2016 CALIFORNIA LABOR AND EMPLOYMENT UPDATE

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I. 2016 CALIFORNIA LABOR AND EMPLOYMENT LEGISLATION[1]

SB 3 RAISES CALIFORNIA'S MINIMUM WAGE.

Summary

SB 3 will increase the state minimum wage to $15.00 per hour over the next six years.[2] The bill sets two minimum wage rate hikes, depending on whether an employer has 26 or more, or 25 or fewer, employees, according to the following schedule:

DATE	26 OR MORE EMPLOYEES	25 OR LESS EMPLOYEES
January 1, 2017	$10.50	$10.00 (no change)
January 1, 2018	$11.00	$10.50
January 1, 2019	$12.00	$11.00
January 1, 2020	$13.00	$12.00
January 1, 2021	$14.00	$13.00
January 1, 2022	$15.00	$14.00
January 1, 2023	TBD	$15.00

All employers in the state must comply with the new minimum wage law. Under SB 3, an "employer" is defined expansively as "any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person," and includes public entities.[3] SB 3 applies to all of California, from larger cities like Fresno to sparsely populated rural areas in Northern and Eastern California. However, unlike minimum wage laws recently passed in other states, SB 3 does not bar municipalities from enacting their own minimum wages that are higher than the state's minimum wage (as many jurisdictions, including San Francisco and Los Angeles, have already done).

During the six-year phase in period, scheduled increases to the state minimum wage may be paused by the Governor for economic or budgetary reasons. These delays, referred to as "off-ramps," may be implemented only twice during the six-year period.

Beginning in 2022 for employers with 26 or more employees, and in 2023 for employers with 25 or less employees, the Department of Finance will annually calculate adjustments to the minimum wage, to be implemented January 1 of the following calendar year. The minimum wage will increase annually either by (i) a rate of 3.5%, or (ii) the rate of change in the averages of the previous year's U.S. Consumer Price Index for Urban Wage Earners and Clerical Workers (U.S. CPI-W), whichever is lesser. Annual minimum wage increases, however, are not guaranteed. The minimum wage will stay the same if that year's U.S. CPI-W is negative.

TAKEAWAYS

On May 18, 2016, the U.S. Department of Labor (DOL) released the following changes to the federal overtime regulations for executive, administrative, and professional (*i.e.*, "white-collar") exemptions to the Fair Labor Standards Act (FLSA):

- The minimum salary threshold for FLSA white-collar exemptions will increase from $455 per week ($23,660 annually) to $913 per week ($47,476 annually), to be increased automatically every three years thereafter beginning January 1, 2020.
- Employers may use nondiscretionary bonuses and incentive payments (*e.g.*, commissions) to satisfy up to 10% of the increased salary levels, so long as those payments are made on a quarterly or more frequent basis.

- The salary threshold required under the federal highly-compensated employee exemption will increase from $100,000 to $134,004 per year, of which at least $913 per week must be paid on a salary basis.[4]

The impact of these new federal regulations—the implantation of which, for now, has been preliminarily enjoined by a federal district court in Texas[5] —is made more complex by California's new minimum wage standards. For an employee to be exempt under the state's version of the white-collar exemptions, like under federal law, he or she must meet a salary test.[6] The salary threshold for California's white-collar exemptions is twice the state's minimum hourly wage rate based on a 40-hour workweek. Therefore, under California's current $10.00 minimum wage rate, the salary threshold for white-collar employees is $41,600 per year (40 hours per week x $10.00 x 52 weeks x 2 = $41,600).

Under SB 3's minimum wage increase schedules, California's white-collar exemption salary threshold for employers with 26 or more employees will not meet the FLSA white-collar exemption salary threshold of $47,476 per year until January 1, 2019. Therefore, employees with exempt workers who earn a sufficient salary to meet the state white-collar exemptions, but not the federal white-collar exemptions, will need to consider numerous options, including: (i) increasing exempt employees' salaries to meet both exemptions, (ii) reclassifying employees as non-exempt, in which case the employer would be responsible for paying them overtime wages, or (iii) maintaining employees' exempt status under state law but treating the employees as non-exempt under the FLSA.

The minimum wage increases under SB 3 will also impact other state-based wage and hour requirements, including:

- Earnings of commissioned salespersons in the retail and service business must exceed 1.5 times the state minimum wage for such employees to be exempt from overtime. And, because over one-half of that amount must consist of commissions, commissions may have to be increased under the new minimum wage law.

- Employees under a qualifying collective bargaining agreement (CBA) are exempt from the payment of overtime. To qualify, a CBA must provide for regular hourly wages of at least 30 percent more than the minimum wage.

- Under California law, employers paying employees on a piece-rate basis must pay for "other non-productive time" (*i.e.*, time when the employee is under the employer's control but is not engaged in the piece-rate activity). The hourly rate calculation for other non-productive time must be no less than the minimum wage.

- Industrial Welfare Commission (IWC) wage orders for most industries allow the value of meals and lodging furnished by the employer to be credited (up to specific amounts) toward the employer's minimum wage obligation. Employers who use these credits as compensation must ensure that they are meeting the increased minimum wage obligations under SB 3.

SB 836 MODIFIES PAGA TO EXPAND INVOLVEMENT OF THE LWDA.

Summary

Employers had hoped for wide-ranging changes to the Private Attorneys General Act (PAGA)[7] in 2016, especially after Governor Brown acknowledged the "concern" in his initial budget that "employers are

being sued and incurring substantial costs defending against technical or frivolous [PAGA] claims." While the changes to PAGA under SB 836 (signed into law as part of the state budget package) are not as widespread as employers had hoped for, there are several significant changes summarized below, particularly regarding oversight power of the Labor and Workforce Development Agency (LWDA), of which California employers should be aware.

- SB 836 extends the amount of time the LWDA has to review PAGA notices (*i.e.*, notice of potential Labor Code violations of an employer) from 30 days to 60 days.
- A plaintiff suing under PAGA cannot commence a civil action until 65 days after sending notice to the LWDA, instead of 33 days.
- If, after receiving a PAGA notice, the LWDA opts to investigate the claims, it now has 65 days, rather than 33 days, to notify the plaintiff and employer of its intent to investigate.
- For cases filed on or after July 1, 2016, the LWDA (i) has up to 180 days, rather than 120 days, to issue citations against the employer, and (ii) must be served with a copy of any PAGA complaint filed in court.
- The LWDA must now be provided with (i) a copy of any proposed PAGA settlement at the time it is submitted to the court for approval, and (ii) any judgment in a PAGA action and any order that approves or denies PAGA penalties.
- All documentation required to be provided to the LWDA must be submitted online, including PAGA claim notices and employer cure notices.

TAKEAWAYS

SB 836's effect on PAGA litigation remains to be seen. On the one hand, affording the LWDA additional time to review and investigate PAGA claims may help to eliminate frivolous claims (and the attendant costs employers incur to defend those claims). On the other hand, the LWDA may also be more proactive in reviewing proposed PAGA settlements, which could complicate the settlement process if the LWDA chooses to intervene. For instance, if the LWDA becomes more aggressive in reviewing PAGA settlements, then litigants may begin allocating more settlement funds to the LWDA portion of PAGA penalties[8] to mitigate the possibility that the LWDA will express any disapproval of the settlement with the court. If so, plaintiffs will likely demand a higher settlement amount to mitigate the increased penalties to the state, making it more costly for employers to settle PAGA suits. It is also uncertain whether the procedural changes to PAGA under SB 836 will impact the number of PAGA claims that will be accepted for administrative enforcement actions by state agencies rather than allowing private parties to prosecute PAGA claims.

AB 2337 REQUIRES EMPLOYERS TO GIVE NOTICE OF THE RIGHT TO TAKE DOMESTIC VIOLENCE LEAVE.

Summary

AB 2337 requires employers of 25 or more to provide written notice to employees of their right to take protected time off—without retaliation or threat of termination—for domestic violence, sexual assault, or stalking.[9] Employers must provide this notice to each employee at the time of hire and any time thereafter upon an employee's request. By July 1, 2017, the Labor Commissioner must develop and post online a template that employers may use to satisfy these expanded notice requirements. An employer's obligation to comply with these new disclosure requirements will become effective when the Labor Commissioner develops this new notice template and posts it online.

TAKEAWAYS

Labor Code section 230(c) already prohibits *all employers* from discriminating or retaliating against a victim of domestic violence, sexual assault, or stalking for taking time off from work to seek judicial protection to ensure the health, safety, or welfare of himself or herself or his or her child. Labor Code section 230.1 prescribes additional anti-discrimination obligations for employers of 25 or more employees. AB 2337 merely adds the additional requirement that employers of 25 or more provide employees with notice of these rights.

Employers are encouraged to review their employee handbooks to ensure that they adequately explain an employee's right to take leave under these circumstances and the type of notice a victim of domestic violence is required to provide to his or her employer. Specifically, the handbook should provide that a victim of domestic violence, sexual assault, or stalking may take time off to seek judicial relief to help ensure his or her safety or the safety of his or her children. For employers with more than 25 employees, the handbook should state that a victim may also take time off to: (i) seek treatment for injuries caused by violence or abuse, (ii) obtain services from a domestic violence shelter, program, or rape crisis center, (iii) obtain psychological counseling, or (iv) participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, including relocation. Lastly, the employer's policy should state that a victim of domestic violence must provide reasonable advance notice of his or her intention to take time off, unless advance notice is not feasible, in which case the employee must provide written certification that meets applicable legal standards within a reasonable time following the absence.

