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

## 2009 Legislative Report

by

Bruce Matlock, Esq. • EAC-OC Hotline

**T**his is the fourth 2009 report on California and Federal legislation, court decisions, and administrative actions that may affect employers. A number of these bills have been stalled in committee and probably are dead for this session. Bills that have passed the house of origin and are awaiting a third vote in the second house will be sent to the governor if the third vote passes the bill. If you want information on any of these bills or copies of the bill language, contact me or go to [www.leginfo.ca.gov](http://www.leginfo.ca.gov). Please do not rely on this report as legal advice, because it isn't. If you need more detailed information, you should contact your local attorney, or give me a call.

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## Ricci v. DeStefano: Supreme Court Articulates Anti-Discrimination Standard for Employers

by

Evgenia Fkiaras, Esq., Sheppard, Mullin, Richter & Hampton, LLP

**T**he Supreme Court, in a divided decision, recently held that the City of New Haven discriminated against one Hispanic and 17 white firefighters, Plaintiffs in *Ricci v. DeStefano*, by disregarding promotion examinations where racial minorities as a group performed poorly. The Court's legal analysis of Title VII of the Civil Rights Act of 1964 is important to private as well as public employers, all of whom are covered by Title VII's anti-discrimination mandate.

The basis of the lawsuit was a selection method for promotion that many employers use: a test. As mandated by its charter, New Haven relies on examinations to choose the most qualified firefighters for promotion. The results of the examinations that were administered in November and December of 2003 varied considerably among racial groups. For example, on the captain exam, 64% of white candidates passed while only 37.5% of minority candidates passed. On seeing the results, some candidates threatened a discrimination lawsuit against New Haven based on the impact of the test on minorities. The City initiated an investigation and held five public meetings to evaluate the fairness of the test. It decided that the test might disproportionately and unlawfully affect minorities and thus decided to throw out the results. Plaintiffs, who had scored well and would have likely received promotions had the test results not been invalidated, sued the City and some of its officials. The case wound its way through the courts and the Supreme Court issued its decision on June 29, 2009.

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

***by Stewart Lerner***

Your EAC has just completed its planning meeting for the next year. As we reviewed our budget figures for the period ending June 2009, it was clear that our organization has suffered the same financial setbacks as some many other businesses in this difficult economy. Despite the financial challenges, we plan to move forward with our plans to provide even better services to our members in the remainder of this year and throughout 2010.

Part of our ability to do so is because of the stability of the EAC Board. I am pleased to announce that I have been reelected to a two-year term as President while our esteemed Treasurer, Nick Teel, will continue to serve in that capacity. Other Board members will continue to provide strong support by retaining their chairperson roles on our various committees.

As you know, our programs for 2009 are in place for the balance of this year with four excellent workshops still to be presented. For 2010, Robert Orozco, our program chair, has once again proposed a series of seminar topics that will educate and protect our employer members. You will hear much more on these in the months to come.

Walt Storch, our website chair, continues to work on improvements and enhancements for our website. For example, our new Members Only section is now online with lots of important information available to our members.

Jim Hart will launch his second year as *Advisor* chair and will be providing updated information and important legal articles to assist you.

The best news of all is that our services will be provided with no price increases for either annual membership fees or workshop costs. Those of you who have reviewed pricing from other organizations know full well what a tremendous bargain EAC membership has been and will continue to be.

I want to end my comments this month by thanking all of our loyal members who have supported the EAC for so many years and continue to do so. You are the reason for our existence and we appreciate you greatly. Our best wishes for better times in the months ahead.

### **Recent Additions**

**AB 23 Cal-COBRA Subsidy:** Requires employers covered by Cal-COBRA, those with less than 20 employees, to provide notices to Cal-Cobra enrollees and those eligible for Cal-COBRA of the Federal Stimulus COBRA subsidy. Effectively makes Cal-COBRA comply with the same subsidy issues as COBRA. **Signed by the Governor, effective immediately.**

**SB 242 Language Discrimination:** Would add the prohibitions against banning speaking a language other than English that exist in the Fair Employment and Housing Act to the Unruh Civil Rights Act. The Unruh Act deals with providing services to the public.

**In Assembly for third reading.**

**SB810 Universal Health Care:** Would establish a single payer universal health care system for California. The bill has 43 co-authors. **Senate Appropriations, no action since 5/28.**

### **Wage and Hour Issues**

**AB141, SB187, 10 Hour Schedule:** Would allow an individual employee to agree to a 10 hour day without overtime. **No action on either bill since February.**

**AB227, Labor Commissioner Consulting:** Requires the Labor Commissioner to set up a consulting service similar to CalOsha Consulting. If the employer corrects all deficiencies, there would be no penalties. **Assembly, no action since 4/22.**

**AB527, Time Records:** If Labor Commissioner finds that some employer time records are false, all employer records will be considered false. **Passed Assembly in Senate for second reading 7/20.**

**AB793, Wage Discrimination:** Would require California to conform to new Federal laws on Equal Pay Act violations. **Passed Assembly in Senate for third reading on 7/20.**

**SB 287, Meal Periods:** Would change meal period rules consistent with the following court decisions. **Senate, no action pending since 4/29.**

### **Meal and Rest Period Issues:**

The California Supreme Court has agreed to review the Brinker and Brinkly decisions where two Courts of Appeal have ruled that an employer need only “provide an opportunity” for meal and rest periods.

