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Employment Auditor's Notepad

SHOULD YOUR COMPANY REVISIT ITS ELECTRONIC INFORMATION STORAGE POLICY?

Employers are well-advised to examine their electronic information storage policies. This assessment makes sense not only from a business perspective as the volume of electronic information continues to increase, but also in light of some proposed changes to California's Civil Discovery Act. To date, California courts have followed federal law, which has provided for the discovery of electronic information since 2006. Under federal law, if a party deems electronic information requested to be inaccessible, then the party simply need not produce it. Under the new proposed California rules, however, all electronic information is presumed to be accessible. The effect of this presumption will undoubtedly shift the burden to the responding party, and invite criticism, and possible sanctions for the refusal, or inability to produce electronically stored information. An effective electronic information storage policy should protect against these risks.

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Tip-Pooling Policies Upheld

THOSE WHO PARTICIPATE IN THE CHAIN OF SERVICE, EXCLUDING MANAGEMENT EMPLOYEES, MAY FAIRLY SHARE IN A TIP POOL.

In a split decision, the Court of Appeals in *Etheridge v. Reins International California*, 2009 Cal. App. LEXIS 444 (March 27, 2009), held that a mandatory tip-pooling policy can be legal under California Labor Code section 351. The mandatory tip-pooling policy at issue in *Etheridge* required waiters to share their tips with other restaurant employees, including dishwashers, kitchen staff and bartenders, but not managers. *Etheridge* argued he should not have to share tips with employees who did not provide "direct table service." The court disagreed, holding those who contribute to a restaurant patron's "chain of service," fairly share in the financial reward for their good work, and further, that such tip-pooling policies allow financial reward to those employees a patron cannot tip directly. The dissent argued that Labor Code section 351 prohibits "back of the house" employees who do not provide direct table service from sharing in the tip pool. *Etheridge* accords with another March opinion, *Budrow v. Dave & Buster's of California, Inc.*, 171 Cal.App.4th 875 (2009), that construed the "direct table service" requirement, and held that bartenders may share in tip-pooling, regardless of whether the bartender delivers the drink to the patron's table. While *Etheridge* and *Budrow* provide employers with some flexibility to require the sharing of tips, it remains to be seen whether the Supreme Court will weigh in.

Arbitration Agreement Invalidated

IMPERMISSIBLE TO WAIVE CLASS AND REPRESENTATIVE CLAIMS BY AGREEMENT.

California law is well-settled that an arbitration agreement tainted with illegality is invalid in its entirety. In a recent decision, *Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277 (2009), the court invalidated an arbitration agreement requiring both the employee's waiver of the right to arbitrate wage and hour labor code violations on a class basis, and the right to bring a representative, as opposed to an individual suit, under California's PAGA law (Labor Code § 2698). The class waiver provision decreased the likelihood that a potential plaintiff would be able to find representation since individual recovery was modest. The PAGA waiver clause conflicted with the purpose of the PAGA statute, which is to allow enforcement actions by employees acting as private attorneys general. Accordingly, the court invalidated the arbitration agreement in its entirety. Employers should consult with an attorney to assess the likelihood that their arbitration agreements will be upheld.

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