Finally, employers should be reminded that: (i) it is unlawful to discharge, discriminate, or retaliate against an employee for taking domestic violence leave; (ii) they must maintain the confidentiality of any employee requesting domestic violence leave; and (iii) they are required to provide reasonable accommodations to victims of domestic violence in accordance with Labor Code section 230.

AB 908 EXPANDS PAID FAMILY LEAVE AND DISABILITY INSURANCE.

Summary

AB 908 increases the benefits paid out under California's Paid Family Leave (PFL) and State Disability Insurance (SDI) programs as of January 1, 2018.[10] The PFL program provides up to six weeks of partial wage replacement to employees who take time off to care for a family member or to bond with a minor child, while the SDI program provides up to six weeks of partial wage replacement to employees who need time off because of their own illness or injury. Under pre-AB 908 law, there was a seven-day waiting period to receive benefits under both the PFL and SDI programs.

Under AB 908, weekly benefit amounts under both PFL and SDI will be raised from 55% of wages to either 60% or 70%, depending on the applicant's income. AB 908 also eliminates the seven-day waiting period for PFL claims, but not for SDI claims. The wage replacement increase is operative from January 1, 2018 until January 1, 2022, at which time the Legislature can make further adjustments to the PFL and SDI programs.

TAKEAWAYS

Because PFL and SDI are funded entirely by employees (through payroll deductions) and

claims are filed by employees, AB 908 does not impose a cost or administrative burden on employers. Also, while PFL and SDI provide partial wage replacement during leave, these programs do not provide guaranteed job protection.

AB 2535 CLARIFIES CALIFORNIA LAW ON WAGE STATEMENTS.

AB 2535 clarifies language in Labor Code section 226 regarding which employees for whom an employer must track hours worked and record those hours on their paystubs.[11]

Under the pre-AB 2535 version of Labor Code section 226[12], the number of hours worked had to be reflected on an employee's paystub, except for workers who are paid "solely" by salary and are exempt from overtime wages. As written, however, this seemed to require hours reflected on the paystubs for certain exempt employees who are not paid solely by salary (*e.g.*, make commission or receive stock options), even though the number of hours worked for such employees is not relevant to calculating their wages.[13]

Under AB 2535, employers do not need to report total hours worked on a paystub for employees who are exempt from the payment of overtime under specified statutes or any applicable order of the IWC.

SB 269 EXPANDS PROTECTIONS FOR SMALL BUSINESSES AGAINST DISABILITY ACCESS LAWSUITS.

Summary

SB 269 amends existing law regarding disability access in public accommodations and business establishments to address the "handful of highly litigious plaintiffs and attorneys [who] have targeted small businesses in the state, especially those without financial resources or sophistication, with lawsuits alleging violations of construction-related accessibility standards."[14]

SB 269 provides that, for certain disability accessibility claims filed after May 10, 2016, there shall be a rebuttable presumption (for the purpose of awarding minimum statutory damages) that certain "technical violations" do not cause a plaintiff to experience "difficulty, discomfort, or embarrassment," if specified conditions are met—namely, the defendant (i) is a small business (as that term is defined under the Civil Code), and (ii) corrects all of the technical violations included in the claim within 15 days of receiving written notice or the service of a summons and complaint regarding the accessibility claim, whichever is earlier.

SB 269 also exempts a defendant from liability for statutory damages with respect to a structure or area inspected by a certified access specialist (CASp) for a period of 120 days if specified conditions are met—namely, (i) the defendant employs 50 or fewer employees, (ii) the CASp inspection predates the filing of the accessibility claim, and (iii) the defendant has corrected all constructed-related violations noted by the CASp within 120 days of the CASp's inspection.

TAKEAWAYS

SB 269 applies only to small businesses. The safe harbor provisions in SB 269 do not protect all businesses from minimum statutory damages, nor do they protect small businesses from liability if not all of the specified conditions in SB 269 are met. Therefore, small businesses in California should—before being served with a demand letter or complaint—take proactive steps to ensure that their establishments meet the disability access requirements under the federal Americans with Disabilities Act (ADA) and California Fair Employment and Housing Act (FEHA).

AB 2883 AMENDS WHO IS COVERED UNDER WORKERS' COMPENSATION.

California law provides for a workers' compensation system to compensate an "employee" for injuries sustained in the course of his or her employment. AB 2883 revises the definition of "employee" for purposes of workers' compensation.[15]

Under AB 2883, the following persons now meet the definition of "employee" for workers' compensation purposes: (i) officers and members of boards of directors of private corporations during the time they render service for pay to the corporation; and (ii) all working members of a partnership or limited liability company (LLC) who receive wages irrespective of profits. AB 2883 also specifies how officers or members of boards of directors, general partners of a partnership, and managing members of LLCs can declare that they are not "employees" of the company for purposes of workers' compensation coverage.

AB 2899 REQUIRES THAT EMPLOYERS POST A BOND TO CONTEST A DECISION BY THE LABOR COMMISSIONER.

AB 2899 requires an employer, prior to filing an appeal of a decision by the Labor Commissioner regarding a violation of wage laws, to file a bond with the Labor Commissioner in the amount of any minimum wages, liquidated damages, and overtime compensation owed.

Under the pre-AB 2899 version of Labor Code section 1197.1, any employer who pays (or causes to be paid to) any employee a wage less than the minimum wage is subject to a civil penalty, restitution of wages, liquidated damages, and waiting time penalties. Existing law provides (i) notice and hearing requirements under which an employer against whom a citation has been issued can request a hearing to contest the amount allegedly due; and (ii) that after a hearing with the Labor Commissioner, an employer contesting a citation may file a writ of mandate within 45 days in state court.

Under AB 2899, an employer seeking a writ of mandate contesting the Labor Commissioner's ruling must post a bond in an amount equal to the unpaid wages assessed under the citation. The bond amount shall not include amounts for penalties. AB 2899 provides that the proceeds of the bond would be forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of court proceedings.

SB 1241 ALLOWS EMPLOYEES TO VOID CHOICE OF LAW PROVISIONS IN EMPLOYMENT CONTRACTS.

Summary

SB 1241 prohibits an employer from requiring an employee who primarily resides and works in California, as a condition of employment, to agree to a contract term that would require the employee to adjudicate claims stemming from the contract outside of California or deprive the employee of the substantive protection of California law with respect to such claims, whether in litigation or arbitration.[17] SB 1241 makes any contract term that violates these prohibitions voidable by the employee. Any dispute over a voided provision must be adjudicated in California under California law. Employees enforcing their rights under SB 1241 would be entitled to injunctive relief and attorney's fees.

TAKEAWAYS

Out-of-state employers that hire employees in California are no longer able to designate another state's law (*e.g.*, the state of the company's incorporation or where the state primarily does business) to apply to disputes with California-based employees regarding the terms and conditions of employment. As enacted, SB 1241 may expand claims available to plaintiffs who assert that including a non-California choice of law or venue provision violates PAGA and/or unfair competition law.

SB 1241, however, is limited in several respects:

- SB 1241 does not apply to an employee who is represented by legal counsel during contractual negotiations with the employer.
- SB 1241 applies only to new agreements (or modifications or extensions of existing agreements), not to existing agreements.
- SB 1241 permits employees to void forum selection/choice of law provisions only if the underlying claims "arise in California," but not if the claims arise in another jurisdiction.
- SB 1241 only applies if the employee's job is conditioned on the agreement. For example, the legislation will apply to an agreement to arbitrate if, but only if, an agreement to arbitrate is a condition to be hired or a condition for continued employment. Opt-out arbitration agreements and contracts that affect benefits, but not the actual retaining of a job, likely do not fall within SB 1241's ambit.

AB 1843 BARS EMPLOYERS FROM ASKING ABOUT, OR CONSIDERING AS A FACTOR, JUVENILE CRIMES DURING THE JOB APPLICATION PROCESS.

AB 1843 bars employers from asking job candidates to disclose juvenile crimes.[18]

Under existing law, employers are prohibited from asking an applicant to disclose, or from utilizing as a factor in determining any condition of employment, (i) information regarding an arrest or detention that did not result in a conviction, (ii) information concerning a referral, or participation in, any pretrial or post-trial diversion program, or (iii) information regarding a conviction that has been judicially dismissed or sealed. These provisions do not prohibit an employer at a health facility from asking about specific types of arrests for certain crimes.

AB 1843 prohibits an employer from asking an applicant to disclose, or from utilizing as a factor in determining any condition of employment, information regarding an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the applicant was involved in the juvenile justice system. Employers at health care facilities, however, may seek information about any adjudication by a juvenile court in which the applicant has been found by the court to have committed a felony or misdemeanor offense within five years preceding the application for employment, unless the applicant's juvenile offense history has been sealed. Furthermore, an employer at a health facility seeking information on the applicant's juvenile offense history under the foregoing exception must provide the applicant with a list describing the offenses for which disclosure is sought.

SB 1001 BROADENS PROTECTIONS FROM "UNFAIR IMMIGRATION-RELATED PRACTICES."

