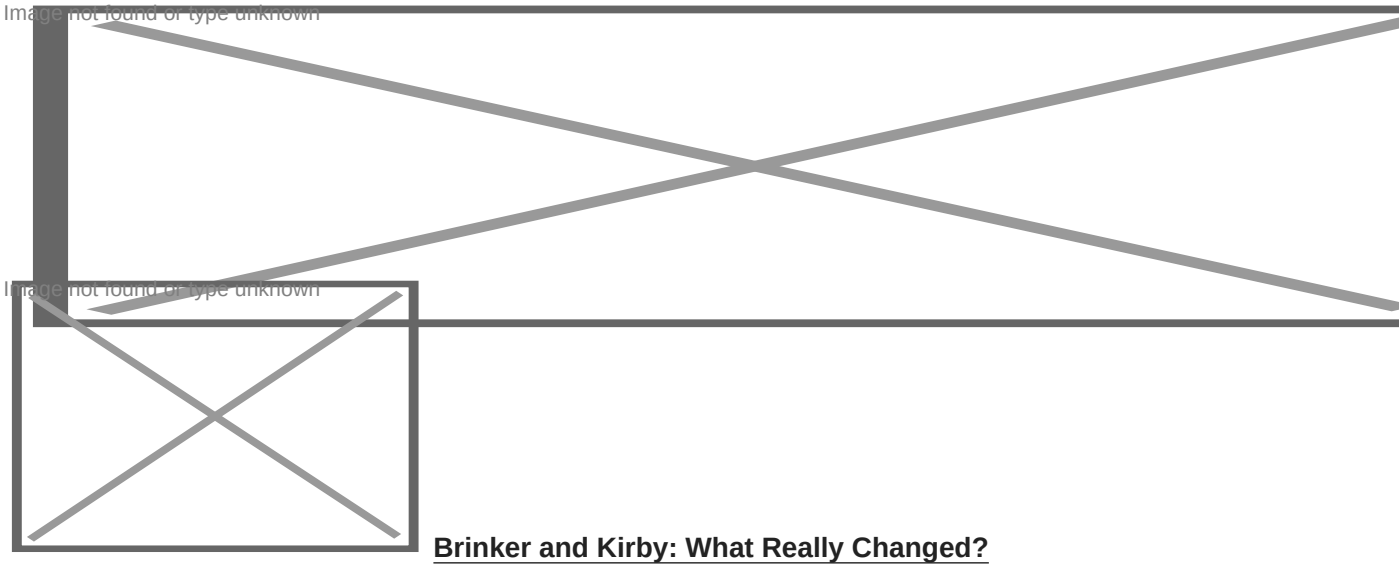
Tucker Ellis LLP

Employment Law – Spring 2012

MAY 2012



Brinker and Kirby: What Really Changed?

The California Supreme Court recently issued decisions in *Brinker* (an employer is generally not liable for ensuring that employees actually take required meal/rest breaks) *and Kirby* (employers and employees have no right to attorneys' fees when wage/hour dispute relates to workplace conduct). These decisions have spurred numerous commentators to provide summaries that might be misinterpreted or that fail to mention key issues **not** addressed in these cases that could lead to significant exposure or loss of rights.

Brinker importantly confirmed that California employers need not "supervise" employees during their meal/rest breaks to **ensure** that they are not performing work-related activities for their employer, also confirming that class certification in many wage and hour cases is difficult to achieve because workplace conduct is often employee/supervisor/site specific. *Brinker* did not, however, change the requirement that employers not foster an environment in which employees are expected or knowingly allowed to commonly work through meal/rest breaks. If "outdated" policies or statements or actions by supervisors cause an employee to reasonably believe that he/she should or must work through a meal or rest break, the employer can still face legal liability. This includes situations in which a supervisor knowingly and repeatedly overburdens an employee with an expectation the employee will "need" to work through his/her breaks in order to perform required tasks. If enough employees are subjected to the express or implied pressure, group or class action litigation might still be possible. It is one thing for employers to "passively" fail to recognize that employees may at

times be working through their breaks, but from a liability standpoint, it is a legally different situation when the employer (even if only through its lower- and mid-level supervisors) directly or indirectly fosters a work environment in which working through statutorily required breaks is an expected or regular part of the work day.

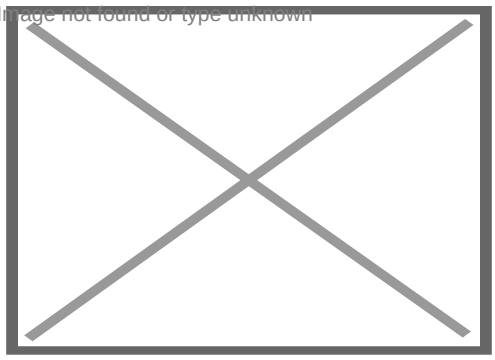
Kirby also needs to be properly understood for the limited issue resolved by the California Supreme Court. *Kirby* simply concluded that California's Labor Code does not permit the employee or the employer to recover attorneys' fees when the litigated relief involves action (i.e., steps to ensure the taking of meal periods) as opposed to statutory damages (unpaid wages). Under the doctrine that attorneys' fees must be expressly allowed by statute or contract, the Labor Code does not extend a right to attorneys' fees when addressing generalized workplace conduct; however, even in these situations, a court may still award attorneys' fees when an employee's (or employer's) claim or defense is deemed "frivolous" or pursued for a "bad faith" purpose. California Code of Civil Procedure Sections 128.5/128.7. While these standards can be difficult to meet, these statutes can still provide financial relief to employers targeted by employee claims lacking a reasonable factual and legal basis.

