of other factors external to the parties'

agreement before enforcing a contractual class waiver. The *Gentry* court, thus, additionally required consideration of absent class members' awareness of their rights, whether these individuals might fear retaliation if they sued on their own, and an unspecified range of other factors that courts may review when faced with a clause in an employment arbitration agreement that forbade class arbitrations.

It is difficult to see how the *Gentry* rules, yet additional obstacles themselves to the enforcement of the parties' agreement, survive *Concepcion*. If the single *Discover Bank* factor that an individual's claim may be "too small" to fulfill the policy of deterring law violation thus making class actions a necessary component of the dispute resolution scheme is preempted by the FAA, it would appear that adding more hurdles – "obstacles" the United States Supreme Court would say that employers would have to surmount before they could get their agreements enforced only exacerbates the problems with the California scheme identified in *Concepcion*.

Employers considering their options for resolving disputes may now well add another reason to consider arbitration.

<sup>1</sup> 36 Cal. 4th 148 (2005)

<sup>2</sup> 42 Cal. 4th 443 (2007)

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For more information, please contact  
hlederman@littler.com

prohibits any smoking of tobacco products in the workplace.<sup>2</sup>

Over the years, some employers outside of California have been taking their “no-smoking” requirement a dramatic step further by imposing outright bans on hiring smokers. The impetus behind such bans is a desire to control employee healthcare costs and increase productivity. While this no-hire trend is not new, it appears to be ongoing and possibly even gaining traction in some job sectors. As reported recently by the *New York Times*, no-smoker policies “reflect a frustration that softer efforts—like banning smoking on company grounds, offering cessation programs and increasing health care premiums for smokers—have not been powerful-enough incentives to quit.”<sup>3</sup> The *Times* article in particular focused on hospitals and medical businesses, noting that “hospitals in Florida, Georgia, Massachusetts, Missouri, Ohio, Pennsylvania, Tennessee and Texas, among others, stopped hiring smokers in the last year and more are openly considering the option.”

Reaction to employers refusing to hire or retain smokers has been mixed. Many states have adopted laws prohibiting employers from requiring employees to refrain from off-duty tobacco use. For instance, Connecticut, Indiana, Louisiana, Maine, New Mexico, Oklahoma, Rhode Island, South Dakota, West Virginia, Wyoming, New Jersey, and the District of Columbia prevent employers from discriminating against employees who use tobacco products.<sup>4</sup> These laws do not interfere with an employer’s ability to maintain a smoke-free workplace, but are intended to prevent employers from forbidding the use of tobacco by employees outside work.

Elsewhere, courts have rejected privacy-based challenges to smoker bans and upheld the lawfulness of employers refusing to employ those who light up. The Florida Supreme Court has ruled, “[g]iven that individuals must reveal whether they smoke in almost every aspect of life in today’s society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job and, consequently, that Florida’s right of privacy is not implicated . . .”<sup>5</sup> In reaching this conclusion, the Court relied upon the Tenth Circuit’s holding in *Grusendorf v. City of Oklahoma City*, 816 F.2d. 539 (10th Cir. 1987), which

deemed the City of Oklahoma’s prohibition on smoking for newly-hired firefighters acceptable under the Fourteenth Amendment. Similarly, a federal district court in Massachusetts found that an employee fired for violating his employer’s no-smoker policy after he tested positive for nicotine had not suffered an actionable invasion of privacy. See *Rodrigues v. EG Systems, Inc. d/b/a Scotts Lawnservice*, 639 F. Supp.2d 131, 134 (2009). (“*Rodrigues* does not have a protected privacy interest in the fact that he is a smoker because he has never attempted to keep that fact private.”)

California so far has not weighed in on the debate.<sup>6</sup> But even if an off-duty ban on smoking were to pass muster under California’s strict privacy laws, an employer’s policing of this ban would be difficult to manage from a legal perspective. California law generally does not permit the random drug testing of employees. Further, medical testing is not a viable option because most employers would be hard pressed to explain how screening for signs of smoking-related ailments is “job-related and consistent with business necessity,” as required under the Americans with Disabilities Act.

California employers concerned with the costs of business associated with smoking employees are not without options. They can encourage healthy habits, offer discounted gym memberships, provide employees with smoking cessation help through an Employee Assistance Program (EAP), and consider sponsoring a wellness program.<sup>7</sup> Prohibiting workers from ever smoking, however, may be viewed as crossing the line. While California law does not allow workplaces to resemble the smoke-filled offices of *Mad Men*, an employer’s reach does not necessarily extend to an employee’s living room where he or she is watching the show off-duty. In that case, the employee is free to smoke as many Lucky Strikes as the characters on TV—and they don’t even have to be herbal cigarettes.

1. Witchel, Alex (2008-06-22). “‘Mad Men’ Has Its Moment.” *New York Times* (The New York Times Company). <http://www.nytimes.com/2008/06/22/magazine/22madmen-t.html>.