The California Legislature has made immigration-related misconduct a priority in recent years, including the 2014 amendment to FEHA prohibiting discrimination against drivers licenses issued to undocumented workers (AB 1660) and the 2013 laws prohibiting retaliation for "immigration-related practices" (AB 263 and SB 666). Now, SB 1001 adds a new layer by extending protections from "unfair immigration-related practices" to any employee or applicant regardless of whether they have made a complaint.[19]

Under SB 1001, it is unlawful for employers to: (i) request more or different documents than required under federal law to verify that an employee or applicant is not an unauthorized immigrant; (ii) refuse to honor documents that reasonably appear to be genuine; (iii) refuse to honor documents or work authorization based on specific status or term that accompanies the authorization to work; and (iv) attempt to reinvestigate or re-verify an incumbent

employee's authorization to work using an "unfair immigration-related practice" (as that term is defined in Labor Code section 1019). Further, SB 1001 authorizes a job applicant or an employee to file a complaint with the state for a violation of the foregoing provisions, and authorizes the Labor Commissioner to award penalties of up to $10,000 per violation.

AB 1732 REQUIRES SINGLE-OCCUPANCY RESTROOMS TO BE LABELED "ALL-GENDER."

AB 1732 requires single-user toilet facilities[20] at any business, place of public accommodation, or government agency to be identified by signage as all-gender toilet facilities.[21] AB 1732 will go into effect on March 1, 2017.

AB 1676 AND SB 1063 TARGET WAGE DISCRIMINATION.

According to Section 1197.5 of the Labor Code, as amended under the recently passed AB 1676 and SB 1063, over the last 10 years "the wage gap has barely budged and wage disparities continue to persist." In fact, in 2015, the gender wage gap in California stood at 16 cents on the dollar. Women are paid less than men in 99.6 percent of jobs and are more likely to face financial consequences for taking time off for childbearing and caregiving responsibilities. And wage inequality for minority women fares much worse. For instance, African American women in California make just 63 cents and Hispanic women less than 43 cents for every dollar white non-Hispanic men make.

AB 1676 and SB 1063 were signed into law to combat these wage disparities. AB 1676 prohibits employers from considering prior salary, by itself, to justify any disparity in compensation between male and female employees. SB 1063 prohibits employers from paying workers a wage less than the wage paid to workers of a different race or ethnicity for substantially similar work, unless the employer shows the wage differential is based upon one or more of the following factors: (ii) seniority; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production; or (iv) a bona fide factor other than race or ethnicity, such as education, training, or experience, if the employer demonstrates that the factor is job related and consistent with a business necessity.

SB 1234 REQUIRES SOME EMPLOYERS TO ENROLL EMPLOYEES IN A STATE-RUN RETIREMENT PLAN.

A plan to create a state-run retirement program for nearly seven million private workers in California became law in 2016 with the passage of SB 1234.

SB 1234 requires employers to either offer their own retirement savings plan or enroll workers in the new California Secure Choice Retirement Savings Program.[22] Notably, however, SB 1234 does not require employers to make contributions to the program. Rather, Secure Choice would be structured as an individual retirement account (IRA), with a small percentage of every paycheck of eligible employees automatically diverted into the program unless workers take action to opt out.

The law, which goes into effect on January 1, 2017, will eventually apply to employers with five or more employees; however, it will be phased in over time. Eligible employers with more than 100 employees must participate within 12 months after the program is open for enrollment; employers with more than 50 employees must participate within 24 months after the program is open for enrollment; and within 36 months all other eligible employers will be required to participate.

AB 1066 PHASES IN A STANDARD OVERTIME SCHEDULE FOR AGRICULTURAL WORKERS.

Under IWC Wage Order No. 14, agricultural workers are currently entitled to overtime compensation only if they work more than 10 hours in a day or 60 hours in a week. However, under the recently passed AB

1066,[23] agricultural workers will eventually be paid overtime if they work more than 8 hours in a day or more than 40 hours in a week.

AB 1066 will gradually raise overtime wages for agricultural employees over a four-year period. For employers who employ more than 25 employees, the new pay regulations will commence on January 1, 2019. For these employers, the new legislation will lower the daily 10-hour-day threshold for overtime by a half an hour each year until it reaches the standard 8-hour workday by 2022, and will lower the 60-hour-weekly threshold for overtime by 5 hours until it reaches the standard 40-hour workweek by 2022. For employers with 25 or fewer employees, the effective dates of the overtime standards are delayed by three years—*i.e.*, the overtime shifts will commence on January 1, 2022, and will be fully adjusted by January 1, 2025.

Most all other provisions contained in Labor Code sections 500 through 558.1, including meal breaks, will become applicable to agricultural workers on January 1, 2017.

The bill would authorize the Governor to delay the implementation of these overtime pay provisions if the Governor also suspends the implementation of a scheduled state minimum wage increase based on economic conditions.

AB 1687 PROHIBITS ONLINE ENTERTAINMENT COMPANIES FROM POSTING AN ACTOR'S AGE.

Addressing concerns about age discrimination in the entertainment industry, California passed AB 1687[24] to expand the obligations of commercial online entertainment employment service providers, that enter into a contractual agreement to provide employment services to paid subscribers, from publishing information about subscribers' ages in an online profile. Such subscribers may request to have their age removed from their online profile and, within five days, the provider must honor the request.

Under AB 1687, an online provider that permits the public to upload or modify content on its own website, or any website under its control, without prior review by that provider would not be in violation of these provisions unless the subscriber first requested the provider to remove his or her age information and the provider does not honor the request within five days.

SB 1007 PROVIDES A RIGHT TO A COURT REPORTER IN ARBITRATION.

SB 1007 provides that a party to an arbitration proceeding has the right to have a certified shorthand reporter transcribe any deposition, proceeding, or hearing as the official record.[25] The party requesting a reporter must do so in a demand, response, answer, or counterclaim related to the arbitration, or at a pre-hearing scheduling conference at which a deposition, proceeding, or hearing is being calendared. The bill also requires the party requesting the transcript to incur the expense of the reporter, except as specified in a consumer arbitration.

AB 1289 REQUIRES TRANSPORTATION NETWORK COMPANIES TO PERFORM COMPREHENSIVE BACKGROUND CHECKS.

AB 1289 requires transportation network companies ("TNC"), like Uber and Lyft, to conduct, or have a third party conduct, criminal background checks on each participating driver.[26] The bill also prohibits a TNC from contracting with or retaining a driver who is currently registered on the U.S. Department of Justice's National Sex Offender Public Website; has been convicted of certain terrorism-related or violent felonies; or has been convicted, within the past seven years, of misdemeanor assault or battery, domestic violence, or driving under the influence of drugs or alcohol.

CALIFORNIANS VOTE TO LEGALIZE RECREATIONAL USE OF MARIJUANA.

On November 8, 2016, California voters passed Proposition 64 (the Control, Regulate, and Tax Adult

Use of Marijuana Act), making recreational marijuana use legal for individuals over the age of 21. The good news for employers is that Proposition 64, which took effect on November 9, 2016, will not create any significant changes in the employment arena.

Main Provisions of Proposition 64

- Adults 21 years and older may use and possess up to 1 ounce of marijuana, and up to 8 grams of concentrated marijuana (*e.g.*, waxes and oils).
- Individuals may grow up to 6 plants in their home for personal consumption.
- Public use of marijuana and driving while impaired from marijuana use are prohibited. Individuals may smoke in a private home or at a business specifically licensed for on-site marijuana consumption.
- Imposes new state taxes on growing and selling both medical and nonmedical marijuana.
- Violating the new marijuana law will result in fines and required drug education or counseling.

Impact of Proposition 64 on Employers

Proposition 64 raises various questions and concerns for employers. By and large, however, the new marijuana law does not significantly alter the legal landscape on the use of marijuana by applicants and employees and what policies employers may implement to regulate such use in the workplace.

Proposition 64 states that its intent is to "[a]llow public and private employers to enact and enforce workplace policies concerning marijuana." Proposition 64 also explicitly provides that none of its provisions shall be "construed or interpreted to amend, repeal, affect, restrict or preempt" numerous existing laws, such as driving under the influence and selling to minors. And perhaps most importantly for California employers, Proposition 64 provides that it *does not* impact the "rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law."

TAKEAWAYS

First, while marijuana use and possession may be legal in some circumstances following the passage of Proposition 64, employers may still adopt policies and practices for maintaining a drug free workplace (much like they can prohibit alcohol in the workplace and discipline employees for coming to work under the influence of alcohol). Proposition 64 is intended to decriminalize recreational use of marijuana, not restrict employers from regulating marijuana use in the workplace.

Second, the passage of Proposition 64 does not mean that employers have to accommodate employee use of marijuana for medicinal purposes. In *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008), the California Supreme Court held that an employer may refuse to employ an individual who failed a drug test, even if the positive test resulted from medical use of marijuana authorized under Proposition 215 (which California voters passed in 1996 to legalize medical marijuana). The Court further held that employers are not required to accommodate marijuana use as a reasonable accommodation under FEHA. Thus, despite Proposition 64, the *RagingWire* decision remains good law. Furthermore, under the federal Controlled Substances Act, marijuana remains a Schedule I drug, such that employers may still rely on federal law to refuse to hire applicants who test positive for marijuana use.