Tucker Ellis guides employers in developing policies and implementing training programs for their managers and supervisors to ensure compliance with wage, hour and overtime laws. We regularly represent clients in state and federal courts in wage and hour litigation, where we protect our clients' legal rights and potential right to recover their attorneys' fees.

Can Your Employer-Sponsored Wellness Program Unexpectedly Make Your Business Sick?

In response to ever-increasing employer-paid health care premium contributions, employers have begun expanding their employee wellness programs. Employees who engage in healthier behaviors have a reduced need for medical care, leading to decreased health insurance premiums, workers' compensation expenses and workplace absence costs. To encourage participation in employer-sponsored wellness programs, many employers have begun to provide financial incentives and/or penalties which may be unwittingly creating new exposures with potentially significant financial repercussions.

The line between "voluntary" and "required" participation in wellness programs is becoming blurred as employers (directly or in conjunction



with their health care insurers) provide direct financial payments, gym memberships, health insurance discounts and “performance” bonuses if certain participation goals are met. Some employers also impose penalty provisions if goals are not met or there is evidence the employee has failed to follow medical directives from health care providers, including denials of access to company-sponsored health screenings or continuation in drug/alcohol/mental health/diet support services. These approaches, when not properly developed and managed, place employers at three distinct risks:

• First, “reward” or “punishment” programs can trigger unexpected disability, race and national origin discrimination lawsuits as employees assert that such programs have punished or treated “protected classes” of employees differently. A failure to consider and manage such considerations can lead to claims greatly exceeding any financial benefits the wellness program could otherwise provide.
• Second, in order to evaluate the success of participants, disclosure of “medical” information to the employer may be required that can trigger exposures under HIPAA and state-based medical information privacy laws.
• Third, creation of special rewards/punishments can move the program from a “voluntary” effort intended to improve the lives of employees to a “coercive” environment in which employees feel compelled – on their own time – to participate in educational, health, behavioral modification or exercise programs. Courts have upheld overtime wage and workers’ compensation benefits arising from such “compelled” participation. Federal regulations place strict limits on the scope of permissible rewards/punishments.

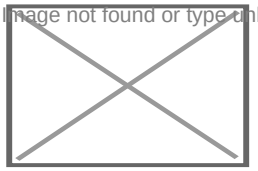
Tucker Ellis helps employers evaluate their company wellness and fitness programs to ensure they do not unexpectedly violate governing labor laws or create unintended liability exposures which can negatively affect morale and workplace cohesion.

New EEOC Guidance Limits the Use of Criminal Records in Employment Decisions

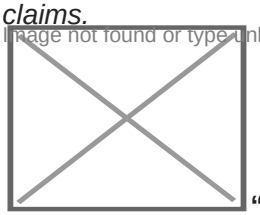
The U.S. Equal Employment Opportunity Commission (EEOC) recently issued new guidelines regarding the use of arrest and conviction information when making employment decisions. After long suggesting that making these decisions based solely on criminal histories could be a violation of Title VII, particularly given disproportionate conviction rates for African Americans and Hispanics, the EEOC has confirmed that in order to avoid claims of illegal discrimination, “individual assessments” are necessary when using criminal history

information.

In the new guidelines, the EEOC reminds employers that criminal history information should be used to determine whether an applicant is **unfit for a particular position**. Thus, it is necessary to conduct an individual assessment that takes into account the applicant's skills, the nature of the job sought, the gravity and nature of the offense and how much time has elapsed since the underlying conduct. The EEOC has also developed "best practice" recommendations for employers, including: (1) identifying those jobs/job functions that could actually be impacted by a criminal history record; (2) determining specific criminal convictions (not arrests) that would be relevant to those jobs/job functions and a reasonable cut-off period (five years?/10 years?) for considering such convictions; (3) recording the research and justification for adopted criminal history screening procedures; (4) training supervisory employees to ensure compliance with adopted policies/procedures and governing laws, including proper interview techniques; and (5) ensuring that all criminal history documents are maintained in a highly confidential manner in the personnel file so that they cannot later be inadvertently viewed or used by company employees.



In addition to the EEOC's guidance, many states have also adopted laws further limiting the use of criminal histories. Tucker Ellis helps clients develop legally appropriate interviewing and hiring practices and criminal history and background check processes, and we help train managers and other hiring personnel in these important areas. Our approach leads to employee-selection processes that better protect against potential hiring discrimination claims.