2. See California Labor Code § 6404.5. Section 6404.5(d)(9) does, however, create an exception for theatrical production sites “if

**T**here was mixed news in the employment figures for April. On the good side, the U.S. gained 244,000 jobs last month. However, on the negative side, the unemployment rate rose to 9.0% last month from 8.8% in March.

The challenge is that the high unemployment rate may be structural with millions of workers having dim prospects of finding work due to their levels of skill and education. Last Friday's Labor Department report showed 13.8 million workers as jobless. The even more scary part is that 43% or nearly 6 million of them have been unemployed for more than six months. Unfortunately, many of them have experience in construction and housing-related industries, jobs that are not likely to come back anytime soon.

This long term unemployment has created problems in unemployment insurance benefit funds across the country. Last month I reported on California's bankrupt fund and the state of Michigan reducing its benefits from 26 to 20 weeks. Now, other states are reacting in some interesting ways.

In Utah, leaders have refused to extend unemployment benefits for more than 20,000 people whose current assistance is about to end. In so doing, they turned down an offer from the federal government to provide more than \$100 million for an additional 13 weeks of benefits. "It's tax money, and people need to be weaned off the government paying for everything," said Senate President Michael Waddoups. He went on to say that this will provide "motivation for people to get back to work."

In Texas, lawmakers are considering legislation that would require unemployed workers to pass a drug test before collecting jobless benefits. Rep. Ken Legler, who sponsored the proposal, said that allowing drug-users to collect benefits is "stealing from hard-working people who aren't on drugs."

A group of Texas business owners testifying in support of the legislation before a House committee said that they

already require pre-employment drug tests for applicants. However, opponents say that the legislation would violate privacy rights and raise constitutional questions. Similar legislation is also pending in the state of Florida.

Now, let's move to a topic that we have not addressed in some time – employee safety and health. Enforcement agencies at both the federal (OSHA) and state levels (Cal-OSHA) are stepping up their monitoring of employers. With summer weather on the horizon, both are focusing on protecting workers from heat-related illnesses. With this goal in mind, OSHA in late April launched a national outreach campaign to educate workers and their employers about the hazards of working outdoors in

the heat and steps needed to prevent illness. Educational materials in both English and Spanish can be found in a new Web page which is available at <http://www.osha.gov/SLTC/heatillness/index.html>.

Cal-OSHA, in addition to its concern with heat-related illness, has recently been active in a couple of interesting cases where they assessed significant penalties. The first involved Napa State Hospital. Here, citations were issued after concluding an investigation into the death of an employee at the hospital. On October 24, 2010, she had apparently been asphyxiated, and a patient at the hospital has been arrested for her death.

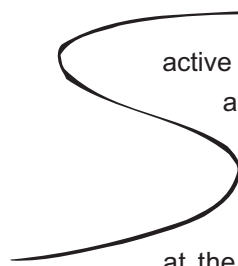
Factors believed to be involved in the fatality include lack of adequate alarm systems on the unit, non-existent alarm systems outside the units, inadequate police presence in the event of assaults, and no enforcement of written policies and procedures by the employer.

To show the breadth of the agency's concerns, the second case involved LFP Video Group LLC, doing business as Hustler Video. Citations resulted after a complaint-based inspection about the employer's failure to ensure the use of appropriate personal protective equipment, such as condoms, to protect employees from possible exposure to potentially infectious materials during the course of producing adult videos.



## Lerner Lines

by  
Stewart Lerner  
Lerner & Associates



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## Legal Alert! DOL Launches Smartphone Timesheet App

by  
Amy Littrell, Esq. • Ford & Harrison, LLP

**E****xecutive Summary:** The Department of Labor's (DOL)'s new SmartPhone app, a timesheet that enables employees to track their hours and determine the wages they may be owed, makes it more important than ever for employers to ensure that they have accurate and effective record-keeping procedures and that exempt employees are appropriately classified.

### The New Timesheet App

The app, a link for which is available on the Wage and Hour Division's web page, <http://www.dol.gov/whd/>, includes overtime pay calculations at a rate of one and one-half the employee's regular rate of pay but does not handle items such as tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials, or pay for regular days of rest.

The app permits users to add comments on any information related to their work hours; view a summary of work hours in a daily, weekly and monthly format; and email the summary of work hours and gross pay as an attachment. Additionally, the app includes a glossary with the DOL's important terms and a "contact us" button with links to the DOL's Wage and Hour division.

Currently the app is compatible with the iPhone and iPod Touch. The DOL has stated it will explore updates that could enable similar versions for other smartphone platforms, such as Android and BlackBerry, as well as other pay features

### The App Will be Useful in Wage Hour Investigations

In the press release announcing its launch, the DOL stated that the app is significant because "instead of relying on their employers' records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records." Thus, it is clear that the DOL views this app as an important tool for employees who want to challenge their employer's pay practices.

A number of other issues are not so clear, however. For example, can an employer require employees to turn in the timesheets created from the app so these records can be compared to the employer's records to ensure there are no discrepancies? What action should an employer take if there are discrepancies between the records? Can an employer fire an employee for refusal to turn in these records when requested? Or would such action violate the FLSA's antiretaliation provision? If the records are created from an app installed on an employer-provided smartphone, does that change the answer to any of the prior questions? It is possible the DOL will issue guidance that clarifies some of these issues; however, other issues may not be resolved short of litigation.