### **Health Insurance**

#### **AB29, Dependent Health Insurance:**

Would require group Health Insurance coverage for dependent children up to age 27. Employers would not have to pay after age 23. **No action since 5/28.**

**AB108, Cancellation of Health Insurance:** Would prohibit a carrier from rescinding coverage if policy has been in effect for more than 18 months. **Passed Assembly, in Senate Appropriations.**

### **Discrimination**

**AB1001, Familial Status:** Would add “Familial Status” to categories protected from employment discrimination. **Assembly, no action since 5/28.**

### **Mandatory Sick Leave**

**AB1000:** Would require all employers to provide one hour of sick leave for each 30 hours of work. Carry over from 2008 when the bill did not get out of the Legislature.

**Still in Assembly, no action pending. Probably dead for this year.**

### **New Hire Issues**

**AB390 Marijuana Use:** Employers would not be allowed to deny employment or terminate employees for using medical marijuana. This bill was vetoed by the Governor in 2008. **Hearing cancelled at request of author 3/31.**

**AB943 Consumer Credit Reports:** Would prohibit the use of consumer credit reports by employers. Similar bill did not pass the Legislature in 2008. **In Senate Appropriations 7/9.**

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***Ricci v. DeStefano*** . . . from Page 1

In holding that the City’s decision was racially discriminatory, the Court analyzed two principles that govern employers’ actions in the racial discrimination arena: “disparate impact” and “disparate treatment.” Under a “disparate treatment” analysis, it is unlawful for employers to treat people differently because of a protected characteristic without proper justification. Under a “disparate impact” analysis, employers are prohibited from engaging in practices that are not meant to be discriminatory but that in fact have a disproportionately negative effect on a protected group.

*Ricci* demonstrates the dilemma that many employers can find themselves in when faced with these two sometimes competing principles. Although the promotion test was administered in good faith and meant to be neutral, the City feared that, if it certified the test results, it might be liable for racial discrimination under a “disparate impact” analysis because of the relatively poor performance of minorities. On the other hand, a decision to throw out the test results could—and eventually did—expose it to “disparate treatment” liability for making a decision based on race without enough justification. Many employers have to ask themselves exactly what New Haven had to ask itself in this situation: Under what circumstances can the employer make a decision based on race in order to avoid possibly unlawful discrimination that might be the inadvertent result of its practices?

The Court’s answer is that a “race-based action,” like that of New Haven’s in *Ricci*, is impermissible unless there is a “strong basis in evidence” that it is necessary to avoid disparate impact liability. It rejected both extremes of the spectrum: A mere good-faith belief that it is necessary to take race-based action in order to avoid unlawful disparate treatment does not suffice to justify a decision based on race. At the same time, an employer need not in fact be in violation of the disparate impact principle before it can take race-based measures. The reality of making decisions that fall in the middle of these extremes will be difficult for employers, but the Court provided some rough guidance: A purely statistical disparity—even one so “significant” that almost no minorities would be represented in firefighter leadership positions despite a 60% city-wide minority population—does not alone suffice to justify race-based remedial action. However, it is enough for employers to initiate an investigation into what actions created the statistical disparity and the likelihood that they would give

***CEAC Leg Report*** . . . from Page 3

**AB1288 E-Verify:** Would prohibit any California government agency from requiring employers to use E-Verify. The Obama administration has indicated that mandatory use of E-Verify may only be required for government contractors. **In Senate, third reading 7/20.**

**New I-9s:** The latest I-9 form issued in April has an expiration date of June 30<sup>th</sup>. The Feds have announced that the new form must be used until they develop a new form some time in the future.

**Unemployment Insurance**

**AB1298:** Would increase annual wages subject to UIB taxes from \$7,000 to \$16,600 and increase tax rates.

**Assembly Insurance, no action pending.**

**Litigation Issues**

**AB298:** Allows immediate appeal of “class certifications.” **Failed passage 3/31.**

**AB335:** Would prohibit employers from requiring California employees to agree that any employment disputes must be tried outside of California.

**Passed Senate Appropriations, 7/15.**

**Independent Contractors**

**AB370:** Increases penalties for unlicensed contractors. **Senate 3<sup>rd</sup> reading 7/20.**

**California Family Rights Act**

**AB849:** Allows CFRA leave for any dependent child, parents-in-laws, grandparents, siblings, grandchildren and domestic partners. **Assembly, no action since 5/28.**

**California WARN Act**

**AB 842:** Increases required notice of layoffs from 60 to 90 days. **Assembly, no action since 5/28.**



**I**t pains me to begin this newsletter with more negative economic news. However, the situation is what it is! The bottom line is that after four straight months of encouraging signs, the nation's unemployment picture has unexpectedly worsened. The loss of 467,000 payroll jobs made it clear that the economic crisis is far from over. Not only was the size of the job loss unexpected, it reversed a trend in which the monthly losses had been shrinking. Those declines had raised hopes that an actual turnaround might be coming.

Not surprisingly, the unemployment rate also edged up — to a 26-year high of 9.5%. The unemployment rate for men reached 10% while the jobless figure for women was 7.6%. Of particular concern, the number of long-term unemployed — those out of work for 27 weeks or more — grew by 433,000 last month to 4.4 million. This group now represents 29% of unemployed workers.

In other matters, there was lots of news this month in the immigration/immigration reform area. You may recall our mentioning in a previous edition that the Form I-9 which was revised only last February would expire on June 30 of this year. BUT, just before the end of the month, the U.S. Citizen and Immigration Services (USCIS) requested that the Office of Management and Budget approve the continued use of the current version of the Form I-9. Thus, while this request is pending, the form will NOT expire and can continue to be used until further notice.

