

The Advisor

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*Dear Members,
This issue contains two
articles that are consider-
ably longer than those
we usually print. How-
ever, the material
contained in each of
these articles is both
timely and important and
we wanted to provide
them to you in their full
text. We believe they will
be worthy of your
perusal.*

*Have a wonderful
summer!*

*Stewart Lerner,
Advisor Editor*

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

LEGISLATIVE UPDATE • JUNE 2006

by

Bruce Matlock, Esq.
EAC-OC Hotline

Following is the latest Legislative Update for 2006. If you want information on any of these bills or copies of the bill language, go to www.leginfo.ca.gov.

Minimum Wage Issues

Two Democratic bills have passed their respective houses. AB 1835 and SB 1162 would increase the minimum wage \$1.00 an hour over two years and then provide for automatic increases based on inflation. The Governor has just filled 4 vacancies on the Industrial Welfare Commission that has been dormant since 2000. He has asked the IWC to consider an increase without an escalator. The IWC has until October 31st to make a decision. This would possibly allow the Governor to veto the Democratic bills and still take credit for an increase, or if the IWC approves an escalator tell his supporters it is not his fault. **Both passed respective Labor and Employment Committees. Both bills in Appropriation Committees.**

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Incorporating ADR Into Your Employee Agreements

by

Shirley D. Deutsch, Esq.
Ropers, Majeski, Kohn & Bentley

Arbitration has been the traditional way of resolving disputes between unionized labor and management. More recently, many of the nation's largest employers have implemented programs to encourage arbitration of disputes with their non-union employees. The leaders of these companies have concluded that requiring arbitration instead of litigation results in significant savings in attorneys' fees and other litigation costs.

A recent survey found that more than half of employment suits are filed against companies with fewer than 100 employees. Although the majority of these suits are ultimately determined to lack merit, the cost of defending even a frivolous wrongful termination or discrimination claim can easily run into the six figures. Thus, smaller employers should consider whether adopting alternative dispute resolution programs can decrease their exposure to staggering litigation costs.

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President's Message . . .

Doug Wade, Esq.

The new fiscal year for EAC-OC began July 1 and as the year progresses the board is moving the association forward in a number of ways.

This year the board is working toward bringing to the membership a new website with information about the latest educational opportunities offered by the EAC-OC. It will also have helpful links to other sites that will bring you additional information you may be seeking.

EAC-OC will soon be accepting credit cards as a payment option for meetings and membership dues. After many years of accepting cash and checks only, the board feels this is a step forward and one that will be appreciated by many members. As part of the website creation, the board envisions having a secure site to which you can go to reserve and pay your meeting registration as well as renew your annual membership dues.

As this is being written, the board and the Program Committee are beginning to plan the workshops for the 2007 Certificate Program and other types of meetings that will bring added value to your membership. Topic and/or speaker suggestions are always welcome to help us in being responsive to the "hot topics" facing California employers.

As with all associations, the EAC-OC is looking for volunteers willing to bring their expertise, ideas and energy to augment and implement the vision and mission of the EAC-OC. Please call me directly at (714) 612-0937 to discuss your involvement.

As these new ideas are put into operation, your feedback will be very important in helping the board provide the very best programs and educational workshops possible for the membership. We look forward to your comments and participation.



EAC-OC HOTLINE

by Bruce Matlock, Esq.

The Hotline always receives a variety of interesting questions from EACOC members. The following is a sample of those we have received recently:

Can we charge an employee a fee for always turning in time sheets late?

No, you may not charge the employee. However, if you have an employee who is consistently late, you can treat it as a performance issue. For a non-exempt employee, that could include a short suspension without pay for repeated violations.

How do we record the one-hour penalty for missed meal periods?

It is recorded as one hour at straight time pay as a penalty. It is not considered time worked for overtime.

Is the eligibility for FMLA the same as for Paid Family Leave?

No. FMLA applies to employers with more than 50 employees and to employees who have worked for the company for at least one year, and worked more than 1250 hours in the previous 12 months. Paid Family Leave applies to any California employer regardless of size. To be eligible the employee need only to participate in the State Disability Insurance Plan, there is no length of service requirement.