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—> “an employer may designate a workweek used to calculate compensation that differs from the work schedule of its employees only if there is a bona fide business reason for doing so, which does not include the primary objective of avoiding the obligation to pay overtime.”

During that time, employees were free to leave their ships, but they were not permitted to consume alcohol and were required to return to their ships within a maximum of 45 minutes when necessary. The trial court determined that Metson was not required to pay its employees for any of the 12 off-duty hours.

On appeal, the Court of Appeal held Metson was not required to compensate its employees for any of the 8 hours allowed for sleeping because the employees worked 24 hour shifts and the employees entered into a non-written agreement with Metson that the time allowed for sleeping would not be considered compensable time. As for the 4 hours designated as meal or free time, however, the Court of Appeal held this time was compensable because Metson’s 45-minute response time, and, perhaps, the alcohol ban precluded the employees from going places and pursuing activities in which they otherwise may have engaged. The Court determined that the level of control these limitations placed on employees rendered the off-duty time as compensable even though there was

substantial evidence demonstrating that employees were seldom called back to the ship during this time.

#### **What the Decision Means for Employers**

Employers should be mindful that courts will scrutinize designated workweeks that differ from employees’ actual work schedules to determine (a) whether a designated workweek deprives employees of overtime pay for which the employees would otherwise be entitled and (b) whether the designated workweek is supported by a bona fide business reason for doing so apart from reducing or eliminating the payment of overtime compensation.

Also, courts will often deem non-work-time as compensable time if the employer places significant restrictions on how employees may use non-work-time based on the following seven factors: (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employees’ movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time.

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## ***Is An Employer of Household Workers Subject to Payroll Taxes?***

by

*Employment Weekly • Floyd, Skeren & Kelly, LLP*

**A**n employer of household workers must report when he or she employs one or more individuals to perform work for the household and pays cash wages of \$750 or more in a calendar quarter. Household workers may include, but are not limited to, housekeepers, baby-sitters, janitors, handy persons, gardeners, governesses, cooks, chauffeurs, waiters, waitresses, and butlers. Household workers does not include carpenters, plumbers, electricians, painters or other skilled craftsmen. A private home includes fixed places of residence, apartments, hotel rooms, and summer or winter homes. Wages are all payments made for services, whether by cash or check, or the reasonable value of noncash payments such as meals and lodging. If the employer meets the \$750 or more in a calendar quarter requirement, then the employer must register with the Employment Development Department (EDD) by submitting a Registration Form for Employers of Household Workers (DE1 HW) within 15 days after paying \$750 in total cash wages. An online registration process is available using the expanded e-Services for Business, available from the e-Services for Business page. Employers of household workers can obtain more detailed information on their reporting requirements from the following publications: (1) Information Sheet - Household Employment (DE 231L) and (2) Household Employer’s Guide (DE 8829). Employers may also call the Taxpayer Assistance Center at (888) 745-3886 for further information.

# E-Z FORM 2011 Workshops

## General Workshops

5 Per Year • 1 Location per Workshop

The General Workshops are open to all members, nonmembers and guests. They are normally held on the third Thursday of each **ODD** month at the Hyatt Regency,

11999 Harbor Blvd, Garden Grove, CA. The only exceptions are July and December, when no workshops are held. Reservations can be made in advance, at a discounted rate, or for each specific workshop individually.

**HR Solutions • Let's Role Play** – September 15

**HR Hotline** – November 17

## Certificate Workshops

5 Per Year • 2 Locations per Workshop

The Certificate Workshops are held twice on the **EVEN** months, once in Garden Grove and once in San Juan Capistrano. The only exceptions are July and December, when no workshops are held.

**Innovative Strategies for Your HR Department** –

June 16 and 21

**Internal Audits** – August 18 and 23

**Unemployment & Disability Insurance Updates** –

October 20 and 25

### Questions?

**Please call Barbara Bivens at the EAC office at 714-846-2510 or email [info@eacorangelcounty.com](mailto:info@eacorangelcounty.com)**



*These programs have been approved for 2.75 recertification credit hours through the HR Certification Institute. For more information about certification or recertification, please visit the HR Certification Institute home page at*

*[www.hrci.org](http://www.hrci.org). The use of this seal is not an endorsement by HRCI of the quality of the program. It means that this program has met HRCI's criteria to be pre-approved for recertification credit.*