Next came an announcement from Senate Democrats regarding plans to overhaul the nation's immigration laws, including a requirement that workers verify their identities through fingerprints or eye scans. They said this national system was necessary because Congress had failed to crack down on unscrupulous employers and illegal immigrants with fake documents.

Then, as an indication that the government is serious about a crackdown, the federal Immigration and Customs Enforcement agency (ICE) has notified 652 companies nationwide that they may be facing immigration audits. Agents plan to review the I-9 forms and identification documents at all of these firms. Those with significant numbers of undocumented workers may be fined. AND, if

the agents believe that the businesses knowingly hired illegal immigrants, or if they find a pattern of "egregious violations," criminal investigations could be launched.

Here in Los Angeles, the early results of such an audit was announced by American Apparel, Inc. The clothing manufacturer put out a news release to announce that the government had found that about 1,600 of their workers did not appear to be authorized to work in

the U.S. In its release, the company said it would give the employees cited by the government a "reasonable" amount of time to verify their immigration status. If they can't, "such employees will not be able to continue their employment at the company," it said.

A spokeswoman for the immigration agency said that "They are going to be fined no matter what. What's in question now is the amount of the fine." She also indicated that .... we have concerns about possibly a scheme to avoid immigration law." Clearly, there will be much more to come in regard to this investigation.

In recent weeks, the Supreme Court has released two very important decisions. The first reversed a long-standing rule applied to age bias cases. As you are aware from earlier articles in this newsletter, age discrimination claims have been rising rapidly. This new decision has made it much harder for older workers to win in court.

In the past, many courts had decided that, if a worker could show age was one of the factors in a layoff or demotion, then the EMPLOYER was required to prove that it had a legitimate reason for its action apart from age. The Court, however, threw out this two-step approach saying that WORKERS bear the full burden of proving that age was the deciding factor in their dismissal or demotion.

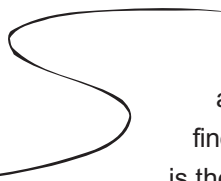
Analysts say that because workers claiming age discrimination will almost certainly not be present when their employers discuss laying them off or demoting them, it will be extremely difficult for the employees to obtain hard evidence that age was the key factor.

The second case decided by the Court could have a major impact on hiring and promotion policies. The 5-4 decision ruled in favor of a group of white firefighters who



## *Lerner Lines*

by  
Stewart Lerner  
Lerner & Associates



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# California Appellate Court Protects Employers Who Allow Tips For Dishwashers

by

Matthew D. Marca, Esq., and Guissu N. Raafat, Esq., Littler Mendelson

**O**n March 27, 2009, in *Brad Etheridge v. Reins International California, Inc.*, No. B205005, the Second Appellate District of the California Court of Appeal approved a mandatory tip-pooling policy that allows participation of kitchen staff. The court rejected all wage and hour claims by a class of waiters arguing that kitchen staff cannot participate in a tip pool. Given the ruling in *Etheridge*, California restaurant employers with mandatory tip pooling policies would be well advised to review, and if necessary, amend their policies.

## Background

California Labor Code section 351 provides that tips are the sole property of the employee to whom it was paid and not the employer or manager. The general rule of thumb for the restaurant industry is that tips are for waiters to be shared with bussers and bartenders. The waiters provide the service and hence share in the majority of the tips. At most restaurants, the waiters then tip-out the bussers and sometimes the bartenders.

Many times there were arguments among waiters, bussers, and bartenders as to how much was to be shared — with bussers and bartenders reacting to the cheap waiter. In order to resolve these issues, many employers implemented mandatory tip-pooling policies. Under the terms of these policies, all tips are pooled and then shared by a pre-determined percentage. Waiters have challenged this practice and alleged that mandatory tip pooling violates Labor Code section 351. In previous California Court of Appeal decisions, the waiters lost that battle.

In 1990, the California Court of Appeal in *Leighton v. Old Heidelberg, Ltd.* upheld mandatory tip-pooling policies. The court in *Leighton* stated that a mandatory tip-pooling policy is one of common sense and fairness, and protects the public, the employees and the restaurant employer, and allows a restaurant employer to exercise control over his business to ensure an equitable sharing of gratuities in order to promote peace and harmony among employees and provide good service to the public.

Following the *Leighton* decision, the rule of thumb used

by the restaurant industry was that only employees who provide “direct table service” can participate in the tip pool. This industry rule was also supported by several Labor Commissioner opinion letters relying upon *Leighton*. In fact, in a 1998 Department of Labor Standards Enforcement (DLSE) opinion letter, the chief counsel explicitly excluded dishwashers, cooks, and chefs from participating in any tip pool given that they did not provide “direct table service.” In its most recent decision, the court in *Etheridge* disregarded this DLSE opinion and expanded the types of employees who are eligible to participate in a tip-sharing pool.

## Etheridge Allows Kitchen Staff to Participate in a Tip Pool

In *Etheridge*, the court considered whether a mandatory tip-pooling policy that shared tips with employees who did not provide “direct table service” violated Labor Code section 351. The employer in *Etheridge* had a mandatory tip-pooling policy stating that tips must be shared between waiters, bussers, kitchen staff, bartenders and dishwashers. The plaintiffs alleged that this was a violation of California Labor Code section 351 because they were required to share tips with employees who did not provide “direct table service.” The plaintiffs relied on the language in *Leighton*, which stated that the standard industry practice is to distribute tips among employees “who directly provide table service to a patron.”