If we rehire an employee who terminated, do we have to reinstate their seniority?

No, there is no legal requirement to do so. However you must be consistent with your internal policies and procedures.

What do we do if an employee does not show up for work or contact us?

It is suggested that you send the employee a letter, giving them a few days to respond. The letter should tell the employee that the employee must provide, within the time frame given, information as to why the employee has not been to work and has not contacted the employer. Failure to timely respond or failure to provide a satisfactory reason for the employee's inaction may result in termination of employment.

What must be recorded on the time card?

The time card must show when the employee began work, left for the meal period, returned from the meal period, and left work. If the employer does not have accurate time records and the employee files a claim with the Labor Commissioner, the Commissioner will use the employee's time records.



Legislative Update . . . from Page 1

AB 1840, Health Insurance: Identical to vetoed bill from last year. This bill will require State agencies to notify the legislature of employees who apply for health services such as Healthy Families because the employer does not provide health insurance to employees. This applies to employers with more than 25 employees. **Passed Assembly, in Senate.**

SB1414, Health Insurance: Mandates that employers with more than 10,000 employees allocate at least 8 percent of payroll to employee healthcare. **Passed Senate, in Assembly.**

AB 1884, Locked Out Employees: Vetoed last year. Under current law, employees who strike, or are locked out by their employer during a labor dispute, cannot receive unemployment insurance benefits. This bill would allow locked out employees to receive unemployment insurance benefits. **Passed Assembly, in Senate.**

AB 805, Heat Illness: Would require the OSHA Standards Board to develop standards to protect employees from heat illness. **Held over from last year. Still in Senate Appropriations, hearing set August 25th. See report at end of update on new OSHA regulations.**

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What is Alternative Dispute Resolution?

Alternative dispute resolution (ADR) encompasses a variety of (non-violent) methods of resolving conflicts. ADR can either take the place of court litigation or it can supplement or precede litigation. In the employment arena, the most typical types of ADR are employer grievance procedures, mediation and arbitration.

An employer grievance procedure can be as simple as informing employees to report all complaints to Human Resources or to another designated person, who will conduct an investigation and attempt to resolve the complaint. Grievance procedures can also involve several steps, such as peer review, review by a supervisor and an appeal to higher level management. Grievance procedures can be formal or informal, voluntary or mandatory.

Mediation is a private, voluntary process whereby the parties to a dispute come together to negotiate a resolution or settlement with the help of a third party. The third party can be a trained mediator or other neutral person. Most mediations are voluntary, although some employers have policies requiring mediation as an initial step before arbitration or litigation. Mediation sessions are confidential and mediation is non-binding; i.e., the mediator does not make a decision. Rather, the parties come to a voluntary resolution that both sides agree on. The parties may participate in mediation by themselves or with attorneys. Mediators can explore many different ways of resolving disputes. Employment cases can even be settled without the payment of money. For example, the employee may agree to resign in exchange for an apology or a letter of reference.

Arbitration is the most traditional form of private dispute resolution. Like mediation, the process is conducted by a third party. The arbitrator has the power to make a decision. Arbitration is usually private (non-public). It can be binding or non-binding. Binding arbitration results in a decision that can be enforced in court. If the arbitration is non-binding, the arbitrator simply makes a suggested ruling that the parties can either accept or not. If either party decides not to accept the result, that party can proceed to court. Arbitration is more formal than mediation, but generally less formal than court. The arbitrator can swear

witnesses and take testimony and consider documents, just as a judge would. In most cases, the parties to an arbitration are represented by attorneys.

Are Mandatory ADR Agreements Enforced?

California law favors settlement of disputes through ADR. The law states that a written agreement to submit a controversy to arbitration is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. Code of Civil Procedure 1281.

The California Supreme Court has held that employers may require their employees to submit employment claims to arbitration instead of litigation as long as the arbitration agreements meet certain standards of fairness. Thus, the Court has held that an agreement requiring arbitration of employment disputes is to be enforced so long as the agreement: (1) provides for selection of neutral arbitrators; (2) permits more than minimal discovery; (3) requires a written award; (4) provides for all types of relief that would otherwise be available in court, and (5) does not require the employee to pay either unreasonable costs or any arbitrators' fees or expenses.