Third, Proposition 64 does not create any rights protecting employees who use or possess marijuana at work or prohibit employers from discriminating against employees who use marijuana. For instance, employers need not be concerned about disciplining employees for being under the influence of marijuana while at work. Proposition 64 also does not affect smoke-free workplace policies—the new law states that it shall not be construed to permit smoking marijuana or marijuana products "in a location where smoking tobacco is prohibited." Where California law prohibits or restricts tobacco smoking—including under the new restrictions on smoking in the workplace under AB 7—the same laws should apply to smoking marijuana.

Fourth, Proposition 64 does not change California law on drug testing. According to the California Supreme Court, and notwithstanding California's state constitutional right to privacy, public and private employers may drug test a *job applicant* for marijuana without suspicion. But testing *employees*, including post-accident testing,[27] generally requires reasonable suspicion that the employee was under the influence of marijuana.

Finally, employers should take note that, under Proposition 64, an employee engaged in marijuana cultivation is subject to IWC Wage Order No. 4, not IWC Wage Order No. 14. Before Proposition 64, employees cultivating plants were subject to Wage Order No. 14, which covers agricultural occupations. The main difference between the two Wage Orders is that Wage Order No. 4 requires overtime after 8 hours in a day or 40 hours in a workweek, with double overtime after 12 hours in a day, whereas Wage Order No. 14 currently requires overtime after 10 hours in a day or 60 hours in a workweek. Under the recently passed AB 1066, agricultural employees subject to Wage Order No. 14 will gradually become subject to the same overtime requirements as found in Wage Order No. 4. Proposition 64, however, made this change immediate for employees in marijuana cultivation.

In sum, while Proposition 64 does not affect employers' ability to regulate marijuana use in the workplace and discipline employees for consuming or being under the influence of marijuana while at work, all employers should consider revising their alcohol and drug policies to specifically address how marijuana will be treated under such policies. Doing so may help employees understand that the employer may treat marijuana no different than, for example, alcohol, after its legalization following Proposition 64.

II. 2016 AMENDMENTS TO FEHA REGULATIONS

The Fair Employment and Housing Council's (FEHC)[28] amendments to FEHA Regulations took effect on April 1, 2016. This summary discusses the most important additions to the amended FEHA regulations. All employers with California-based employees should carefully review their discrimination, harassment, and retaliation policies and practices to ensure compliance with these amended regulations.

Written Policy Requirements

Under the new FEHC regulations, employers must create a written harassment, discrimination, and retaliation prevention policy that:

- Lists all protected groups under FEHA[29];
- States that supervisors, co-workers, and third-parties are prohibited from engaging in unlawful behavior under FEHA;
- Provides for a complaint process that allows employees to report to someone other than a direct supervisor;
- States that all complaints will be followed by a fair, complete and timely investigation,[30] and that the employer will maintain confidentiality to the extent possible;
- Instructs supervisors to report all complaints to the company;
- States that remedial action will be taken if any misconduct is found after the investigation; and
- Makes clear that employees will not be retaliated against for complaining or participating in an investigation.

Under the amended FEHA regulations, an employer must distribute its prevention policies to all current and future employees under any of the methods promulgated by the regulations (*e.g.*, via email with an acknowledgment return form), or using any method that ensures all employees receive and understand the prevention policies.

Sex Discrimination

Discrimination on the basis of sex[31] protects all individuals—not just females—from sex discrimination. Furthermore, gender identity[32] (including transgender[33]) and gender expression[34] status are now expressly protected and defined under FEHA.

Religious Discrimination

The amended FEHA regulations clarify that it is: (i) unlawful religious creed discrimination to fail to hire or terminate an employee in order to avoid the need to accommodate a religious practice; and (ii) unlawful to discriminate or retaliate against a person for requesting a reasonable accommodation based on religion. Furthermore, an accommodation is not reasonable if it requires segregation of an employee from customers or the public, unless expressly requested by the employee.

National-Origin Discrimination

The California Vehicle Code permits the issuance of a driver's license to non-citizens. The new FEHA regulations prohibit discrimination against an employee or job applicant because he or she holds or presents a driver's license despite not being a citizen. An employer may require that an employee or applicant hold or present a license issued under the Vehicle Code only if possession of a driver's license is required by state or federal law, or possession of a driver's license is required by the employer and is otherwise permitted by law.

Furthermore, a policy that requires employees or applicants to hold or present a driver's license may be evidence of unlawful discrimination if that policy is (i) not uniformly applied, or (ii) inconsistent with a legitimate business reason (*i.e.*, possessing a driver's license is not required to perform an essential function of the job).

Reasonable Accommodations

Under FEHA, employers must provide reasonable accommodations for applicants and employees who, because of their disability, are unable to perform the essential functions of the job. Employers are required to engage in a good-faith interactive process with applicants and employees in need of reasonable accommodation (*e.g.*, working with the employee to determine his or her work limitations and how they could be overcome with a reasonable accommodation).

Under the new FEHA regulations, the interactive process requires an individualized assessment of (i) the job requirements at issue, and (ii) the physical or mental limitations of the applicant or employee that are directly related to the need for reasonable accommodation. The regulations also make clear that an employer shall not discriminate or retaliate against a disabled person for requesting a reasonable accommodation.

Finally, some employers have developed policies with respect to the provision of assistive animals, including support animals, as a reasonable accommodation for disabled workers. Such employers should confirm that their documentation is updated to include the FEHA regulations' new definition of "support animal," which is: "A support animal is one that provides emotional, cognitive, or other similar support to a person with a disability, including but not limited to, traumatic brain injuries or mental disabilities, such as major depression." The amended regulations also clarify that an assistive animal may be needed as a reasonable accommodation for a person with a disability, based on the same individualized analysis required under the new regulations governing the requisite interactive process. Employers should also note that the regulations no longer provide that an assistive animal be "trained to provide assistance for the employee's disability."

Sexual Harassment

Employers may need to update handbook and personnel policies, and training materials, that reference the definition of sexual harassment. "Sexual harassment" includes verbal, physical, and visual harassment, as well as unwanted sexual advances.

The new FEHA regulations provide that an employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire. Furthermore, an employee alleging sexual harassment is not required to sustain a loss of tangible job benefits to establish harassment. The regulations also specify that sexual harassment may be either "quid pro quo" sexual harassment (*i.e.*, explicitly or implicitly conditioning a job or promotion on an applicant's or employee's submission to sexual conduct) or "hostile work environment" sexual harassment (*i.e.*, unwelcome comments or conduct based on sex that unreasonably interfere with an employee's work performance or create an intimidating or offensive work environment).

The regulations also add expansive provisions regarding employer liability for workplace sexual harassment. Under the new FEHA regulations:

- An employer is strictly liable for the harassing conduct of an agent or supervisor, regardless of whether the employer knew or should have known of the harassment.
- An employer is liable for harassment, perpetrated by an employee other than an agent or supervisor, if the employer (or its agents or supervisors) knew or should have known of the harassment and failed to take appropriate corrective action.
- An employer is liable for the sexually harassing conduct of nonemployees towards its own employees where the employer (or its agents or supervisors) knew or should have known of the conduct and failed to take appropriate corrective action.
- An employee who harasses a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

In line with Section 12940(k) of the Government Code, the regulations are clear that employers have a duty to take reasonable steps to prevent and correct discrimination and harassment in the workplace. However, the amended FEHA regulations also clarify that there is no stand-alone private cause of action under Section 12940(k)—*i.e.*, a plaintiff must plead and prevail on some underlying claim for discrimination, harassment, or retaliation.[35]

Expanded Requirements for Anti-Harassment Training

Section 12950.1 of the Government Code requires employers with 50 or more employees to provide two hours of classroom or other interactive training regarding sexual harassment prevention to supervisory employees based in California every two years. Under the amended FEHA regulations, sexual harassment training for employers must be expanded to discuss:

- Remedies available to victims of sexual harassment, including investigation of complaints;
- Supervisors' obligation to report sexual harassment, discrimination, and retaliation;
- Negative effects of "abusive conduct" on victim and employer (*e.g.*, reducing productivity and morale); and
- Elements of "abusive conduct."[36]

The regulations also include new documentation and recordkeeping requirements, including maintaining sign-in sheets and questions received and answered, a copy of training materials, and certificates of attendance or completion.

The existing regulations require that instruction on sexual harassment includes questions that assess learning, skill-building activities that assess the supervisor's application and understanding of content, and hypothetical scenarios (with follow up discussion questions) about harassment. The new regulations provide the following, specific examples: pre- or post-training quizzes or tests, small group discussion questions, discussion questions that accompany hypothetical fact scenarios, use of brief scenarios discussed in small groups or by the entire group, or any other learning activity geared towards ensuring interactive participation as well as the ability to apply what is learned to the supervisor's work environment.

Pregnancy and Pregnancy Leave

Under the new regulations, it is an unlawful practice to harass an employee or applicant because of pregnancy or perceived pregnancy, childbirth, breastfeeding, or any related medical condition.

An employee is eligible for up to four months of leave per pregnancy, not per year. Such leave need not be taken in one continuous period.