The Second Appellate District rejected this argument and expanded upon the reasoning in *Leighton*. First, it found that *Leighton* did not rely solely on “direct table service” to allow participation in tip pooling. Rather, *Leighton* actually held that bartenders could participate in tip pools given that they “contributed to the service of that patron.” Next, the court expanded its reasoning in *Leighton* and found that limiting tips to those employees who provide “direct table service” would lead to strange results.

[A] ‘direct table service’ limitation would allow a busser to participate in a tip pool if the busser clears

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# E-Z FORM 2009 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.

## Certificate Workshops

5 Per Year • 2 Locations per Workshop

The Certificate Workshops are open to all members, nonmembers and guests. They are held on the third Thursday of each **EVEN** month at the Hyatt Regency, 11999 Harbor Blvd, Garden Grove, CA AND on the fourth Tuesday of each **EVEN** month at the Holiday Inn, 25205 La Paz Road, Laguna Hills, CA. Signup for the Certificate Workshops will be from November 2008 through February 2009. To receive certification you must pre-register and attend four out of the five workshops scheduled.

### Questions?

Please call Barbara Bivens at the  
EAC office  
at 714-846-2510  
or email  
info@eacorangecounty.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 page 8.  
**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@eacorangecounty.com

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

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

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

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

# ***Last Chance !!***

## ***SIGN UP for the Remaining FOUR WORKSHOPS***

**Please check date and location for the WORKSHOPS you will be attending and send this page in with the Registration Form.**

**COMPANY NAME** \_\_\_\_\_

**YOUR NAME** \_\_\_\_\_

**August - Internal Investigations**

**Certificate Workshop 4**

- Aug 20, 2009 – Garden Grove, Hyatt Regency
- Aug 25, 2009 – Laguna Hills, The Holiday Inn

**October - Effective Interview Techniques**

**Certificate Program 5**

- Oct 15, 2009 – Garden Grove, Hyatt Regency
- Oct 20, 2009 – Laguna Hills, The Holiday Inn

**September - Employee A-Z**

- September 17, 2009 General Workshop – Garden Grove, Hyatt Regency

**November 19 – Hotline Q&A & Member**

- Appreciation Breakfast**  
Nov 29, 2009 – Garden Grove, Hyatt Regency

***Note:* EAC IS AN APPROVED PROVIDER FOR HRCI WORKSHOPS**

*Each year the EAC develops a series of five workshops that are approved for HRCI (Human Resource Certificate Institute) credits. For each workshop attended you will receive a certificate for 2.75 credit hours. This program will start again in 2010 in the months of February, April, June, August and October. You need to prepay for all five workshops but EAC offers a discounted rate for pre-payment.*

*Information on the 2010 Certificate Program will go out in November 2009. You can sign up between November 2009 and February 2010.*

*HR certification is a career-long commitment that proves to your peers and your organization that you are driven to be successful in HR management. Earning your HR credentials can:*

- Increase your professional confidence
- Set you apart from your peers
- Result in greater respect from the organization in which you work

**Overview:** The HR Certification Institute offers four certifications for HR professionals:

- PHR® (Professional in Human Resources)
- SPHR® (Senior Professional in Human Resources)
- GPHR® (Global Professional in Human Resources)
- PHR-CA® and SPHR-CA® (PHR with state certification in California and SPHR with state certification in California)

*Certification is a voluntary action by a professional group to establish a system to grant recognition to professionals who have met a stated level of training and work experience. Certified individuals are usually issued a certificate attesting that they have met the standards of the credentialing organization and are entitled to make the public aware of their credentialed status, usually through the use of initials (i.e., PHR or SPHR) after their names.*

*Certifications differ from certificate programs because certifications include an experience component. Certificate programs, on the other hand, award certificates once a course of study has been completed and do not require previous work experience.*

*EAC also offers general workshops in January, March, May, September and November. And even if you do not need the credits, you can sign up for the Certificate Workshops on a monthly basis.*



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# ***Sanders Construction Co. v. Cerda: Contractors Liable for Wages of Unlicensed Contractor's Employees***

by  
*Scott K. Dauscher, Esq. and Christopher S. Milligan, Esq.,  
Atkinson, Andelson, Loya, Ruud & Romo*

**I**n *Sanders Construction Co. v. Cerda*, the California Court of Appeals upheld a Labor Commissioner award for unpaid wages brought by the employees of an unlicensed subcontractor against a general contractor. In doing so, the Court of Appeals served a reminder upon general contractors that they can be found to be the employer not merely of their unlicensed subcontractors, but also of their subcontractors own employees.

Additionally, the decision serves as a reminder that the employees of a subcontractor have the statutory right to file a stop notice claim against not merely their own employer, but also against the general contractor, to recover unpaid wages.

## **Background**

Sanders Construction Co. ("Sanders") was the general contractor on the construction of a hotel in Hesperia, California. In June 2006, Sanders hired Humberto to install drywall for a contract price which included labor and materials. Between June and September, Sanders paid Humberto, who in turn was supposed to pay the workers.

Beginning in September 2006, the parties disagreed about the quality of the work and the payments made from Sanders to Humberto. After Sanders discovered that Humberto's license had expired before June 2006, Sanders continued to work with Humberto to complete the project. Because he was already paying Humberto, Sanders did not believe he was responsible for paying Humberto's workers.