"Accommodating" Reliable, In-Person Attendance at Work?

While some employers provide "telecommuting" and other alternative workplace options, many employers either want or need their employees to be physically present at a given worksite. The Ninth Circuit recently held that while disabled employees are entitled to reasonable workplace accommodations, regular and reliable in-person attendance can be required when it relates to the performance of essential functions of the job.

In *Samper v. Providence St. Vincent Medical Center*, a hospital worker argued that the medical center where she was employed failed to accommodate her fibromyalgia by refusing to allow her to regularly call in sick on short notice. The court concluded that her position as neonatal nurse required her to reliably appear for work at her scheduled shift times because

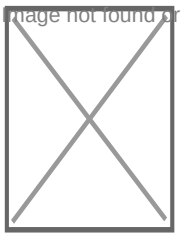
she could not otherwise perform her job functions and her absence was too disruptive to the medical center's operations.

In a different factual setting, the outcome could be different. The court noted that the employer had the burden of demonstrating why on-site attendance was an essential job function (which is a higher standard than a mere employer preference), which might be tied to obligations to work as part of a team, required face-to-face interactions with clients or required use of computer/technology systems that can only be accessed at a designated work site. However, many employees can perform their primary job functions from home or other locations which can then trigger an obligation to accommodate potentially "irregular" attendance, at least in circumstances where the company can withstand such "irregularity" without causing undue hardship.

Tucker Ellis helps employers develop and manage workplace accommodation requests in a manner that protects employers' interests while still implementing reasonable policies and procedures that protect against costly disability discrimination and accommodation litigation.

Workplace Clothing: Paying for "Walking" Time?

Employers requiring employees to change into company uniforms have struggled with the question of when the work day begins. In *Sandifer v. U.S. Steel Corp.,* — F.3d —-, 2012 WL 1592543 (7th Cir., May 8, 2012), the Seventh Circuit created a split of authority among the federal appellate courts as to when the time clock should begin when the parties governed by a collective bargaining agreement are required to change clothes and walk to their separate work location.



It is important to recognize the limited reach of *Sandifer*. Non-unionized employees and union employees not covered by a collective bargaining agreement stating that "changing time" is **not** compensable are entitled to both "changing time" and "walking time." Under *Sandifer*, which is now in conflict with the Sixth Circuit's holding in *Franklin v. Kellogg Co.,* 619 F.3d 604, 618–19 (6th Cir. 2010), the changing of clothes is not a "principal activity" which creates a right to compensation on a portal-to-portal basis. The court also took the Department of Labor to task for changing position on the issue depending on the political party of the current U.S. president, while also noting that in "borderline" cases the definition of "compensable work" should be based on the negotiated union agreement rather than the opinion of an uninvolved bureaucrat.

Tucker Ellis assists employers with union contracts in developing or clarifying language in their collective bargaining agreements in order to clarify the start/end of the work day and protect against wage and hour litigation.

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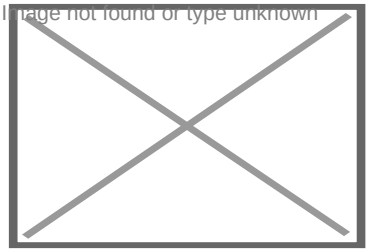
Client Alert



Their Fault/Their Problem? Paycheck Deductions for "Culpable" Employee Damage

Employees make mistakes. Sometimes those mistakes cause harm to third parties, triggering defense and indemnity obligations by the employer or its insurance company. Sometimes those mistakes cause harm to the employer's property (e.g., software installation errors that crash the computer system resulting in service/repair costs; leaving a heater on triggers a fire resulting in the destruction of the employer's office). When the loss or damage arises from an employee's purposeful or criminal conduct, the question becomes whether the employer can obtain any reimbursement from the employee through paycheck deduction or civil/criminal litigation.

Most states have statutes or regulations **preventing** employee paycheck deductions or reimbursement lawsuits arising from an employee's acts and omissions; however, even under these laws, withholding wages to pay for cash shortages, breakage, loss of equipment or other damages is often permitted when the event arises from the employee's "culpable negligence" or knowing or purposeful misconduct. These statutes support the concept that the employee, not the employer, should be held responsible for purposeful or intentional acts expected to cause harm or damage.

Before imposing a unilateral paycheck deduction, employers should ensure that they have conducted a reasonable investigation that develops objective evidence of the employee's willful wrongful acts. For example, when the employer's decision is based on a properly documented investigation – even if the employer's decision is later shown to be incorrect – a reasonable and good faith belief in the right of deduction can negate a basis for any claimed penalties under the California Labor Code. Thus, for employers who may have no other reasonable basis to mitigate their losses, particularly in cases of employee theft, this option might prove to be a prudent course of action.

Tucker Ellis advises employers seeking financial recovery when the knowing and intentional acts of their employees cause harm to its interests, and we successfully defend employers in litigation brought by employees whose wages have been withheld based on harm caused to the company by their misconduct.

situations. Readers should not act upon the information contained herein without professional guidance.