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## New Court Decision Prompts Websites To Revise Their Terms



**Robert V. Hawn, Esq.**

Clients often ask, “How can we minimize our risk when operating a commercial website?” One way is to create terms of use that govern a visitor’s use of the site. A September 2012 court decision found that website terms could be invalid and fail to provide protection to website operators. This is a critical decision for California website operators.

*In re Zappos.com Inc., Customer Data Security Breach Litigation*, 2012 WL 4466660 (D. Nev. Sept. 27, 2012) arises out of Zappos’ security breach in January 2012. Following discovery of the breach Zappos notified all persons whose personally identified information may have been compromised. When a lawsuit was filed, Zappos attempted to enforce an arbitration clause in the terms of use found on its website. A federal court in Nevada objected.

Terms of use are often created with little thought, and can be changed anytime by the website operator. Typically they are submitted as a “browse-wrap” and do not require the user to click on a box to confirm consent to the agreement.

The court said the Zappos’ terms of use failed for two reasons.

First, Zappos’ terms of use weren’t set up to create a binding contract because the link to the terms of use was not conspicuous. A link that “is the same size, font, and color as most other non-significant links” will not form a contract and the website did not direct a user to the terms of use when creating an account, logging in, or making a purchase. Absent any direct proof that the user had read the terms of use, no contract existed.

Second, even if a contract was formed, the Zappos terms of use could be

*“Terms of use are often created with little thought.”*

changed by Zappos, but not the user. Zappos’ ability to change the arbitration requirement allowed Zappos to decide whether to arbitrate or litigate without providing the same option to users, and lacked “mutuality of obligation.” Citing decisions in other federal courts, Nevada said this one-sided ability rendered the provision invalid and invalidated the arbitration clause.

In light of this case, website operators should re-examine their terms of use to make sure they are adequately protected.

## Success Story



SLG’s client, a privately-held company, terminated one of its employees. While the client appropriately handled all employment-related matters, the former employee was also a minority shareholder of the company and the company had not repurchased the shares at time of termination. SLG’s attorneys were able to step in and tactfully raise this issue post-termination. SLG’s attorneys were able to negotiate a repurchase of the shares from the former employee without any additional compensation. As a result, the client was able to keep full ownership of the company in the hands of those still active in the company.

## Interesting New Laws In California for 2013

California has over 800 new laws on the books for 2013. These laws range from animals to health care and mortgage reform and went into effect on January 1st. Below is a list of some of the more interesting laws:

### Animals and Agriculture

- SB 1221—prohibits use of a dog to pursue a bear or bobcat.
- SB 935—prohibits use of a vehicle or watercraft if aquatic plants or animals are attached to the exterior.

### Employment

- AB 1844—prohibits employers from requiring applicants or employees to disclose social media passwords.

### Environment

- AB 2230—requires in-car or conveyor-driven car washes to recycle at least 60-percent of their wash or rinse water.

- SB 1076—requires tire pressure gauges to meet specified requirements.

### Transportation

- AB 1266—states that passengers in off-road vehicles are no longer required to keep both feet flat on the floorboard.
- AB 1536—allows drivers to text while driving if the driver is using a voice-operated, hands-free device.
- AB 1890—prohibits driving with any object or material that obstructs the driver's clear view through the windshield or side windows.



In addition, employers in San Jose need to be aware of the increase in minimum wage to \$10 per hour. This minimum wage is higher than the state minimum wage. In addition, San Francisco now has the highest minimum wage in the country at \$10.55 per hour.

## Tax Corner

### Proposition 30

With all the talk about federal income taxes going up in 2013, don't forget about the Proposition 30 retroactive increase in California taxes, effective as of January 1, 2012. For taxpayers with taxable income over \$250,000, the California maximum rate is now 12.3%. On top of this, there is a 1% mental health surcharge for taxpayers with taxable income over \$1,000,000. Together, these taxes give California the highest maximum state tax rate. If you fall under these tax brackets, you may not have paid enough taxes throughout the year, through either withholding or estimated tax payments, to avoid being under-withheld. However, there will be no penalty for the under-withholding so long as you pay the tax due in full by April 15, 2013. Note: The ability to get out of penalties expires on April 15<sup>th</sup>. An extension to file doesn't extend the payment deadline or the penalty exclusion. A late payment penalty of 5% plus 0.5% per month will be due if the full 2012 liability is not paid in full by April 15<sup>th</sup>. Source: *Spidell's California Taxletter Volume 34.12, December 1, 2012.*