## **Labor Commission Hearing**

The employees filed wage claims against Sanders with the California Labor Commissioner, seeking wages, interest, and waiting-time penalties. In each instance, the hearing officer found that Humberto had told the claimants they would be paid by Sanders, while Sanders considered Humberto responsible for paying the claimants. The hearing officer decided Sanders was the statutory

employer of the workers employed by Humberto, entitling them to wages and interest. The hearing officer declined to award waiting-time penalties because he deemed there was a good-faith dispute about whether Sanders was the employer.

In a separate wage claim brought by Humberto against Sanders, the hearing officer determined that Humberto had misrepresented himself as a licensed contractor and dismissed Humberto's wage claim on the grounds Humberto was an unlicensed contractor, who was acting as an independent contractor. According to the hearing officer, the Labor Commissioner did not have jurisdiction over Humberto's claim, since he was not an employee. Humberto did not challenge the dismissal.

## **Trial Court**

Sanders filed an appeal of the Labor Commissioner's decision in superior court, challenging the Labor Commissioner's awards. The superior court found in favor of the respondents, adopting the reasoning of the Labor Commissioner, and awarded respondents their wages, interest, and waiting-time penalties. Sanders appealed to the appellate division of the superior court, which issued an opinion in favor of respondents, but modified the judgment to eliminate the waiting-time penalties. Sanders then appealed the appellate division's decision to the Court of Appeal.

## **Decision**

In its decision, the Court first found that under the plain language of Labor Code § 2750.5, an unlicensed subcontractor is a statutory employee of the general contractor, not an independent contractor. The Court cited to a number of prior decisions, including *Hunt Building Corp. v. Bernick*, 79 Cal.App.4th 213 (2000), which had held precisely the same. The Court then noted that both Hunt and other prior courts had also found Labor Code §

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**Contractors Liable . . . from Page 9**

207.5 operated to determine that a general contractor is not only the employer of its unlicensed subcontractors, but also their unlicensed subcontractors. The Court also noted that a general contractor is liable for workers' compensation costs incurred by employees of its unlicensed subcontractors, as well as liable for unpaid contributions and payroll withholdings.

The Court dispensed with Sanders' arguments that Labor Code § 2570.5 only applies to cases involving worker's compensation and unemployment benefits, stating that "[w]e discern no meaningful distinction exists between being paid wages and receiving other benefits based on wages." The Court also rejected Sanders' argument that making Humberto's workers the statutory employees contravenes Business and Professions Code § 7031, which prohibits an unlicensed contractor from recovering payment for services. The Court, however, noted that the workers themselves had not posed as a licensed subcontractor, but were merely employees.

**Stop Notice Rights**

Cerda also serves as a reminder that employees of subcontractors, both licensed and unlicensed have the right to file a stop notice to recover unpaid wages. A stop notice is a notice given to an owner and/or lender, requiring the owner (public or private) or construction lender (private works only) to set aside a sum of money to satisfy a claimant's claim. It is enforced by a suit against the holder

of the funds and the person who, absent the stop notice, would be entitled to receive those funds. When a public agency or other agency is served with a stop notice, it withholds funds from its prime contractor. If it ends up having to pay, the money is simply never paid to the prime contractor, thus making the prime contractor the ultimate payor. Additionally, public works payment bonds are required on all public contracts involving expenditures of over \$25,000.

**Conclusion**

*Sanders Construction v. Cerda* constitutes a reminder to general contractors that they must verify their subcontractors' licensed status. As Cerda demonstrates, failure to do so puts general contractors at risk of having to doubly pay subcontractors' employee's wages, interest and penalties, as well as making them responsible for workers' compensation costs and payroll withholdings.

In addition to requiring licensure in the terms of their written subcontracts, general contractors should therefore require proof of license by a verified certificate of licensure from the Contractors' State License Board before finalizing any subcontracts. Further, general contractors should demand regular verification updates prior to making progress payments.

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## ***Verdict Against Houston's Restaurant Demonstrates Risks of Accessing Employee's Restricted Social Networking Sites***

by

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**R**anting on the Internet about one's employer has become commonplace. When complaints are posted on a publicly accessible Internet page, employers have the same right as anyone in the general public to access the posting, and, except in limited circumstances, can take adverse action based on the posting's content.

As the Hillstone Restaurant Group, owner of the Houston's restaurant chain, recently learned after an adverse jury verdict, employers who access a restricted

social networking site without proper authorization face potentially significant exposure under federal and state laws intended to protect personal privacy. With employees becoming increasingly sophisticated about using privacy settings to control access to their personal social networking pages, this risk will become only more significant over time.

rise to “disparate impact” liability. Employers will be able to implement a race-based solution to the impact problem only if the investigation reveals that there is a strong basis in evidence that the cause of the disparity is not job related and consistent with business necessity, or that there exists an equally valid, less-discriminatory alternative that serves an employer’s needs that the employer refused to adopt.

These principles should be more generally applied by employers to all characteristics protected by Title VII: color, religion, sex, and national origin. In addition, they should be applied to analogous situations, such as screenings for new hires or termination standards that seem to result in a disproportionate impact on a protected group.