Because an arbitration agreement must not impose any costs on the employee that he or she would not have to pay in a court suit, an employer who wishes to arbitrate must absorb all arbitration costs except for the filing fee (around \$200-300) that would be required to file a court suit. This means the employer must pay the arbitrator's hourly fee and any fees charged by the arbitration service. The employer need not pay the employee's attorneys' fees.

In addition, an employer cannot force an employee to arbitrate statutory claims that the employee has a right to bring before an administrative body, such as claims for unemployment insurance benefits, workers' compensation and wage and hour claims. In contrast, claims created by the Fair Employment and Housing Act such as discrimination and harassment can be included in a mandatory arbitration agreement, so long as the agreement passes muster under the above standard.

There is little question that courts will enforce agreements to mediate, so long as the costs are borne by the employer. California law favors settlement of disputes. In fact, the legal system could not possibly operate if the

Program News

By Robert Orozco, Esq.
Program Committee Chair

After a one-month lay-off, EAC-OC's 2006 seminar schedule resumes with the always topical and informative "2006 California Wage & Hour Law Update." This year's seminar is particularly important given the exponential growth of not only class action lawsuits involving wage & hour law, but also the recent string of conflicting decisions from the Courts of Appeal on the interpretation of wage & hour law. (Please refer to article entitled "Wal-Mart and Its Aftershock" on Page 6 for a discussion on recent wage & hour decisions.) Consequently, this seminar is essential to any organization's operations.

This session will be moderated by Mr. Robert Naeve of Morrison Forster. Mr. Naeve is a renowned expert on wage & hour issues and his seminar promises to be both entertaining and informative. Mr. Naeve has been a featured speaker at previous EAC-OC seminars and we welcome his return.

In addition to the above issues, Mr. Naeve will tackle such topics as: proper employee classification; calculation of wages and overtime, including the effect bonuses have; and employment trends.

We hope you continue to have an enjoyable summer and we look forward to seeing you in August.

ADR . . . from Page 4

vast majority of cases did not settle. A recent survey conducted in Riverside revealed that 99.5 percent of civil cases were resolved without trial!

Finally, the law looks favorably on internal grievance procedures. Employers are required to investigate and resolve complaints of harassment. If an employer has a valid grievance procedure for resolving complaints of harassment and discrimination, an employee's failure to follow that procedure without good reason can result in less money to the employee.

Why Should Employers Adopt Grievance Procedures?

Under current law, employers are already required to investigate and resolve complaints of harassment. Thus, every employer in the State of California is required to have a procedure for resolving these types of complaints.

While extending the grievance procedures to other types of employment complaints can be time-consuming, the advantage of a grievance procedure is that it encourages employees to bring their complaints forward before the employees become frustrated enough to quit. Providing an avenue to air grievances can reduce turnover and enhance morale. Employers may be concerned that employees may abuse the system by bringing frivolous complaints to management. However, those employees would likely cause problems with or without a grievance system.

Why Should You Require Your Employees to Mediate?

Requiring employees to mediate employment disputes before bringing their claims to arbitration or litigation can be somewhat costly. Mediators generally charge a fee for their services. As noted above, employers cannot legally require their employees to pay the mediators' fee (note that this rule only applies to pre-dispute mandatory mediation agreements; after a dispute has arisen, it is common for employer and employee to agree to mediate and to share fees in some agreed-upon fashion).

Although mediation can be somewhat expensive, a policy of requiring employees to participate in mediation before they can sue is virtually guaranteed to result in fewer lawsuits being filed. When cases are mediated at an earlier stage (especially before counsel become

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Upcoming Prepaid Certificate Program

OCTOBER 2006

*"Responding to Administrative Claims
Effectively and Efficiently"*

Garden Grove: Oct. 19
Laguna Hills: Oct 24

Speaker:
Anne Llauro,
Fisher & Phillips

"This program has been approved for 2.75
recertification credit hours toward PHR and
SPHR recertification through
the Human Resource
Certification Institute
(HRCI).
For more information
about the certification or
recertification, please visit the HRCI
homepage at www.hrci.org."