### Sales Taxes

As of January 1, 2013, the California state sales and use tax rate increased by 0.25% to 7.5% for four years. Of course, city and county district taxes are added on top of the 7.5%. Source: *Spidell's California Taxletter Volume 34.12, December 1, 2012.*

### Sales Taxes

The IRS has announced the mileage rates for 2013:

- 56.5 cents for business miles (up from 55.5 cents in 2012)
- 24 cents for medical and moving miles (up from 23 cents in 2012)
- 14 cents for charitable miles

California conforms to these amounts. Source: *Spidell's California Taxletter Volume 34.12, December 1, 2012, p. 143.*

## The Latest News At



### SLG Welcomes Eli Salameh



We are excited to welcome Eli Salameh as an attorney in our firm's litigation department. Mr. Salameh joined Structure Law Group after practicing with a firm in San Francisco for several years. His years of in-depth experience allow him to assist in all areas of our litigation practice. During law school Mr. Salameh interned with a prestigious entertainment law firm in Los Angeles.

**Elias Salameh, Esq.** Mr. Salameh is admitted to the State Bar of California, and to practice before all courts in the state. He earned a Bachelor's Degree from the University of California, Los Angeles in 2002. He earned his Juris Doctor Degree from Georgetown University Law Center in 2007.

### SLG Welcomes Serge Filatov



We are also excited to announce that Serge Filatov has joined the firm's transactional practice department. Serge Filatov assists with transactional matters. His practice focuses on representing individuals and businesses in all aspects of business and real estate transactions as well as commercial lending matters.

**Serge Filatov, Esq.** Prior to joining Structure Law Group, Mr. Filatov provided in-house legal assistance to Peralta Community College District as its Deputy General Counsel. He earned a Bachelor's Degree from the University of California, San Diego in 2007. He earned his Juris Doctor Degree from the University of California, Hastings College of the Law.

## Employment Corner

### Retirement Contributions

Taxes may be going up in 2013, but dollar limitations on retirement plans will also be higher this year. The maximum 401k contribution has gone up \$500 to \$17,500, with people born before 1964 able to put in as much as \$23,000. The pay-in limitation for defined contribution plans goes up to \$51,000, and the pay-in limits for IRAs and Roth IRAs goes up to \$5,500, with an extra \$1,000 of pay-ins available to those born before 1964. *Source: The Kiplinger Tax Letter, Vol. 87, No. 22, October 26, 2012.*

### Brinker v. Superior Court (April 12, 2012) 53 Cal. 45th 1004

The long awaited Brinker decision has shown that employers must provide 30-minute meal breaks and 10-minute rest breaks based on number of hours worked but the employer does not have to **ensure** that the breaks are taken. Company policies should still state that employees are required to take their meal breaks.



## Reminders & Other Items of Note

### EDD New Hire Reporting Changes

Recently enacted legislation clarified what is meant by a "new hire." Beginning on or after January 1, 2013, a new hire ALSO includes an employee who had previously worked for the employer but who had not worked for the employer for at least 60 days prior to rehire date. All employers are required to report new hires to the EDD within 20 days of hire. *Source: Spidell's California Taxletter, Vol. 35.1, January 1, 2013.*

### Lower And Middle Income Earners Also Hit With Tax Hikes

Because of the payroll tax cut repeal, lower and middle income earners are also feeling the tax hikes. Many workers are now seeing lower paychecks because of the 2% Social Security tax increase. For example, an employee making \$50,000 in 2013 owes an additional \$1,000 in payroll taxes this year. *Source: The Kiplinger Tax Letter, Vol. 88, No. 22, January 18, 2013.*





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## Dates To Remember

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|----------|--|
| March 10 | Daylight Savings Begins  |
| March 17 | St. Patrick's Day  |
| March 20 | First Day of Spring  |
| April 1  | Cesar Chavez Day (observed)<br>some courts and government offices closed |
| April 15 | Tax Day  |



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## Did You Know?

- Babies are born with 300 bones in their body, but have only 206 bones as they grow into adulthood. This happens because many of them join together to make a single bone.
- The skeleton of spiders, insects and shellfish is located on the outside of the body. It's called an exoskeleton.
- The King of Hearts is the only king without a mustache.
- A typical lead pencil can draw a line that is 35 miles long.
- You use 200 muscles to take one step.
- The average human dream lasts 2 to 3 seconds.



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