Nevertheless, employers might not have to second-guess all of their practices motivated by protected characteristics. The Court was careful to point out that “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.” That is to say, *Ricci* should not affect an employer’s ability to consider racial issues in the development of its policies and practices even though that consideration is arguably a “race-based action.” This is because it is only when an employer engages in “intentional discrimination” with the goal of “remediating an unintentional disparate impact” that an employer must have a “strong basis in evidence” for its race-based actions. Thus, *Ricci* will probably not affect the status of most diversity groups, awareness programs, anti-discrimination training sessions, and other actions in the workplace motivated by a protected characteristic that are designed to promote the inclusion and fair treatment of traditionally under-represented groups generally rather than remedy a particular situation of possibly disparate impact.

Although the *Ricci* case should not influence many of employers’ decisions regarding protected characteristics, it nevertheless creates a difficult situation when it does apply. Employers who are considering correcting a possibly discriminatory situation with a racially-motivated action may have to interpret how “strong” a “strong basis in evidence” really is with little practical guidance from the Court. The split nature of the decision also reflects the divisiveness of opinion on the matter and thus, the uncertain long-term sustainability of the current standard. For now, employers can only be diligent in the scrutiny of their practices and seek legal advice when faced with the difficult balancing act they are required to perform under *Ricci*.

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### **Houston’s Management Accesses A Restricted Rant Site and Fires the Site’s Leaders**

Houston’s employee Brian Pietrylo established a group on MySpace, called “The Spec-Tator,” with the stated purpose of “vent[ing] about any BS we deal with at work without any outside eyes spying in on us.” In his opening post, Pietrylo explained that the group was “entirely private and [could] only be joined by invitation.” He then urged group members to “let the s\*\*t talking begin.” Pietrylo’s coworkers, including hisco-plaintiff Doreen Marino, took Pietrylo at his word. Over time, Pietrylo, Marino, and their Houston’s colleagues posted sexual remarks about Houston’s management and customers, jokes about Houston’s standards for customer service and quality, and references to violence and illegal drug use.

Karen St. Jean, a Houston’s greeter and authorized rant group member, showed The Spec-Tator to a Houston’s manager while dining at the manager’s home. Subsequently, another Houston’s manager asked St. Jean for her password, and St. Jean provided it. This manager and a regional supervisor of operations separately accessed the site. St. Jean testified at her deposition that she did not believe that she would be fired if she had refused the request for her password, but she did think she “would have gotten insome sort of trouble.” She also testified that she is “not good under pressure.” She admitted thinking that other managers would access The Spec-Tator once she gave her password to one of the Houston’s managers. Pietrylo testified at his deposition that he viewed the site’s content as “just joking.” Houston’s management, however, did not find the site’s content to be funny. The regional supervisor who viewed The Spec-Tator testified that he considered its content to be adverse to Houston’s four core values of professionalism, positive mental attitude, aim to please, and teamwork. The regional supervisor terminated Pietrylo and Marino.

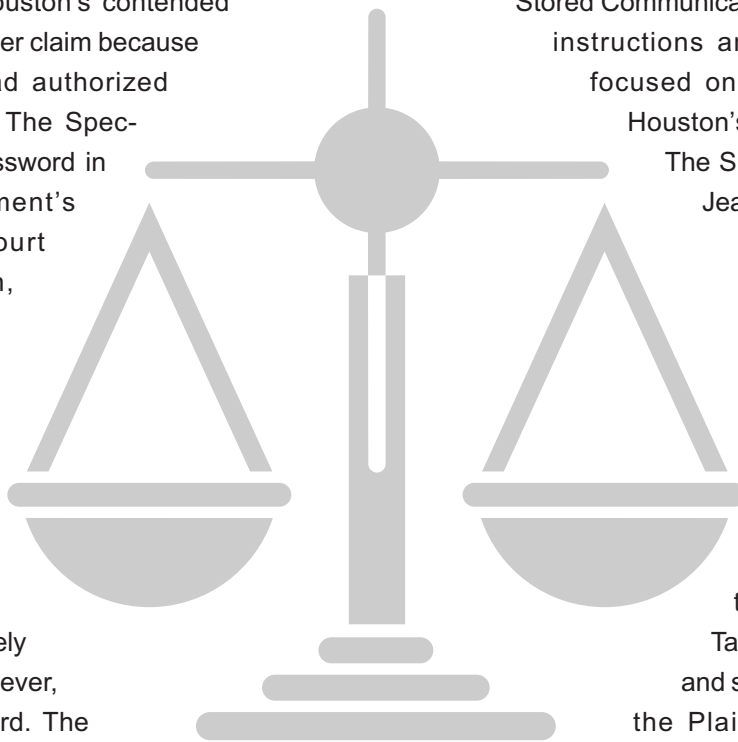
### **Proceedings in the Trial Court**

In their lawsuit against Houston’s owner, Pietrylo and Marino alleged violations of the federal Stored Communications Act and invasion of privacy, among other claims. The federal statute prohibits unauthorized access to electronic communications, such as Internet postings,