An employer must provide appropriate notice of employee rights and obligations regarding pregnancy, childbirth, and related medical conditions. The notice must be in easily readable text and posted in a conspicuous place where employees are employed. Electronic notice may be sufficient. A FEHA-compliant notice can be found at http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2016/DFEH-100-20%20(04-16).pdf, which includes language regarding employees' obligation to give advance notice of the need for pregnancy-related leave whenever possible, and employees' potential entitlement to leave under the California Family Rights Act.

Unpaid Interns

Pursuant to the new FEHA regulations, it is unlawful for an employer to discriminate against an unpaid intern or any other person providing unpaid work in the hiring, termination, training, or other terms of employment on any protected basis. Unpaid interns and volunteers[37] are considered "employees" for purposes of FEHA's protections of persons from harassment.

III. PROPOSED FEHA REGULATIONS

The FEHC has proposed regulations (i) describing how consideration of criminal history in employment decisions may constitute discrimination if it adversely affects protected classes, and (ii) defining employment practices that may constitute discrimination against transgender applicants and employees. These regulations are still being modified and are not yet in effect.

Criminal History in Employment Decisions

Employers are likely aware of "ban the box" initiatives inside and outside of California,[38] which aim to remove the "box" from employment applications asking an applicant whether he or she has ever been convicted of a crime. Now, proposed FEHC regulations concerning the use of criminal history in employment decisions will make it easier for employees and applicants with a criminal past to sue for violations of FEHA.

Under the proposed regulations, employers would be prohibited from utilizing hiring practices that, although facially neutral, have an adverse impact on FEHA-protected classes, unless the employer can show the policy is job-related and consistent with business necessity.[39] The proposed regulations make clear that employers, to avoid liability, must consider each applicant or employee with a criminal history individually, as well as the nature and gravity of the offense, the time that has passed since the offense, when the individual completed their sentence, and the nature of the job held or sought. A "bright line" policy disqualifying job applicants for certain convictions is presumptively not job-related and not consistent with business necessity, unless the employer can show that the policy can properly distinguish between applicants or employees that do and do not pose an unacceptable level of risk and that the convictions being used to disqualify have a direct and specific negative bearing on the person's ability to perform the job.

Moreover, irrespective of adverse impact, employers would be prohibited from considering certain types of criminal history (*e.g.*, misdemeanor possession of marijuana that is two or more years old), or from seeking such history, when making employment decisions.

While these new regulations are not yet in effect, employers should reevaluate any policy regarding the use of criminal history as grounds for disqualification from employment.

Transgender Identity and Expression

In addition to DFEH's recently published guidance document, "Transgender Rights in the Workplace," and other FEHA regulations that added protections for transgender employees and applicants, the FEHC has proposed new regulations to increase protections for transgender workers. The "Regulations Regarding Transgender Identify and Expression" will require employers to:

- Provide rest breaks to employees without regard to sex;
- Provide equal access to comparable, safe, and adequate facilities (*e.g.*, restrooms) without regard to sex;
- Permit employees to use facilities that correspond to the employee's gender identity or gender expression, irrespective of the employee's sex at birth; and
- Use gender-neutral signage on single occupancy facilities under the employer's control.

Aside from discrimination based on failure to hire or termination, employers may also be liable for discrimination against transgender workers by:

- Imposing dress standards on an applicant or employee that is inconsistent with the individual's gender identity or gender expression;
- Requiring an employee to use a particular facility designated for use by a particular gender;

- Requiring an individual to state whether they are male or female when applying for work;
- Deeming an applicant to have been misleading or untruthful by identifying themselves on an application in a manner inconsistent with their assigned sex at birth;
- Inquiring as to or requiring proof of an applicant's sex, gender, gender identity, or gender expression as a condition of employment.

Finally, the proposed regulations provide that an employer may not discriminate against an individual who is "transitioning" (*e.g.*, changes in name and pronoun, medical procedures, and hormone therapy).

IV. 2016 LABOR AND EMPLOYMENT CASE UPDATES

CASH IN-LIEU OF BENEFITS MUST BE INCLUDED IN REGULAR RATE OF PAY.

In *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016), plaintiffs, all of whom are current or former police officers of the City of San Gabriel, brought suit for violations of the FLSA, alleging that the City failed to include payments of unused portions of plaintiffs' benefits allowances when calculating their regular rate of pay, resulting in underpayment of overtime. The City claimed that its cash-in-lieu of benefits payments[40] were properly excluded from plaintiffs' regular rate of pay pursuant to certain statutory exclusions under the FLSA.

The Ninth Circuit affirmed summary judgment in favor of plaintiffs, holding that defendant's payment of unused benefits must be included in the regular rate of pay for purposes of calculating overtime compensation. In so doing, the court found that section 207(e)(2) of the FLSA (which exempts from the regular rate payments not made to compensate for hours worked) did not apply to the cash in-lieu payments made by defendant because "though [such payments are] not directly attributable to any particular hours of work . . ., [they are] clearly understood to be compensation for services." As a separate basis for affirming summary judgment, the court found that section 207(e)(4) of the FLSA (which exempts from the regular rate payments made by an employer to a trustee or third person pursuant to a bona fide benefits plan) also did not apply to the cash in-lieu of benefits payments made by defendant because the benefits plan at issue did not meet the definition of a "bona fide" plan under federal regulations.

NINTH CIRCUIT REAFFIRMS THAT INDIVIDUALIZED DAMAGES DO NOT DEFEAT CLASS CERTIFICATION.

In *Bermudez Vaquero v. Ashley Furniture Industries*, Inc., 824 F.3d 1150 (9th Cir. 2016), the Ninth Circuit affirmed a district court order granting class certification for alleged minimum wage violations under California law.

Of particular importance was the court's analysis of Rule 23(b)(3) of the Federal Rules of Civil Procedure. For a class to be certified under Rule 23(b)(3), a plaintiff must show that common questions of law or fact predominate over individualized questions. On appeal, defendant argued that, when damages calculations cannot be performed on a classwide basis, the predominance requirement for class actions under Rule 23(b)(3) cannot be satisfied. Defendant relied on the U.S. Supreme Court's holding in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In *Comcast*, an

antitrust case, the Court reversed class certification because plaintiffs' damages model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability was premised. The court in *Ashley Furniture* found Rule 23(b)(3) satisfied because, unlike *Comcast*, it was indisputable that plaintiffs' alleged damages were necessarily caused by defendant's actions.

The court further reaffirmed that, based on "well-settled" and "repeatedly confirmed" Ninth Circuit law, individualized damages calculations do not render a class uncertifiable. In so holding, the court also addressed the recent U.S. Supreme Court decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). In *Tyson*, the Court affirmed certification of a class of employees who claimed defendant failed to compensate them for time spent donning and doffing protective gear. Those employees relied on representative evidence, such as expert statistics and video testimony, to establish both liability and damages on a classwide basis. The Court in *Tyson* adopted plaintiffs' position that representative evidence could defeat the need for individualized inquiries regarding liability and damages for each class member. Looking to *Tyson*, the Ninth Circuit in *Ashley Furniture* stated that "[t]he need for individual damages calculations does not, alone, defeat class certification" and, therefore, held that the district court did not commit reversible error in certifying the class.

TAKEAWAYS

- The law in California state courts appears to be similar to the law explicated in *Ashley Furniture*. *See, e.g., Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 408-09 (2015) (internal citations omitted) ("However, the fact that some employees may have taken some [rest] breaks is an issue that goes to damages. It is not a proper basis on which to deny certification. [A] class action . . . is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. . . . The fact that individual [workers] may have different damages does not require denial of the class certification motion.").

- In *Ashley Furniture*, defendants also claimed that, under a seminal Supreme Court case, *Wal-Mart Stores, Inc. v. Dukes*, individualized damages calculations violated their rights under the Rules Enabling Act, which provides that Rule 23 "shall not abridge, enlarge or modify any substantive right."[41] More specifically, defendants argued that the use of representative evidence would inevitably change the substantive rights of the parties by preventing defendants from individually cross-examining and challenging each class member's claims. The *Ashley Furniture* court, relying on language from *Tyson*, found that the use of representative evidence did not violate defendant's rights under the Rule Enabling Act, particularly where the trial court had discretion to choose an option, such as the use of individual claim forms or the appointment of a special master, that would allow defendants to raise any defenses they may have to individual damages claims.

- Notwithstanding that individual damages calculations, alone, cannot defeat certification, both *Tyson* and *Ashley Furniture* make clear that defendants in class actions may nonetheless challenge the viability of representative evidence and statistical sampling at a later stage of the proceedings (*e.g.*, decertification, summary judgment, in pre-trial evidentiary motions). State law tracks *Tyson* and *Ashley Furniture* in that respect. *See, e.g., Walsh v. IKON Office Solutions, Inc.*, 148 Cal. App. 4th 1440, 1451-52 (2007) (granting decertification of

class action where the circumstances of each class member's employment differed significantly from every other member of the class and, as a result, individual hearings on both liability and damages would be required for each of the 150 class members).

EXERCISE YOUR RIGHT TO ARBITRATION EARLY OR RISK WAIVER.

Summary

In *Martin v. Yasuda*, No. 15-55696, 2016 U.S. App. LEXIS 13323 (9th Cir. July 21, 2016), the Ninth Circuit held that defendants waived their right to arbitration by, among other conduct, litigating the case in district court for 17 months.