Wal-Mart and Its Aftershock

by

Robert Fried, Esq. and Christopher Milligan, Esq.

Atkinson, Andelson, Loya, Ruud & Roma

What Do the Wal-Mart Punitive Damage Award, the Withdrawal of Meal and Rest Period Regulations and Conflicting Meal Period Court Decisions Mean for California Employers?

On December 22, 2005, a Northern California jury awarded \$115 million dollars in punitive damages to employees of Wal-Mart for alleged violations of California's meal and rest period requirements. The verdict in *Savaglio v. Wal-Mart Stores* also included \$57 million in general damages. In a post-verdict interview, the jury foreman was blunt – the large award was intended to send a “very clear message” to California businesses that they should explicitly follow California's employment law.



Barely two weeks later, on Friday, January 13, 2006, the California Division of Labor Standards Enforcement formally withdrew its proposed flexibility regulations. While the decision to withdraw affirmed the Division's continued view that meal and rest period payments are a statutory “penalty,” it also announced that new regulations would be drafted and new public hearings scheduled in 2006. For all practical purposes, the flexibility guidelines represented by the regulations were withdrawn. For California employers, it was not a great way to start out the year.

At the same time, during December 2005 and January 2006, several conflicting court decisions were issued on the issue of whether meal and rest period payments required by California Labor Code §226.7 are “penalties” subject to a one-year statute of limitations, or “wages” subject to a three or four year statute of limitations. In *Murphy v. Kenneth Cole, Caliber Bodyworks, Inc. v. Superior Court*, and *Mills v. Superior Court*, California appellate courts decided that such payments represent penalties. However, in *National Steel and Shipbuilding Co. (NASSCO) v. Superior Court*, another appellate court decided that the payments were better characterized as

“wages.” This issue will eventually need to be decided by the California Supreme Court.

Meal and Rest Breaks - The Enforcement Challenge

Effective monitoring of employee meal and rest periods poses one of the greatest day-to-day challenges employers face. Employees expect flexibility as to when, and sometimes if, they take breaks. Day-to-day work pressures can affect those decisions. These competing factors not only complicate enforcement by the employer – they affect uniform and fair enforcement by the Labor Commissioner. The stakes were raised and the need for clear enforcement guidance heightened on these issues

when the Legislature, during the Davis administration, imposed an additional cost on employers for missed meal and rest periods in the form of an additional one hour of payment, measured by the employee's hourly pay.

During 2005, the California Division of Labor Standards Enforcement began a rule-making process with the intent of publishing regulations that would assist employers and employees alike in determining when and how meal and rest period requirements would be enforced. The final proposed regulations made it clear, consistent with California law, that employers must make meal and rest periods available and cannot discourage employees from taking them. Workers would also have had the option to waive meal periods if they work fewer than six hours in one day. The proposed regulations also clarified that meal and rest period payments are “penalties” subject to the one-year statute of limitations, not “wages,” which can be subject to longer limitations periods, up to four years.

The Wal-Mart Verdict

As most employers realize, California law requires that

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employees receive “off-duty” meal periods of at least 30 minutes for every five hours worked. Wal-Mart acknowledged that it “had compliance issues” with California’s meal period requirements when suit was filed against it in 2001. At trial, Wal-Mart stated that there was no basis for punitive damages, and that prior problems had since been corrected through the use of new monitoring technology. Still, employees testified that they frequently went without meal and rest periods because they felt Wal-Mart would penalize them. Employees also testified that they were pulled from their meal and rest periods to make up for staff shortages. Additionally, evidence was presented that Wal-Mart allegedly pressured managers to lower store labor costs, resulting in understaffed stores, “off-the-clock” work, as well as missed meal and rest periods.