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stored at an electronic communications provider, a term that includes Web hosts such as MySpace, Facebook, and LinkedIn. The Act specifically excludes from this prohibition access “authorized ... by a user of the service with respect to a communication intended for the user.” Similarly, under New Jersey law, consent is a defense to a claim for invasion of privacy. In the summary judgment proceedings, Houston’s contended that it had no liability on either claim because St. Jean indisputably had authorized management’s access to The Spec-Tator by disclosing her password in response to management’s request. The district court rejected this contention, reasoning that St. Jean’s deposition testimony created a factual dispute over whether she had freely given her consent. The court noted that “there is a dearth of authority regarding what it means for consent to be freely given.” The court itself, however, did not establish a standard. The court merely concluded that St. Jean’s deposition testimony regarding her concern over a potentially adverse employment action had she not disclosed her password created a factual dispute that required a jury trial to resolve the question whether St. Jean had freely given her consent. The jury returned a verdict against Houston’s on both the federal Stored Communications Act claim and the invasion of privacy claim. The jury awarded Marino nothing on her claim for emotional distress. (Pietrylo did not claim emotional distress.) However, the jury awarded each plaintiff the maximum backpay that could be awarded — \$903 for Marino and \$2,500 for Pietrylo, both of whom had quickly found new jobs after Houston’s fired them. The jury also found that Houston’s had acted maliciously, *i.e.*, had engaged in “intentional wrongdoing in the sense of an evil-minded act.” That finding entitled plaintiffs to an award of punitive damages, which the parties had agreed before



trial would equal four times any actual damages awarded. The actual damages awarded also triggered the Stored Communications Act’s right of an aggrieved party to recover attorneys’ fees, although the trial court has not awarded fees as of this writing.

The jury instructions and jury questionnaire shed some light on the jury’s thinking. With respect to the federal Stored Communications Act claim, both the jury instructions and the jury questionnaire focused on the state of mind of the Houston’s managers who accessed The Spec-Tator, rather than on St. Jean’s state of mind, when she disclosed the password. Thus, the jury answered “Yes” to the question, “Did Houston’s knowingly or intentionally or purposely access The Spec-Tator without authorization from Karen St. Jean?” On the invasion of privacy claim, the jury found that The Spec-Tator was “a place of solitude and seclusion designed to protect the Plaintiffs’ private affairs and concerns,” but that plaintiffs had no

reasonable expectation of privacy with respect to their statements posted in The Spec-Tator. The most likely explanation for this apparently inconsistent result is that while access to the group’s MySpace page was restricted, authorized group members could share their passwords with any person who was not a group member.

**Lessons Learned**

The jury’s verdict demonstrates that employers should tread with caution when accessing an employee’s restricted web page. The trial court’s willingness to send the case to the jury even though no one in Houston’s management had threatened St. Jean in any way and based solely on St. Jean’s equivocal testimony concerning her state of mind suggests a relatively high standard for proving that an employee’s consent was freely given. At trial, a subtle shift occurred in the inquiry: the jury appeared

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to focus less on St. Jean's state of mind and more on the state of mind of the Houston's managers who accessed The Spec-Tator. Thus, the jury focused on whether St. Jean actually had informed the managers that she was freely sharing her password with them.

In light of the common assumption that subordinate employees may perceive some element of pressure when asked to respond to management's requests and in the absence of settled authority addressing when a user's consent is valid under the federal Stored Communications Act, employers should consider the following course of action when confronted with the need to access a restricted Web site. First, carefully evaluate the degree of necessity and forego access when the need does not justify the risk.

Second, document the voluntary nature of the consent of the employee who provides access in a signed acknowledgement. The documentation could, for example, include the following statements:

- (a) the employee understands that she is providing a manager with her password;
- (b) the manager will use the password to access a group site in which other employees participate; and
- (c) the employee disclosing her password understands that she will not be subject to any discipline or adverse employment action if (i) she does not provide the password, or (ii) she revokes her consent or changes the password at some future date.

Finally, employers should recognize that while the total award in the Houston's case was relatively small, other awards could be much larger. The Plaintiffs in the Houston's case were terminated long before the significant downturn in the economy. In today's economy, backpay awards very well could be larger. In addition, the Stored Communications Act permits for an award of minimum statutory damages of \$1,000 per violation. While there is not much case law on the issue, if that provision were read to permit an award of \$1,000 per unauthorized access, the multiplier effect could result in substantial statutory damages. Notably, the larger the actual damages award, the greater the likelihood of a substantial punitive damages and fee award.

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***Lerner Lines . . . from Page 5***

had earned the top test scores in a promotional exam conducted by the city of New Haven. After analyzing the results of the exam, the city found that the pass rate for black candidates was considerably lower than that of white candidates. Because of concerns about law suits which could be brought by the black candidates based on "disparate impact," the city tossed out the results and denied promotions to the white firefighters.

Justice Kennedy, who wrote the majority opinion, said "it cannot be permissible for an employer to take race-based adverse employment actions in order to avoid disparate-impact liability."

Clearly, this testing decision contains far more complex issues than we are able to cover in a newsletter of this type. However, if you use testing as a factor in making your hiring or promotional decisions, it is important that you review this case in its entirety and consider the pros and cons of the positions taken by the various justices. You may also wish to go online to find legal analysis of this very important case.

Let me close with a reminder. Since 2009 is an odd-numbered year, it is time for many of you to conduct your refresher sexual harassment training. If you have 50 or more employees, remember that AB 1825 requires you to provide two hours of sexual harassment prevention training to your supervisors every two years AND newly hired or promoted supervisors must receive training within six months.

Have a great summer!

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the plates while the patron is still seated at the table, but not to participate if the busser waits until after the patron has departed. The work is the same; the next patron still starts his dining experience with an equally clean table, but the busser who cleans between patrons would be barred from participating in the tip pool because he does not personally interact with any patrons.

The *Etheridge* court found this result to be in its words “illogical.” The court further reasoned that it makes no sense to exclude kitchen staff from participation in tip pooling.