## Registration Form

**Location:** Please check date and location on above.

**Times:** 7:15 to 8:00 am: check-in and breakfast • 8:00 to 11:30 am: Workshop with a 15-minute break

**Costs:** \$65 per workshop per person; for non-members \$85 per workshop per person

**Registrant Name** \_\_\_\_\_

**Company** \_\_\_\_\_

**Contact Phone** \_\_\_\_\_ **Contact Email** \_\_\_\_\_

**Pay by Check:** EAC-OC, 16033 Bolsa Chica Rd. #104-615, Huntington Beach, CA 92649

**Pay by FAX:** 714-844-4779

**Pay by Email:** [info@eacorangelcounty.com](mailto:info@eacorangelcounty.com)

**Credit Card Information:** \_\_\_\_\_

Name on Card \_\_\_\_\_ Authorized Signature \_\_\_\_\_

Credit Card # \_\_\_\_\_ Exp \_\_\_\_\_ / \_\_\_\_\_ Security # \_\_\_\_\_

Billing Zip Code \_\_\_\_\_

**EMPLOYER ADVISORY COUNCIL  
ORANGE COUNTY  
“MEMBER GET A MEMBER”  
CONTEST**



Beginning January 1, 2011 EAC is starting a Membership Contest. If you refer a prospective member who later joins the EAC, you will receive a \$10 Starbucks gift certificate via mail. In addition, for every new member referred, your name will be added into a drawing for a Grand Prize at the November 2011 workshop. For Example - refer 10 new members and you get 10 ten dollar gift certificates from Starbucks plus your name in the November drawing 10 times. Questions??? Please call the EAC OC office at 714-846-2510.

**EAC OC MEMBERSHIP APPLICATION**

Company \_\_\_\_\_  
 Contact Name \_\_\_\_\_  
 Title \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_ Zip \_\_\_\_\_  
 Phone (\_\_\_\_) \_\_\_\_\_  
 Email: \_\_\_\_\_@\_\_\_\_\_  
 # of employees \_\_\_\_ # of years in business \_\_\_\_  
 Industry \_\_\_\_\_  
 DUES: \$95.00 Method of payment: \_\_ Check  
 enclosed \_\_MC \_\_Visa \_\_AX  
*Dues are paid annually in January. Your second year dues will be pro-rated based on the month you join and you will receive an invoice in November so you can pay either this year or next year.*  
 Name on Card \_\_\_\_\_  
 Card # \_\_\_\_\_  
 Expiration date \_\_\_\_\_ Last 3  
 numbers on back of card \_\_\_\_\_ #4 numbers  
 AX \_\_\_\_\_  
 Billing Address \_\_\_\_\_  
 \_\_\_\_\_  
 City \_\_\_\_\_ Zip \_\_\_\_\_  
 Signature \_\_\_\_\_

Please return this application to:

EAC OC  
 16033 Bolsa Chica #104-615  
 Huntington Beach, CA 92649  
 Or Fax to: 714-844-4770  
 Or Email to: [info@eacorangecounty.com](mailto:info@eacorangecounty.com)  
 Or online at: [www.eacorangecounty.com](http://www.eacorangecounty.com)

**EAC OC COMMITMENT TO MEMBERS**

- To provide the employer with quality education and training on topics such as:
  - Employment Trends
  - Labor Law
  - Legislation
  - Workers’ Compensation
- To help employers stay in compliance with the law through the HR Hotline
- To act as advisors to the Employment Development Department and help promote services they provide to the employer

**WHAT OUR MEMBERS SAY**

New Laws & Emerging Issues - January 2010  
 The speakers were exceptional. I appreciate this annual presentation - how else would we know about all these laws? Thank you. Linda Lange, OC Association of Realtors  
Workplace Violence - May 2010  
 Exceptional seminar – very informative and really brought a new light to workplace violence. Thank you. Eliz Parra, West Coast Arborists  
Hiring & Firing Workshop - June 2010  
 This workshop had to the best and most valuable information needed in the relevant cultural and distressed economy. The speakers were very personable and the handouts were very detailed. Joy Lindstrom, TLC Pre School.

**THIS MEMBER IS REFERRED BY:**

Name \_\_\_\_\_  
 Company \_\_\_\_\_

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## *Cuiellette v. City of Los Angeles, A Tale of Two Standards*

by

Robert W. Conti, Esq. • Littler Mendelson, LLP

**E**mployers frequently fail to distinguish an employee's disability rating arising from an industrial injury that traveled through the workers' compensation system from the obligations imposed by disability discrimination laws. Often, an employer learns that an injured employee has received a high disability rating, sometimes one as high as 100% disabled, and decides, based only on that information, that the person is unemployable. Making such a decision, without first undergoing the reasonable accommodation process, however, can prove costly. And in the case of the *Cuiellette v. City of Los Angeles*, No. B224303 (Cal. Ct. App. Apr. 22, 2011), it was a \$1.5 million dollar mistake.

### **Case Background**

Rory Cuiellette, was a field officer with the Los Angeles Police Department. After several years serving on the force, he became injured on the job and was placed on a disability leave of absence. After receiving a 100% disability rating from the California Department of Industrial Relations, he sought reinstatement with the Police Department. At the same time, Cuiellette's doctor released him to return to work, albeit limited to administrative work. On the strength of the doctor's release, the department assigned the officer to a desk job, consistent with an established practice of providing accommodation to disabled police officers by reassigning them to "permanent light duty" positions in areas such as the drug testing or fugitive warrants divisions.