Wal-Mart – Issues on Appeal

Although the Ninth Circuit previously upheld a punitive damage award in a meal period case against a Red Lobster restaurant in *Bender v. Darden Restaurants, Inc.*, the better view under California law is that Wal-Mart should not be subject to a “double penalty” through the issuance of a punitive damage award. In *Murphy v. Kenneth Cole*, Murphy, a retail clothing store manager, filed a DLSE complaint alleging that he was misclassified as overtime exempt. The DLSE found in Murphy’s favor, but Kenneth Cole filed a *de novo* appeal. On appeal, the trial court found that Kenneth Cole failed to prove that Murphy was exempt. Murphy also raised new claims for meal and rest period payments, which were awarded by the trial court. The Court of Appeals affirmed the trial court with respect to the overtime exemption issue. The court stated that substantial evidence supported the trial court’s finding that Murphy did not have the requisite input in hiring and firing decisions, or utilize independent discretion or judgment, because almost all aspects of the store and Murphy’s work were controlled by the district manager or by Kenneth Cole’s procedural manual. The Court also noted that Murphy spent 90% of his time engaged in nonexempt tasks.

However, the Court of Appeals held that the trial court should have dismissed Murphy’s meal and rest period claims. These claims were barred, the court stated,

because meal and rest period payments are statutory “penalties” subject to the one-year statute of limitations. The court stated that these payments represent penalties because they are based upon an arbitrary amount, paid in addition to salary paid for work performed during the meal or rest period.

The Wal-Mart trial court’s decision to allow the Wal-Mart jury to address the issuance of punitive damages came well before the December 2005 issuance of *Murphy v. Kenneth Cole*, and before any published California appellate court guidance on the penalty issue. Indeed, the trial court’s initial decision holding that punitive damages would not represent a “double penalty” under California law, because general damages payments to potential class members are considered “wages” and not a “penalty,” is vulnerable on appeal. The court expressly acknowledged that if the “statutory” payments were deemed a penalty, punitive damages would be unavailable because they would represent a double penalty.

Complicating things further, two new cases addressing the issue of whether meal period payments are “penalties” or “wages” were issued in January 2006. In *NASSCO v. Superior Court*, a California appellate court issued a decision contrary to *Murphy v. Kenneth Cole*. NASSCO held that meal and rest period payments are “compensatory” and therefore subject to a longer statute of limitations. The court noted that the Legislature had meant to protect employees when it enacted the statute providing meal and rest period payments, and that the statute should be interpreted with that in mind. The court adopted the view that meal and rest period payments are payments for additional work performed during meal and rest periods, notwithstanding that employees are already compensated for their work time if they work through a meal or rest period. Curiously, the NASSCO court failed to distinguish the holding in *Murphy v. Kenneth Cole*.

In the second case, *Mills v. Superior Court*, another California appellate court held that meal and rest period payments are statutory “penalties.” Mills noted that such payments have nothing to do with the amount of additional

time actually worked, but rather represent a fixed sum due regardless of the amount of missed break periods. The Mills Court also noted that the statute mandates that such payments be provided and are not left to an employer's discretion. In sum, the resolution of the "penalty" issue is clearly one that will ultimately be presented to the California Supreme Court to resolve.

Punitive Damages in Wage and Hour Litigation – What's Next

It is especially important for employers and their counsel to understand the differing legal issues and risks raised by the Wal-Mart punitive damages award. It can be argued that there is no legal basis for imposing punitive damages because the California Legislature already imposes a statutory penalty in the form of the meal period payment. This is consistent with the view expressed in *Murphy v. Kenneth Cole* and by the Division of Labor Standards Enforcement in the proposed regulations.

However, the Wal-Mart jury also found that Wal-Mart acted "with malice, oppression or fraud in failing to provide meal periods to class members as required by California law." Employee advocates can be expected to suggest that such general findings are based upon the jury's factual assessment of the employer's knowledge of its wage and hour practices and constitute an independent basis for awarding punitive damages. In this context, while the statutory penalty debate is important for many reasons – the risks posed by the possibility that a jury can exercise its discretion to "punish" an employer for their wage and hour practices is far greater.

Conclusion and Action Recommendations

The lesson from Wal-Mart is that if wage and hour violations can expose employers to punitive damages awards for "bad behavior," the risk for employers has been dramatically raised. Unfortunately, when the motivation to litigate arises, yesterday's flexible boss can become today's ogre. If that picture is effectively painted to a jury, the risks to employers are enormous. As a result, no matter what happens as the inevitable appeal progresses, California employers should realize that the stakes for less-than-full compliance with California's meal and rest period requirements just drastically increased.