If the plates on which the food is served are not clean, the food received is not hot, or is not as ordered, the patron may be inclined to leave a smaller tip even when the services of the servers and bussers were satisfactory. Likewise, when the meal is delicious, the presentation on the plates beautiful, and special food requests have been satisfied, the patron may be inclined to leave a generous tip, even when the servers and bussers might not have delivered exceptional service. In short, a patron tips on all of the service received, not simply the service received by employees the patron can see.

Based on this reasoning and on the premise of fairness, protecting the public and promoting peace and harmony among employees, the court held that waiters and bussers cannot maintain a cause of action against an employer with a mandatory tip-pooling policy that tips any employee who “contribute(s) to the patron’s service, even if not providing direct table service,” which includes kitchen staff.

### **Practical Implications**

This is actually the third time in March that the California Courts of Appeal have rejected the concept that only employees providing “direct table service” are entitled to share in the tip pool.<sup>5</sup> Restaurant employers with operations in California can now include kitchen staff in tip-pooling policies without fear of exposure to claims by angry waiters

and bussers. Although there is language in *Etheridge* suggesting that each employee is an integral part of the service to the patron, employers are well advised to set policies that distribute tips by a percentage that has some rational relationship to the overall level of service given by that class of employees. The central theme throughout *Leighton*, and now *Etheridge*, is that the tip-pooling policies are to promote peace and harmony among employees. Certainly distributing 90% of tips to the dishwasher is not reasonable and will not promote peace and harmony. This is a case-by-case analysis based on the division of duties at each restaurant and should be analyzed carefully.

Moreover, an unanswered question is whether kitchen staff and those employees “who provide the service a patron tips on, but cannot see,” now have a right to share in the tips left by patrons. Labor Code section 351 provides that the tips are the “... sole property of the employee or employees to whom it was paid.”<sup>6</sup> *Etheridge* holds that a patron pays the tips to all the employees who provide service. Based upon *Etheridge*, the dishwashers might be able to prevail on a claim that they are entitled to participate in tip pooling and an employer’s policy preventing them from doing so is unlawful. California restaurant employers also would be well advised to amend tippooling policies to allow kitchen staff and other employees who provide service to the patron to participate in the tip pool.

While the central theme appears to be peace and harmony, none is likely to exist for some time as tip-pooling policies change. Every conversation with current and past waiters elicits visceral responses to the concept that they must share tips with kitchen staff. Now kitchen staff might have been given a right to *share* in the tip pool. Unfortunately, the employer is stuck in the middle of a fight about money (that by California statute is not the employer’s money) as it implements policies to fairly divide tips between its employees to promote harmony.

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## Summary of Job Fairs Held in Orange County

### *1<sup>st</sup> Annual Anaheim / Orange County Job Fair & Expo Event*

**O**n June 3, 2009, from 9:00 am to 3:00 pm, the City of Anaheim Workforce Center/One-Stop and the Anaheim EDD Workforce Services office hosted the 1st Annual Anaheim/OC Job Fair and Expo. The event took place at the Gardenwalk in Anaheim with assistance from 50 volunteers.

109 employers were recruited with more than 2,400 job opening identified. Five seminars ran concurrently for four hours (20 seminars).

The Workforce Center estimates that 7,500 job seekers attended the event with more than 2,000 of them taking advantage of the resume review.

The event was covered by Channels 2/9, 7, 4, 5, 11, 34, 52, as well as KOCE. The Orange County (print and video), Associated Press, LA Times, OC Metro as well as Garden Grove and Anaheim's community channels covered the event.

### *West Anaheim Youth Center Job Fair*

**A** Summer Youth Job Fair was held on Saturday, April 25, 2009 in Anaheim. Jardane Castles and Claudia Almanza attended on behalf of the Anaheim EDD and presented several mini-workshops throughout the morning on "Planning & Preparing your Job Search." Jenifer Motes, Coordinator for the West Anaheim Youth Center, attended on behalf of the Youth Center.

Nine employers, 152 employees and 12 parents or other job seekers attended. The event was well organized and ran very smoothly. All students were invited to attend and most felt positive and ready to meet the employers after receiving important information on topics such as appearance, hand shake, résumé and interviewing skills.

Each workshop lasted approximately 15-20 minutes after which the students were sent into the job fair area to meet the employers. This process provided a good flow of job seekers, rather than having large crowds standing around waiting to talk to employers.



### *Brea Community Center Job Fair*

**A** separate Summer Youth Job Fair was held on the same day, Saturday, April 25, 2009, in Brea. Cheryl Cooley, the Events Coordinator of the Brea Community Center, managed the event.

Thirteen employers, 378 students and 17 parents and other job seekers attended. Employers who attended included BJ's Restaurant, Wumbus Corporation, Von's Grocery Store, La Habra Youth Community Center and O.C WIB. Partners that participated in the event were La Habra Youth Center, Coastline Community College, and Orange County Summer Youth Employment Program (OCSYEP).

The Anaheim EDD Workforce Service office thanked the Orange County Employer Advisory Council for providing funds to purchase marketing items and refreshments for the employers and partners who attended the job fairs at both Brea and West Anaheim.

*A special thank you to the O.C Employer Advisory Council for the generous funds they provided to purchase marketing materials and to purchase refreshments for the employers and partners.*

*Roberta Masek, Anaheim Workforce Services Manager*

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

<b>OFFICE</b>	<b>ADDRESS</b>	<b>PHONE</b>
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 ..... Santa Ana, CA 92701	800-480-3287
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

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."