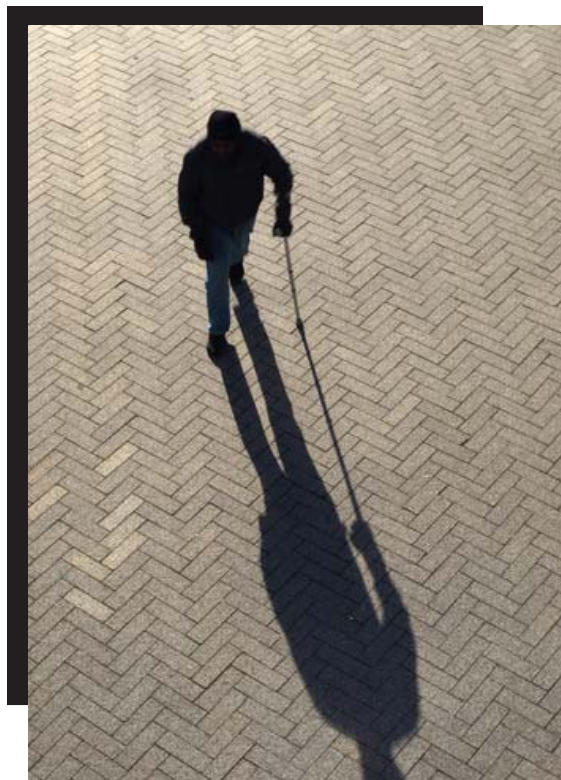
The department learned of the officer's 100% disability rating within a week of his return to light duty position. A supervisor told Cuiellette that he could not continue to work with a 100% rating, even though he performed his new permanent light duty job's essential (and apparently marginal) functions without problem.

At trial, the officer presented evidence that the city had a long-standing practice of assigning administrative, light duty jobs to its disabled police officers on a permanent

basis. Moreover, the officer showed that he could perform the essential functions of his light duty job. In response, the city tried, unsuccessfully, to show that "100% disabled" meant incapable of performing any essential functions of any departmental job and/or that a 100% disability rating meant there was no possible form of reasonable accommodation.

Unfortunately for the city, the officer showed that the decision to remove him from duty was not based on an assessment from any LAPD supervisors about his job performance or his present or future ability to perform the tasks assigned to him. Instead, the evidence showed that the decision to remove the officer from the light duty position was premised on the

concern of the third party administrator (TPA) that adjusted the city's workers' compensation matters that a 100% disability rating was inconsistent with continued, active employment with the department. In fact, the court found that the TPA "instigated the decision to send [the officer] home because of its concern that the City could not place someone in the workplace who, for purposes of workers'



compensation was ‘100% disabled.’”

The TPA’s conclusion underscores the conflict faced by employers: the standard for determining a disability rating under the workers’ compensation system is often at odds with employer obligations under discrimination laws like the California Fair Employment and Housing Act (FEHA) and the Americans with Disabilities Act Amendments Act (ADAAA). While the workers’ compensation analysis focuses on whether the employee is able to perform the usual and customary duties of the “job of injury,” the FEHA, ADAAA and its ilk examine what the employee can do with regard to the original job, or any other position offered as an alternative, i.e., as reasonable accommodation, to a disabled worker.

Here, while the officer could not perform the tasks of a field officer, he had no difficulty performing his desk job. As the trial court noted, “In addition to considering [the TPA’s] advice regarding workers’ compensation issues, the City should have independently evaluated Plaintiff’s situation with reference to FEHA.” In the view of the court, none of the officer’s restrictions stemming from his industrial injury impeded his ability to perform the desk job. The court indicated that “if the City had concerns about these restrictions, it had an affirmative duty to engage in an interactive process and to make an effort to accommodate Plaintiff, rather than simply take him off the job.”

As this case makes clear, an employer cannot base its decision refusing reinstatement or continued employment solely upon the restrictions and permanent disability rating emanating from the workers’ compensation system. Rather, an employer is obligated to engage in the interactive process to determine whether there are any accommodations that can be provided to get the employee back to his original job. Barring such, the employer is obligated to look within its workforce to determine whether there are any open positions for which the employee is qualified. The city’s failure to implement this process in favor of bright-line reliance on a disability rating, proved to be a costly mistake.

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RConti@littler.com*

## **Walmart to Pay \$440,000 for Harassment of Latinos**

*by Employment Weekly • Floyd, Skeren & Kelly, LLP*

**S**am’s Club, the wholesale chain store owned and operated by Walmart, will pay \$440,000 to settle a national origin harassment lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

The EEOC alleged that at least nine employees of Mexican descent at the Sam’s Club in Fresno, California, along with one who was married to a Mexican, endured ethnic slurs and derogatory remarks by a fellow co-worker who is Mexican-American. The employees were apparently inundated with near-daily insults about Mexicans such as “f—n’ wetbacks,” and references to Mexicans only being good for cleaning the harasser’s home. The harasser even threatened to report three of the employees to immigration authorities despite their legal status. The employees and harasser – all female – worked in the demonstration department, serving food samples to customers.