Plaintiffs were individuals who enrolled at cosmetology schools operated by defendants. As part of their enrollment, plaintiffs signed an arbitration agreement. Plaintiffs filed a class action lawsuit against defendants alleging violations of state labor laws and the FLSA. After plaintiffs filed a first amended complaint in 2014, defendants moved to dismiss plaintiffs' state law claims. Plaintiffs then filed a second amended complaint and defendants answered. Later, the parties filed a case management report containing a footnote in which defendant maintained that each plaintiff executed an arbitration agreement and that they were not waiving any rights to compel arbitration. At a subsequent scheduling conference, defendants stated on the record that they did not intend to compel arbitration, preferring instead to remain in court. Finally, before moving to compel, defendants answered plaintiffs' requests for production and defended a deposition.

A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. On the above record, and despite the fact that any party arguing waiver of arbitration "bears a heavy burden of proof," the Ninth Circuit found that defendants had waived their right to arbitration.

TAKEAWAYS

Although a finding of waiver is relatively uncommon because of the Federal Arbitration Act's (FAA) strong presumption in favor of arbitration, employers should be alert to the following lessons from *Martin*:

- Generally, although there is no concrete test, extended silence and delay in moving for arbitration may indicate a "conscious decision" to litigate in a judicial forum rather than in arbitration, which would be inconsistent with a right to arbitrate and could lead to waiver.
- A statement by a party that it has a right to arbitration in court filings is not enough to prevent a finding of waiver.
- A party should assert an intent to arbitrate early in the case (and then at every opportunity throughout the case before compelling arbitration) and provide reasons to the court why it intends to delay filing a motion to compel arbitration.
- If a party intends to file a motion to compel arbitration, it should not tell the court that it is likely "better off" litigating the case in federal court (especially on the record at a scheduling conference, as the defendants in *Martin* did).
- Waiver can be found where the party seeking to compel arbitration has filed a dispositive motion seeking a judgment on the merits in court.
- Prejudice may be found where the party opposing arbitration can demonstrate that

it has incurred substantial costs (*e.g.*, opposing a motion to dismiss, extensive meet and confer to structure pre-class certification discovery) that it would not otherwise have incurred had the moving party compelled arbitration at an earlier stage.

NINTH CIRCUIT FINDS ADA CLAIM IMPROPER WHERE NO FULL-TIME POSITION EXISTED FOLLOWING PLAINTIFF'S LEAVE OF ABSENCE.

In *Mendoza v. Roman Catholic Archbishop*, 824 F.3d 1148 (9th Cir. 2016), plaintiff worked full-time as a bookkeeper for a small parish church. During her employment, she took sick leave for 10 months, during which time the pastor of the church took over the bookkeeping duties himself and determined that the job could be done by a part-time employee. When plaintiff returned from sick leave, there no longer was a full-time bookkeeping position, and plaintiff turned down a part-time position offered by the church.

Plaintiff sued defendant under the Americans with Disabilities Act for failing to return her to a full-time position following her medical leave. The Ninth Circuit affirmed the district court's entry of summary judgment in favor of defendant, holding that plaintiff failed to show the existence of a reasonable accommodation that would have enabled her to perform the essential functions of an *available* job. In other words, plaintiff failed to raise a triable issue regarding whether defendant's non-discriminatory reasons for not returning plaintiff to her full-time position (*i.e.*, that it was no longer available) were pretextual.

NINTH CIRCUIT RECOGNIZES PERMISSIBILITY OF ROUNDING EMPLOYEE HOURS AND REAFFIRMS *DE MINIMIS* DOCTRINE.

In *Corbin v. Time Warner*, 821 F.3d 1069 (9th Cir. 2016), the Ninth Circuit held that defendant's rounding practice was lawful and applied the *de minimis* rule to find that plaintiff's one minute of off-the-clock work was not compensable.

The plaintiff in *Corbin* worked at defendant's call center, during which time his time punches were rounded to the nearest quarter hour.[42] The parties agreed that, in the aggregate, plaintiff lost $15.02 due to defendant's rounding policy. Additionally, plaintiff alleged that, in one instance, he logged onto an alternate computer system before logging onto his normal computer system, costing him a minute of working time for which he was not compensated.

Plaintiff brought federal and state wage and hour claims, alleging that (i) defendant's rounding policy unlawfully denied him overtime (the "rounding claim"), and (ii) the practice of allowing employees to log into an auxiliary system before clocking into the main system denied him full compensation for all time worked (the "logging-in claim").

The Court Affirmed Summary Judgment on the Rounding Claim.

The court in *Corbin* first analyzed plaintiff's rounding claim. As background, under federal regulations, employer rounding practices are permitted as a neutral calculation tool to efficiently calculate hours worked without imposing any burden on employees. Rounding practices, therefore, have been regularly approved by both federal district courts and California courts of appeal.[43] Based on this case law, the Ninth Circuit rejected plaintiff's rounding claim, finding that defendant's rounding practice was facially neutral, without any eye towards favoring either the employer or employee over time, and neutral in application, because sometimes an employee gains minutes worked and compensation and sometimes loses minutes worked and compensation. The court also rejected plaintiff's contention that an individual employee may not lose any compensation due to a rounding policy because the rounding policy is analyzed with respect to the entire employee pool, not just individual employees, and because rounding policies need only average out in the long term. Based on the above, the *Corbin* court affirmed summary judgment in favor of defendant on the rounding claim.

The Court Affirmed Summary Judgment on the Logging-in Claim.

The *Corbin* court also reaffirmed the viability of the *de minimis* doctrine. Like the district court, the Ninth Circuit determined that plaintiff's alleged one minute of time spent logging into an auxiliary program before logging into the main timekeeping system constituted *de minimis* time for which plaintiff could not recover.

The court looked to U.S. Supreme Court and Ninth Circuit cases[44] which have held that "in light of the realities of the industrial work," a "few seconds or minutes of work beyond the scheduled working hours... may be disregarded" as non-compensable *de minimis* time. To determine if time worked is *de minimis*, courts consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time;[45] and (3) the regularity of the additional work. The *Corbin* court, finding that these factors weighed heavily in favor of defendant, held that the one minute of time spent logging into the auxiliary system was *de minimis* under federal law.

The California Supreme Court will Review the *De minimis* Doctrine under California law.

Although *Corbin* analyzed the *de minimis* doctrine, it did so with an eye towards federal law. Recently, though, the California Supreme Court agreed to clarify California law on the *de minimis* doctrine.

In *Troester v. Starbucks Corp.,* No. CV 12-7677 GAF (PJWx), 2014 U.S. Dist. LEXIS 37728 (C.D. Cal. Mar. 7, 2014), the court granted defendant's motion for summary judgment because, among other reasons, plaintiff's time spent in and around the store after clocking out was held to be *de minimis*. That finding, however, was based on federal case law and other federal authorities discussing the *de minimis* doctrine. On appeal, the Ninth Circuit submitted a request under California Rules of Court, Rule 8.548, that the California Supreme Court decide whether the federal *de minimis* doctrine applies to California wage claims.

TAKEAWAYS

- Rounding policies are acceptable under current federal and state law, provided that they are neutral on their face and neutral as applied to the employees.
- Courts will examine a rounding policy's impacts on all nonexempt employees over a protracted period of time, not just a snapshot of one employee's time punches during a short window of time.
- The *de minimis* doctrine (notwithstanding any unfavorable ruling by the California Supreme Court in *Troester*) is a tool to cut short a proposed class seeking penalties for "insubstantial or insignificant" periods of time.

NINTH CIRCUIT WIDENS CIRCUIT SPLIT BY FINDING THAT MANDATORY CLASS ACTION WAIVER IN ARBITRATION AGREEMENT IS UNENFORCEABLE.

In *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016), plaintiffs brought a class and collective action for failure to pay overtime in violation of federal and state law. Plaintiffs, however, had signed arbitration agreements containing a class and collective action waiver. Thus, the district court granted defendant's motion to compel *individual* arbitration of plaintiffs' claims, and plaintiffs appealed.

The Ninth Circuit, in a 2-1 split, reversed that decision, holding that an employer violates the National Labor Relations Act ("NLRA") by requiring employees to sign an agreement precluding them from bringing class or collective claims regarding the terms and conditions of employment in any forum, judicial or arbitral.

TAKEAWAYS

The battle over the enforceability of class and collective action waivers in employment arbitration agreements seems far from over. The Courts of Appeals are sharply divided on the issue, with the Seventh Circuit and Ninth Circuit agreeing with the National Labor Relations Board that such waivers violate employees' rights under the NLRA, while the Second Circuit, Fifth Circuit, Eighth Circuit, and Eleventh Circuit have held that such class action waivers are enforceable under the FAA.

On January 13, 2017, the U.S. Supreme Court granted certiorari in three cases, including *Morris*, to decide whether class action waivers in employment arbitration agreements violate the NLRA. Until a final decision by the Supreme Court, employers that use arbitration agreements with class action waivers are encouraged to consult with legal counsel to discuss latest developments in the law and risk management practices.

FEDERAL COURT DENIES CLASS CERTIFICATION OF CALIFORNIA MEAL AND REST PERIODS CLAIMS.