Employers can take effective proactive steps to

minimize risk. An effective compliance policy includes regular wage and hour compliance reviews, audits, ongoing assessment of the exempt and non-exempt status of key personnel in light of the latest cases, clear written policies and an ongoing commitment to training of human resource personnel and managers in understanding and applying the law. Employers are strongly encouraged to contact wage and hour attorneys for assistance and reexamine their written policies and practices.



Applicants Galore Visit Employment Development Department (EDD) Job Fairs

By Jayne Golis
EAC/EDD Coordinator

On Saturday, April 29th, the EDD Job Service offices in Orange County held their annual Summer Youth Job Fair to assist youth, between the ages of 15 and 24, find employment. More than 107 employers and 1,884 job seekers participated at two locations – the Brea Community Center and The Block at Orange.

The job fair was supported by employers offering a wide range of employment opportunities, with the largest turnout

from the restaurant and service-oriented industries, including Domino's Pizza, Von's/Safeway, Home Depot, James Event Production, Knott's Berry Farm, and YMCA of Orange County.

The Employer Advisory Council of Orange County was a major sponsor of this year's event, providing funds to cover the set-up and operational expenses associated with the job fair. Participating employers were especially pleased with the outcome and indicated on their evaluation forms that they look forward to next year's job fair.



involved), they can usually be settled for much less as the employee has not become so emotionally and financially invested in his or her case.

Are There Pro's and Con's of Arbitration?

While there are definitely factors favoring arbitration over litigation of employment disputes, there are also downsides to arbitration. Each employer must weigh the pro's and con's in the context of its own business and workforce.

Fear of unpredictable jury awards is the most compelling reason many employers choose to adopt ADR policies. An arbitrator is much less likely than a jury to give away the business. Juries are notorious for "runaway" verdicts. Arbitrators are generally more conservative (although there is no guarantee that a particular arbitrator will be rational and moderate!). In fact, many employees actually drop their claims when they are forced to arbitrate, often because there is little "upside" incentive for their lawyers, who consequently lose interest.

Arbitration agreements permit the parties to choose their arbitrator. When a suit is filed in court, each side has one peremptory challenge against a judge. However, as soon as that challenge is used, the party must accept the next randomly-selected judge. In contrast, parties to an arbitration exercise much more control over who will decide their case.

Surprisingly, some arbitrators may be better suited to resolving employment disputes than most judges. Most arbitration services maintain lists of arbitrators who specialize in employment law. Many arbitrators have expertise in specific industries. In contrast, most judges will not be specialists in employment law and may never have had experience in the business world.

An arbitrator may be better prepared than a judge. Arbitrators are paid by the hour, which means they have an incentive to carefully read and consider the evidence and the parties' briefs. Judges are under enormous pressure to resolve many, many cases within a specified time. While a judge may be well-intentioned and conscientious, he or she simply may not have as much time to devote to your case.

Arbitration can proceed more quickly than a court case, depending on the availability of the parties and the arbitrator. According to the American Arbitration

Association, the average time to resolve an employment cases is seven months. It can take one year or two years to conclude a court case.

However, there are definite drawbacks to arbitration. Arbitration can be more expensive than litigation. Judges are public servants who work for free. Jury fees are minimal. The employer, however, must pay the arbitrator for all work done on the case at a fairly steep hourly rate.

Unlike a verdict from a judge or jury, an arbitration award generally is not subject to appeal. The grounds for setting aside an arbitrator's award are extremely limited. If the arbitrator makes a demonstrably wrong legal decision, the losing party is out of luck.

Arbitration awards are not as publicized or even available as are court decisions. Thus, arbitrator's decisions are not subject to public scrutiny, unlike judge's rulings. With the wrong arbitrator, this can mean an irrational decision that is not subject to challenge.

Arbitrators have the right to control discovery. Thus, one side or the other may be stymied in its efforts to take depositions and obtain documents, depending on the arbitrator's discretion. In court, each party has a statutory right to conduct discovery within certain broad limits.