The employees complained about the hostile work environment to management as early as April 2006, but according to the employees, management did not respond. Instead, their complaints allegedly intensified the harassment and led to intimidation. Another employee also began deriding one of the employees for her inability to speak English.

It was not until after an official EEOC charge of discrimination was filed that Sam’s Club finally discharged the harasser. Melissa Barrios, director of the EEOC’s Fresno Local Office, commented that, “National origin discrimination remains a serious problem in this region, and it is important to remember that harassment can manifest even within the same ethnic group. Employers failing to take immediate action send a message that such behavior is tolerated, giving license for others to do the same.”



### **President’s Message . . . from Page 2**

mail but please mark that date on your calendar.

We cannot overstate the importance of this program. If you doubt whether you might be targeted, just ask yourself this question: Why is a governmental agency providing this tool to employees? In its own press release DOL stated “This information could prove invaluable during a Wage and Hour investigation when an employer has failed to maintain accurate employment records.” Please review the Alert for a more in-depth discussion of the important issues raised by this new app and plan to join us in July at our breakfast briefing.

**Thank You . . . from Page 5**

smoking is an integral part of the story . . .” California Labor Code § 6404.5(d)(9). *Mad Men*’s creator and executive producer, Matthew Weiner, nevertheless has explained, “You don’t want actors smoking real cigarettes . . . they get agitated and nervous. I’ve been on sets where people throw up, they’ve smoked so much.” Witchel, Alex (2008-06-22). “‘Mad Men’ Has Its Moment.” *New York Times* (The New York Times Company). <http://www.nytimes.com/2008/06/22/magazine/22madmen-t.html>.

3. Sulzberger, A.G. (2011-02-10). “Hospitals Shift Smoking Bans to Smoker Ban.” *New York Times* (The New York Times Company). <http://www.nytimes.com/2011/02/11/us/11smoking.html>.

4. CONN. GEN. STAT. ANN. § 31-40s; D.C. CODE ANN. § 7-1703.03; IND. CODE ANN. § 22-5-4; LA. REV. STAT. ANN. § 23:966; 26 ME. REV. STAT. ANN. § 597; N.M. STAT. ANN. § 50-11-3; OKLA. STAT. ANN. tit. 40, § 500; R.I. GEN. LAWS § 23-20.10-14; S.D. CODIFIED LAWS § 60-4-11; W. VA. CODE § 21-3-19; WYO. STAT. ANN. § 27-9-105; N.J. STAT. ANN. § 34:6B-1. In these states, it could be problematic for employers not only to ask job applicants whether they smoke, but also to take subsequent action against anyone who is believed to have answered such a question untruthfully.

5. *Kurtz v. City of North Miami*, 653 So. 2d 1025, 1028 (1995) (upholding municipality’s requirement that all job applicants refrain from using tobacco products for one year before applying for employment).

6. Californians arguably have been more focused on the right to smoke something other than tobacco, based on the high-profile litigation and legislative efforts surrounding medical marijuana use. And although California Labor Code § 96(k) and 98.6(a) appear to prohibit employers from discriminating against employees engaged in lawful off-duty conduct, courts have narrowly construed these statutes to shield only such conduct that already is protected under law. See *Grinzi v. San Diego Hosp. Corp.* 120 Cal. App. 4th 72, 87 (2004); *Barbee v. Household Auto. Fin. Corp.*, 113 Cal. App. 4th 525, 533–36 (2003).

7. Wellness programs are regulated by various laws, however, and should not be implemented without first consulting an attorney.

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## **Legal Alert: Ninth Circuit Finds Employer Has Burden of Proof When Denying Reinstatement After FMLA Leave**

by  
Angela Quiles, Esq. • Ford & Harrison, LLP

**I**n a case of first impression on a claim that an employer interfered with an individual’s exercise of her rights under the Family and Medical Leave Act (FMLA), the Ninth Circuit Court of Appeals recently held that the employer bears the burden of proving it had a legitimate reason for not reinstating the employee to her former position following FMLA leave. The court further held that the employee is not required to demonstrate that her employer lacked a reasonable basis for its refusal to reinstate her. *Sanders v. City of Newport* (9th Cir. March 17, 2011).

### **Background**

Sanders, a former utility billing clerk who had worked for the City of Newport for approximately 10 years, began suffering health problems after the City moved her office to a new location and started using lower-grade billing paper. After being diagnosed with “multiple chemical sensitivity” triggered by handling low-grade paper at work and poor air quality in her work area, Sanders requested and was granted one month of FMLA leave. This leave was later extended because of an unrelated medical condition.

Subsequently, Sanders submitted a letter from her doctor stating that she had recovered from her unrelated medical condition and she could return to work, so long as she avoided use of the problem-causing low-grade paper. Sanders also submitted a fitness for work certificate from the surgeon who treated her unrelated medical condition.