A California federal district court gave a big win to employers when it recently denied class certification of minimum wage, meal period, and rest period claims brought under state law.

In *Burnell v. Swift Transportation Co.*, No. 10–809–VAP (SPx), 2016 WL 2621616 (C.D. Cal. May 4, 2016), two truck drivers filed a class action suit against their former employer, Swift Transportation, alleging that Swift had a policy of violating state laws on paying minimum wage and providing breaks. In their certification motion, plaintiffs argued, among other things, that the court (i) should certify the minimum wage class to address the question of whether Swift had a policy of paying drivers for estimated miles driven and not paying drivers for non–driving tasks; and (ii) should certify a meal and rest period class because Swift had a policy of not scheduling—and thus, preventing employees from taking—meal and rest breaks. The court denied certification on the minimum wage and meal/rest period claims.

First, the court found that, despite the undisputed evidence that Swift paid for estimated miles driven and not for certain non-driving duties, plaintiffs failed to show that Swift had an unlawful policy of paying less than the minimum wage. The parties' evidence showed wide variation regarding if, when, and for how long drivers allegedly performed uncompensated work, such as pre- and post-trip vehicle inspections. Therefore, plaintiffs could not demonstrate common (as opposed to individual) questions of law or fact with respect to the minimum wage claim. Next, the court was not convinced that Swift had an unlawful meal and rest period policy because it failed to schedule such breaks. Under the seminal California Supreme Court case, *Brinker Restaurant Corp. v. Superior Court*, Swift's only obligation was to *notify* its drivers of California's meal and rest break claims, not to schedule them. Swift may not prevent employees from taking breaks, but need not police to ensure that breaks were taken, the court emphasized. Thus, plaintiffs could not show that Swift had a general policy of preventing drivers from taking meal and rest breaks, especially where Swift provided evidence of drivers actually taking meal and rest breaks without interference.

For all these reasons, the court denied the drivers' motion for class certification, and in the process affirmed *Brinker*'s (and post-*Brinker* decisions') mandate that employers' liability on meal and rest period claims comes not from a defective policy per se, but from proof that meal and rest breaks were unlawfully denied to class members.

FEDERAL DISTRICT COURT GRANTS MOTION TO COMPEL ARBITRATION WHERE EMPLOYER'S ARBITRATION AGREEMENT ALLOWED EMPLOYEES TO OPT OUT OF CLASS ACTION WAIVER.

In *Ryther et al. v. BJ's Restaurants, Inc.*, No. 8:16-cv-01138 (C.D. Cal. Sept. 15, 2016), a California federal district court upheld the enforceability of a class action waiver in an arbitration agreement because employees were allowed 30 days to opt out of the waiver.

Plaintiffs brought suit for various federal and state wage and hour claims. Before beginning at BJ's, both plaintiffs signed a mutual arbitration agreement requiring that all employment-related claims be brought on an individual basis and not on a class or collective action basis. BJ's moved for an order compelling arbitration of the plaintiffs' claims on an individual basis pursuant to the arbitration agreements.

Plaintiffs argued that the class action waiver was unenforceable because it violated the NLRA's provision protecting concerted employee activities and a similar provision under the Norris-LaGuardia Act. Plaintiffs relied heavily on the Ninth Circuit's recent decision in *Morris v. Ernst & Young LLP*, No. 13-16599, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016), where the court held that requiring employees to agree to a class action waiver in an arbitration agreement is unlawful because it strips them of their right to collective activity under the NLRA.

The court, however, found that *Morris* and a prior decision, *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014), actually directed the court to uphold the class action waivers and *enforce* the arbitration agreements. Under *Morris and Johnmohammadi*, a class and collective action waiver does not violate the NLRA when an employee has an opportunity to "opt out" of the class waiver provision. In the *BJ*'s case, because the employees were given 30 days to opt out but chose not to do so, the arbitration agreements were enforceable.

CALIFORNIA SUPREME COURT CLARIFIES OBLIGATION TO PROVIDE SEATS FOR EMPLOYEES.

In *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1 (2016), the California Supreme Court assessed the state's "suitable seating" provision for certain employees, which states that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." More specifically, the *Kilby* Court framed the issues as:

(1) Does the "nature of the work" refer to individual tasks performed during a day or shift, or the entire range of duties performed during a day or shift?

(2) What factors should a court consider when determining whether nature of the work "reasonably permits" use of a seat?

(3) Must the employee prove that a suitable seat was available to show that his or her employer violated the seating law?

As explained in *Kilby*, the Court resolved those questions as follows:

(1) The "nature of the work" refers to an employee's actual or expected tasks, such that if tasks are performed at a particular location at the job site, those tasks should be considered in evaluating whether work there reasonably permits use of a seat. The "nature of the work" factor does not refer to the entire range of an employee's duties anywhere on the job over the course of a shift (as argued by defendants), nor does it turn on a task-by-task evaluation of whether a single task may feasibly be performed seated (as argued by plaintiffs).

(2) Whether the nature of the work "reasonably permits" use of a seat must be determined based on the totality of the circumstances, including such factors as the employer's objective business judgment, the physical layout of the workplace, the frequency and duration of tasks, and the feasibility and practicability of providing seating.

(3) If the nature of the work reasonably permits seated work, California law states employees "shall be provided with suitable seats." Thus, an *employer* seeking to be excused from the requirement must show that compliance is infeasible because no suitable seating exists. It is not for the *employee* to prove that any particular seat is suitable.

UNSIGNED ARBITRATION AGREEMENT APPENDED TO EMPLOYEE HANDBOOK ENFORCEABLE, SAYS COURT OF APPEAL.

In *Harris v. TAP Worldwide, LLC*, 248 Cal. App. 4th 373 (2016), plaintiff brought multiple causes of action for discrimination and violations of wage and hour laws. Defendants moved to compel arbitration based on three documents: an employee handbook; the then-current employment alternative dispute resolution policy in the handbook; and an alternative dispute resolution agreement appended to the employee handbook. Plaintiff, upon being hired, acknowledged in writing having received the employee handbook with the attached arbitration agreement, although he did not sign the arbitration document itself.

The trial court denied defendant's motion to compel arbitration, but the court of appeal reversed. First, the appellate court concluded that a valid arbitration agreement existed at the time plaintiff began employment because the plaintiff acknowledged in writing that he had received the arbitration agreement. The court also found that the plaintiff consented to arbitrate his claims at all times throughout his employment because the arbitration agreement read: "If Employee voluntarily continues his/her employment with TAP [Worldwide, LLC] after the effective date of this Policy, Employee will be deemed to have knowingly and voluntarily consented to and accepted all of the terms and conditions set forth herein without exception."

Second, the court considered whether the arbitration agreement was illusory because it could be modified unilaterally by the employer. The court distinguished the employee handbook itself from the arbitration agreement appended to the employee handbook. Whereas the employee handbook permitted the changing, modification, supplementing, revision or rescission at any time of all its policies and practices (which is allowed because an employer possesses the unilateral right to alter the terms of future employment, subject to reasonable notice), there was specific language in the arbitration agreement that limited defendant's ability to unilaterally modify the arbitration agreement.

TAKEAWAYS

While employers should ensure that their employees sign a separate arbitration agreement—even if the agreement is appended to a handbook or other document—the ruling in *TAP* gives some leeway to employers that have not required signatures on arbitration agreements in the past. Under *TAP*, an unsigned arbitration agreement appended to an employee handbook should be enforced if it is specifically noted in the employee handbook, is a condition of continued employment, and the employee signs an acknowledgment of receipt.

However, employers should carefully assess whether they should incorporate arbitration agreements within a handbook itself, rather than as a free-standing document. Several cases recognize that arbitration provisions within a handbook may be unenforceable under certain circumstances. For instance, just recently on August 22, 2016 in *Esparza v. Sand & Sea, Inc.*, 2 Cal. App. 5th 781 (2016), a court of appeal held that an arbitration agreement in an employee handbook did not create an enforceable agreement to arbitrate. The employee handbook at issue stated, "[T]his handbook is not intended to be a contract… nor is it intended to otherwise create any legally enforceable obligations on the part of

the Company or its employees." Although the employee signed a handbook acknowledgement that referred to the arbitration agreement contained in the handbook, the form did not state that the employee agreed to the arbitration. Accordingly, the court found that the employer could not compel the employee's claims to arbitration.

PRE-LITIGATION INVESTIGATIVE REPORT MAY BE PRIVILEGED

In *City of Petaluma v. Superior Cour*t, 429 Cal. App. 4th 1023 (2016), the California Court of Appeal held (i) that an outside attorney's investigation of a former employee's harassment and discrimination claims performed prior to litigation was protected by the attorney-client privilege and work product doctrine, and (ii) the employer's assertion of the avoidable consequences defense (*i.e.*, that the employer took reasonable steps to prevent and correct harassment, but the employee failed to use those measures) in the lawsuit did not waive the privileges as to a post-employment investigation.