Some employers believe that arbitration encourages employees to file claims over frivolous matters, since it is simpler to initiate arbitration than to bring a court case. These employers are concerned about the volume of claims going up, even though the prospect of huge jury verdicts is reduced.

Finally, arbitrators have sometimes been known to "split the baby" to avoid making harsh and decisive rulings. Arbitrators are not required to follow the law. Instead of making the difficult choice of dismissing a case based on a technical legal ground, an arbitrator may give the employee something in the name of "fairness." Fairness is the guiding principle of many arbitrators, whereas judges are required to apply the law.

How Can You Adopt an ADR Policy or Agreement?

If, after weighing all the factors, you decide that your employer should adopt an ADR policy which includes either mandatory mediation or arbitration, here are some tips for implementing the policy.

1. Adopt a Grievance Procedure: To adopt a grievance procedure, write up the procedure and publish it to all employees. Then enforce it!

2. Write an Arbitration and Mediation Policy and Agreement. The policy should explain that alternative dispute resolution is a less costly and more efficient way of resolving disputes and that the law favors such methods. The policy should describe in as much detail as possible the specific types of ADR you have adopted, such as internal grievance procedures, mediation and arbitration, including an explanation of each. The policy should state that the employer will bear the cost of these procedures, except for the costs the employee would have to pay in court. The policy should be reviewed by counsel to ensure that it passes legal scrutiny.

3. Publish the Policy. The policy should be added to the Employee Handbook and posted on the company Intra-Net. The policy should be distributed to all employees by e-mail and hard copy. All employees should be asked to acknowledge receipt of the policy.

4. Launch the Program. Once the policy and the arbitration agreement is finalized, hold meetings to explain the new procedures to your employees. At the meeting, the policy and the agreement can be distributed. Give the employees a period of time, such as ten to fourteen days, in which to review and sign the agreement.

5. Have All New Employees Sign an Arbitration Agreement. Each newly hired employee should sign a written agreement to submit all disputes to mediation and binding arbitration. This is easily done for new employees, who can be requested to sign the agreement when they are hired. California law permits an employer not to hire an employee who refuses to sign an arbitration agreement.

6. Request All Current Employees To Sign the Arbitration Agreement. Asking current employees to sign away their right to a jury trial can be tricky. However,

there is no harm in asking! California law permits employers to request current employees to sign agreements that change their status to at-will and this principal arguably extends to arbitration agreements. However, there will inevitably be some employees who refuse to sign. You still have an argument that employees who have refused to sign the arbitration agreement are bound by the ADR policy.

7. Come up with a plan to address employees who refuse to sign. To preserve employee morale, you may want to offer an incentive to employees who sign, rather than punishing those who refuse. Firing employees who refuse to sign the ADR agreement seems inconsistent with the ADR spirit.

8. Enforce the policy. If you adopt an internal grievance procedure, make sure that your employees, including all supervisors and managers, understand it. All managers should receive training on the grievance procedure, including the importance of preserving confidentiality and non-retaliation against claimants, participants and witnesses. If you have gone to the trouble of adopting an ADR policy, insist that all employees use it.

9. Monitor and evaluate. To evaluate whether or not the ADR procedures you have adopted are truly cost-effective, keep records of the time and expense incurred in using the process as well as the results of the process. Don't overlook the indirect monetary costs and benefits, such as increased morale and less turnover. You can always fine-tune or revise the policy to adapt to new or changed circumstances.

10. For more information, the State Bar has recently published a pamphlet on Alternative Dispute Resolution. Copies can be ordered at <http://calbar.ca.gov/calbar/pdfs/publications/pamform.pdf>.

Good luck!