On May 5, 2006, the City informed Sanders that she would not be permitted to return to work because the City could not guarantee that her workplace would be safe for her to due to her chemical sensitivity. On January 8, 2007, the City sent Sanders a letter advising her that her

employment would be terminated that same day “due to the restrictions placed on [her] by [her] physician, Dr. Morgan, which the City is unable to accommodate.” Sanders filed an administrative appeal. In response to her appeal, the City informed her: “The decision to terminate your employment was made for the reason that the City could not provide a safe workplace for you given your sensitivity to chemicals and the lack of knowledge as to the chemicals or concentrations that may cause a reaction.”

Sanders subsequently sued the City in federal court, claiming violations of the FMLA, the Americans with Disabilities Act (ADA) and the Oregon Family Leave Act (OFLA), as well as other federal and state laws. After the jury returned a verdict for the City on Sanders’ FMLA claim, she filed an appeal with the Ninth Circuit. Sanders argued that the court’s FMLA jury instruction improperly placed the burden on her to prove that she was denied reinstatement without reasonable cause and that by adopting a reasonable cause requirement, the court incorrectly stated the elements of her FMLA claim.

The Ninth Circuit agreed with Sanders and reversed the lower court’s decision, remanding the case for a new trial.

### **FMLA Interference Claim**

Under 29 U.S.C. 2615(a)(1), it is “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise” the substantive rights guaranteed by FMLA. When a party alleges a violation of 2615(a)(1), it is known as an “interference” or “entitlement” claim. The Ninth Circuit held that the right to reinstatement is the linchpin of the entitlement theory because “the FMLA does not provide leave for leave’s sake, but instead provides leave with an expectation that an employee will return to work after the leave ends.” (Citations omitted). Thus, evidence that an employer failed to reinstate an employee who was out on FMLA leave to her original (or equivalent) position establishes a prima facie denial of the employee’s FMLA rights. See 29 C.F.R. §825.220(a)(1),(b)(1).

Citing decisions from the Sixth and Seventh Circuits, the Ninth Circuit summarized the elements of an employee’s prima facie case where the employer fails to reinstate the employee: “the employee must establish that: (1) he was eligible for the FMLA’s protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled.” The court

also noted that in interference claims, the employer’s intent is irrelevant to a determination of liability.

The court then held that although the FMLA creates a statutory right to reinstatement after taking FMLA leave, this right is not without limits. The court noted that the Department of Labor (DOL) has interpreted this part of the statute in various regulations that set forth the limitations on an employee’s right to reinstatement. However, the DOL regulations do not clearly state which party has the burden of the proof when an employer defends against a denial of reinstatement by asserting one of these limitations and the federal appeals courts

are divided on this issue.

### **Burden of Proof for Failure to Reinstatement**

The regulation at issue in this case, 29 C.F.R. §825.214, addresses an employee’s right to return to work following FMLA leave and states that “if the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA.” Although the text of this regulation is ambiguous with respect to the parties’ respective burdens, the Ninth Circuit held that it is clear from other regulations that the burden rests with the employer to establish whether the employee can perform the essential functions of the job. Thus, the employer has the burden of showing that it had a legitimate reason to deny the employee reinstatement and the trial court’s

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contrary jury instruction was erroneous.

The Ninth Circuit also held that the trial court erroneously instructed the jury that Sanders was required to prove that the City did not have “reasonable cause” to deny her reinstatement. The court noted that the DOL regulations interpreting the limitations on an employer’s obligation to reinstate an employee include no reference to a “reasonable cause” standard. The Ninth Circuit held that by adding a reasonable cause requirement as an element of Sanders’ reinstatement claim, the trial court’s instruction permitted the jury to assess the City’s overall response to Sanders’ complaints rather than directing the jury to consider the specific reasons under DOL regulations why the City refused to reinstate Sanders to her former position after taking FMLA leave. The court held that this approach is contrary to the FMLA. Further, the court held that this instruction was not harmless because it added an unnecessary element to Sanders’ burden of proving her FMLA reinstatement claim.

Accordingly, the Ninth Circuit vacated the judgment on the jury’s verdict and remanded the case for a new trial.

#### **What This Means for Employers**

The effect of the court’s decision in Sanders is that when an employer seeks to establish that it had a legitimate reason to deny an employee reinstatement, the employer must be prepared to prove the employee had no right to be reinstated. This is true even though the right to reinstatement from FMLA leave is not absolute. Unlike FMLA discrimination or retaliation cases, which apply the type of burden shifting framework recognized in *McDonnell Douglas v. Green* to evaluate such claims, employers in FMLA interference and reinstatement cases are at a disadvantage in the Ninth Circuit because they carry the ultimate burden of proof that the employee was not entitled to reinstatement. Thus, employers considering discharging an employee who has taken FMLA leave must ensure that the legitimate business reason for the discharge is clear and adequately documented.

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## **COBRA News**

by

*Employment Weekly • Floyd, Skeren & Kelly, LLP*

### **Secretary of Labor Hilda L. Solis Issues Statement on COBRA’s 25th Anniversary**

**T**he health insurance continuation provisions in the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), have been in effect for 25 years. Secretary of Labor Hilda L. Solis issued the following statement marking this anniversary: “It’s been a quarter century since the Consolidated Omnibus Budget Reconciliation Act of 1985 became law. During that time COBRA has helped some 50 million workers—and their families—maintain affordable health coverage...COBRA gives workers a means of maintaining coverage by group health insurance plans even when faced with such challenging life events as job loss, divorce, or the death of a spouse...More recently, the American Recovery and Reinvestment Act of 2009 provided additional support to these workers and their families. The help came in the form of a 65 percent premium for workers who lost their jobs through no fault of their own. This made it easier for those individuals to keep health coverage for themselves and their loved ones during what can be a period of tremendous economic and personal stress...For 25 years, COBRA has been an essential safety net for those workers who play by the rules, yet still find themselves weathering difficult times. It ensures that they can continue their health coverage while getting back on their feet. That spirit — of responsible and responsive service to those who work hard and play by the rules, but sometimes need a hand up — is in line with the commitment of the Department of Labor to the working men and women of our nation.”

### **Senator Boxer Reintroduces Legislation to Expand COBRA**

**U**.S. Senator Barbara Boxer (D-CA) has reintroduced legislation known as the Equal Access to COBRA Act, which would provide many domestic partners with the same access married spouses currently have to COBRA health coverage if their partner loses a job.

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## A Day of Opportunity

by  
Nicole Gregory, EDD Employment Specialist  
EAC-OC Coordinator

With youth arriving hours before the event, and with a line running through the mall and around the parking lot, you would think that there was a movie premier or a radio give-away, but they were all there looking for a job. The EDD hosted its 16<sup>th</sup> annual Summer Youth Job Fair on April 30, 2011, at the Anaheim EDD Workforce Services office, as well as at the Block at Orange. With two sites and in three short hours, the event brought over 1,600 professionally dressed job-seekers from all over Orange County with résumés in hand. In spite of the windy, allergy-inducing weather and the long lines, the atmosphere was exhilarating and lively. Nervousness mingled with a sense of excitement could be seen on faces when it was their time to shake hands and meet the employers face to face. The Home Depot stated, "There was lots of excitement and it was great seeing so many young kids getting ready to join the workforce."

Job-seekers patiently waited to come into contact with the 61 employers and resources that were present

between the two locations – Marshalls, Sears, Marriott Newport Coast Villas, Carl's Jr., Knott's Berry Farm and the National Guard; just to name a few. In total, these employers were seeking to fill over 700 open positions. Upon speaking with employers after the event, they have indicated that they were able to fill many of their positions. One employer was quoted stating, "There was a huge turn-out [...] we did get several good candidates that we added to our hiring pool." EDD will be in contact with these employers over the next couple months to see how many of the attendees were hired throughout the summer, as most employers did initial hiring, but indicated that many of the applications would be added to their pool of applications for future use.

The EDD is proud to say that this event has been a success. All of the employers in attendance indicated that the event exceeded their expectations, they were pleased with the ample amount of qualified candidates, and they all plan to attend again next year.



### *COBRA . . . from Page 15*

According to information posted on Senator Boxer's website, "The law would apply to companies that already offer health coverage to domestic partners and their children. Currently, more than half of Fortune 500 companies cover domestic partners under their health plans." Senator Boxer commented on the proposed legislation, stating that "All of our families deserve equal access to health insurance. This bill would help ensure that domestic partners and their families will be able to keep their health coverage if their partner loses their job." This proposed legislation would change federal law to allow equal access to COBRA coverage for all individuals who are covered by an employer's health plan, and it would apply to domestic partners as they are defined by an employer's health insurance plan. However, the legislation would only apply to employers that already offer health care coverage to domestic partners and their children.

*Just a Reminder!*



*Check out our great  
2011 Workshops  
on Page 9 . . .*

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**EMPLOYMENT DEVELOPMENT DEPARTMENT (EDD)**  
**Orange County Locations**

OFFICE	ADDRESS	PHONE
Anaheim Job Service .....	2450 E. Lincoln Ave. .... Anaheim, CA 92806	714-518-2315
Anaheim Workforce Center .....	50 S. Anaheim Blvd. .... Anaheim, CA 92805	714-765-4350
Irvine One-Stop Center .....	125 Technology Drive #200 .... Irvine, CA 92618	949-341-8000
Westminster One-Stop Center .....	5405 Garden Grove Blvd. .... Westminster, CA 92863	714-241-4900
Santa Ana W.O.R.K. Center .....	1000 E. Santa Ana Blvd., Ste. 220 .... Santa Ana, CA 92701 (At the train station)	714-565-2610
Santa Ana Disability Insurance .....	P.O. Box 1466 .....	800-480-3287
	Santa Ana, CA 92701	
Employment Tax Audit Area Office .....	2099 So St College Blvd., Ste. 401 .... Anaheim, CA 92816-6014	714-935-2920
EDD Labor Market Information .....	South County .....	949-341-8051
	North County .....	714-687-4816

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