SB 46, Workers' Compensation Rates: Would establish a Commission on Worker's Compensation Rate Regulation. The Commission would be responsible for setting premium rates. Would exempt State Compensation Insurance Fund from the Commission's jurisdiction. **This bill has been amended to delete any reference to Worker's Comp rates. It now only deals with dry cutting and grinding of masonry products.**

SB 300, California Family Rights Act: Would allow leaves for child of any age, grandparents, siblings, and domestic partners. **In Assembly Appropriations, no action since August 2005.**

SB 840, State Health Insurance Plan: Would set up California Health Insurance System available to all California residents. **In Assembly, no action since July 2005.**

AB 1209, Remove Limits on Workers' Comp Care: Current law limits chiropractic, physical therapy and occupational therapy to 24 visits per injury. This bill would eliminate those limits. This bill originally was written to regulate the rental of snowmobiles. **In Senate Labor and Industrial Relations Committee, Author asked that the bill be held without action.**

AB 1883, Workers' Compensation Insurance: Would, among other provisions, set up a web site, where the public could determine if an employer has Worker's Comp insurance. **Passed Assembly, in Senate.**

SB 538, Medical Provider Networks: Would set up a system for certification of MPN's. **No action since July 2005.**

SB 778 and SB 1188, Charges For Cashing Paychecks: Would clarify that a bank may not charge for cashing paychecks of a business that are written on an account at that bank. **In Assembly Bank and Finance Committee, hearing 6/19/06. Hearing postponed.**

AB 2371, Arbitration of FEHA Complaints: Would void existing employee agreements that require arbitration of

disputes that fall within the jurisdiction of Fair Employment and Housing Act. Would prohibit employers from requiring employees to enter into future agreements as a condition of employment, after 1/1/08. **Did not pass Assembly Floor, 5/31/06.**

SB 1281, Jury Duty Pay: Would require State contractors to pay an undetermined amount of jury duty pay. **Passed Senate in Assembly.**

AB 2217 and SB 1254, Alternative Work Schedules: Would allow individual employees to agree with employers to work up to 4-10 hour days without overtime. **Labor and Employment. Both Failed Passage.**

AB 2277 Review of Workplace Posters: Would require establishment of a working group composed of labor and management to review and rewrite workplace posters. **Assembly Labor and Employment, Failed Passage 4/19.**

AB 2186 Contractors: Would require a penalty up to \$50,000 for knowingly misclassifying an employee as a contractor. In Assembly Labor and Employment. **No action since May 2, 2006.**

New Cal/OSHA Rules on Heat Illness: Cal OSHA has adopted new regulations to prevent heat illness among outside workers. The new rules will take effect after a final review. The new regulations require:

- All outside employees must have access to at least 4 cups of drinking water per hour;
- Shade must be provided to employees in need of rest or recovery;
- New required training on recognizing and prevention of heat illness.

You can get more information at www.dir.ca.gov/DOSH

The following letter shows that the EAC-EDD partnership is alive and well. By helping to support one of the county's largest job fairs, your EAC has helped to enhance services to employers and job seekers.



Arnold Schwarzenegger
Governor

May 24, 1006

Board of Directors
Employer Advisory Council of Orange County
2001 E. Fourth Street, #112
Santa Ana, CA 92705

Dear Board of Directors:

Thank you for your generous contribution to the Eleventh Annual Summer Youth Job Fair sponsored by the Westminster, Irvine, and Santa Ana Job Service offices of the Employment Development Department, the Orange County One-Stop Centers, and the Santa Ana W/O/R/K Center.

Through the collaboration of 25 public and nonprofit agencies, employers, and individuals, the job fair attracted more than 1,500 high school and college age job seekers, 84 employers, and 14 career exhibitors. The event gave youth the opportunity to be considered for jobs starting during the summer and continuing into the next school year.

The Employment Development Department would like to recognize your contribution in serving our community. In particular, we are grateful for your generous donation of the \$1075 for the job fair. The event, which was hosted by The Block at Orange on April 29, 2006, would not have been as successful without your gift.

We look forward to working with you again next year.

Sincerely,

TERESITA DIAZ
Santa Ana Job Service Acting Cluster Manager

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or expert assistance is required, the service of a competent professional person should be sought.

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
Orange County Call Center	N/A	714-736-3000
Orange County Adjudication Center	N/A	714-687-4400
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	949-588-3888
	North County	714-687-4816

The relationship between the California Employment Development Department (EDD) and the Employer Advisory Council (EAC) is defined as a partnership. "The partnership's commitment to both the employer and the worker is to improve EDD services, increase cooperation and communication among EDD and the private sector, and to increase employer's knowledge of EDD programs and services."