Pre-lawsuit Investigation by Outside Attorney

In *Petaluma*, Plaintiff Andrea Waters sued the City of Petaluma for hostile work environment and discrimination based on her gender, retaliation, and failure to prevent harassment during her employment as a firefighter. Waters resigned from the Fire Department three days after filing a complaint with the EEOC. The City retained an outside attorney to investigate Waters' claims. The retention agreement between the City and the investigator indicated that the investigator would interview witnesses, collect and review pertinent information, and report to the City on that information—*i.e.*, conduct a professional evaluation of the evidence based on her employment law experience. The agreement further stated that it created an attorney-client relationship between the City and investigator, that the investigation would be subject to the attorney-client privilege, and that the investigator would not render legal advice as to what action to take as a result of the findings of the investigation.

Lower Court Proceedings

Waters filed suit shortly after the conclusion of the investigation. In its answer to the complaint, Petaluma asserted the avoidable consequences doctrine as an affirmative defense. During the litigation, Waters filed a motion to compel, through which she sought discovery relating to the outside investigation, including the investigative report. The City objected, asserting that such information was protected by the attorney-client privilege and/or the work product doctrine.

The trial court granted Plaintiff's motion to compel, finding that the information sought was not subject to the attorney-client privilege or the work product doctrine because the retention agreement specifically stated that the investigator *would not provide legal advice*. The court also concluded that, by asserting the avoidable consequences doctrine, the City put the investigation at issue and therefore waived any privilege. The City of Petaluma petitioned for a writ of mandate, which was denied. The California Supreme Court thereafter granted the City's petition for review and directed the Court of Appeal to issue an order to show cause as to why the City's petition for writ should not be granted.

Court of Appeal Reverses the Trial Court to Protect the Investigation Report from Disclosure

The court of appeal ultimately reversed the trial court, finding (i) that the investigation was protected by the attorney-client privilege and work product doctrine, and (ii) that the City did not waive either privilege by asserting the avoidable consequences doctrine in its answer.

First, the court rejected plaintiff's argument that there was no privilege because the investigator was merely a fact investigator and not retained to provide legal advice on how to proceed in relation to the EEOC complaint. The court emphasized that communications

made during the course of the attorney-client relationship are privileged, and the City and outside attorney clearly had an attorney-client relationship because the City sought the investigator's legal services. In reaching its holding, the court recognized that attorneys use legal expertise to identify facts that are legally relevant and synthesize evidence to resolve legal issues. Moreover, based on the facts, the court found that the "dominant purpose" of outside counsel's investigation was to provide legal services to the employer in anticipation of litigation. Thus, the findings of fact stemming from the investigation were privileged even if outside counsel did not provide legal advice regarding how to proceed.

Second, the court held that an employer does not waive either the attorney-client privilege or work product doctrine by asserting the avoidable consequences defense where counsel conducts a fact investigation *after* the employee leaves his or her job. That is, the avoidable consequences doctrine did not put the *post-employment* investigation at issue because the investigation is not evidence of corrective measures of which Waters could have taken advantage *during her employment*.

TAKEAWAYS

- The court did not rule on the issue of whether asserting the avoidable consequences doctrine as an affirmative defense to a complaint brought by a *current employee* would result in a waiver of the attorney-client privilege and work-product doctrine.
- Employers should exercise due care in drafting retention agreements with outside investigators and, in particular, ensure that the agreement *explicitly states* the privileged nature of the employer-investigator relationship.

A COMBINED REST PERIOD MAY BE UNLAWFUL.

In *Rodriguez v. E.M.E., Inc.*, 246 Cal. App. 4th 1027 (2016), plaintiff alleged defendant violated the state Labor Code and applicable IWC wage order when it compelled employees to take a single, combined rest period of 20 minutes.

Plaintiff in *Rodriguez* worked two different shifts: from 7:30 a.m. to 4 p.m. and from 3:30 p.m. to 11:30 p.m. Employees working the earlier shift received a 20-minute rest break at 9:30 or 9:40 a.m. and a 30-minute meal break at 12:30 p.m., while employees working the later shift received a 30-minute meal break at 5:30 p.m. and a 20-minute rest break at 8 p.m.

IWC Wage Order 1-2001, applicable to the manufacturing industry in which plaintiff worked, states that employees working for a period of more than five hours must be provided with a meal period of "not less than 30 minutes." In addition, the wage order provides that "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof."

The trial court granted summary judgment in favor of the employer on the meal and rest break claims. On appeal, the court affirmed summary judgment on the meal break claim. And while the trial court held that an employer may combine the 10-minute rest periods required during an 8-hour work shift and provide them before or after the meal break, the court of appeal reversed summary judgment and remanded the rest period claim because of disputed facts in the record.

The *Rodriguez* court relied primarily on the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court*, which also examined the timing of meal and rest breaks. In *Brinker*, the Court emphasized that "the only constraint" regarding the provision of

rest breaks is that "rest breaks must fall in the middle of work periods 'insofar as practicable.'" The *Brinker* court continued: "Employers are … subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible. At the certification stage, we have no occasion to decide, and express no opinion on, what considerations might be legally sufficient to justify such a departure." Under *Brinker*'s guidance, the *Rodriguez* court held that "a departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule." A departure from the preferred schedule that is merely advantageous to the employer is not lawful.

Turning to the facts, the court found that defendant provided sufficient evidence to support its departure from the preferred schedule. The combined rest breaks were not detrimental to employees and actually were preferred, according to declarations from current employees. In addition, the schedule enabled defendant to avoid material economic losses attributable to its production activities. However, because defendant identified no authority establishing the permissibility of its combined rest break as a matter of law, the court reversed summary judgment on the rest break claim and remanded consideration of the claim to the trial court.

ASSOCIATIONAL DISABILITY CLAIM RECOGNIZED BY CALIFORNIA COURT OF APPEAL.

Summary

In *Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal. App. 5th 1028 (2016), the court of appeal extended California law prohibiting disability discrimination to include "associational disability discrimination."

Castro-Ramirez worked as a truck driver for Dependable Highway Express (DHE). Before being hired in 2010, he told DHE that he had a disabled son who required dialysis on a daily basis and that he was responsible for administering the dialysis. Castro-Ramirez requested, and was granted, a work schedule that would allow him to be home in the evenings. The scheduling worked until 2013, when a new supervisor gave Castro-Ramirez a late shift that would not allow him to be home in time to help with his son's dialysis. When he objected to the new shift time, the supervisor terminated him, telling him that he "quit by choosing not to take the assigned shift." Castro-Ramirez brought claims for "associational disability discrimination" under FEHA, alleging that he was terminated because of his "association" with his disabled son who required daily dialysis and in retaliation for his assertion of rights under FEHA. The trial court granted DHE's motion for summary judgment in full.

A three-judge panel ruled in April 2016 that DHE may have violated the FEHA on the basis of an associational reasonable accommodation claim. After granting rehearing for further briefing, the panel again reversed the state court's grant of summary judgment, 2-1, recognizing a claim for associational disability discrimination in violation of FEHA. The court, however, did not go as far as to hold that employers can be liable for a failure to accommodate an associational disability request. "To us, the proper inquiry is: Even if DHE had no separate duty under FEHA to provide plaintiff with reasonable accommodations for his son's illness, was there sufficient evidence that discriminatory animus motivated [the supervisor's] refusal to honor plaintiff's scheduling request and his termination of plaintiff?", the court asked.

In response to that question, the court found that triable issues of material fact existed regarding discriminatory motive and pretext: "A jury could reasonably find from the evidence that plaintiff's association with his disabled son was a substantial motivating factor in [the] decision to terminate him, and, furthermore, that [the] stated reason for termination was a pretext." The court emphasized that "[d]espite knowing plaintiff's need to be home early," the new supervisor "scheduled plaintiff for a shift that

started at noon, later than plaintiff had ever started before," despite there being eight available pre-noon shifts that plaintiff could work. Also, when plaintiff asked to take the earlier shift, the new supervisor lied and said the customer was unhappy with his work—despite the fact that the customer had actually asked for Castro-Ramirez to make its 7:00 a.m. delivery.[46]

TAKEAWAYS

The first decision in April 2016 addressed—for the first time—whether employers have a duty under FEHA to provide *reasonable accommodations* to an employee associated with a disabled person. The second decision after rehearing softened the court's position on the accommodations issue, instead finding that *disability discrimination* under FEHA may extend to employees associated with a disabled person. Still, as the dissenting judge in *Castro-Ramirez* observed, the court has gone "where no one has gone before, to find a California employer may be liable under FEHA for failing to accommodate a nondisabled employee's request to modify his work schedule to permit him to care for a disabled family member."

DHE petitioned the California Supreme Court to review the decision in Castro-Ramirez. However, on November 30, 2016, the Court denied DHE's petition for review, effectively ending the case.

SETTLEMENT OF INDIVIDUAL CLAIMS DOOMS PLAINTIFF'S PAGA CLAIM.

In *Kim v. Reins International California Inc.*, No. BC539194, a Los Angeles County trial court dismissed claims against a restaurant operator brought under PAGA, finding that the settlement of plaintiff's individual wage and hour claims precluded litigation of plaintiff's PAGA claims.

Kim initially filed suit against Reins in his individual capacity and on behalf of all "aggrieved" training managers currently or previously employed by Reins, who Kim alleged were misclassified as exempt employees. The majority of Kim's wage claims were compelled to arbitration while his PAGA claims were stayed pending the results of arbitration proceedings. In arbitration, Kim accepted a statutory offer to compromise under California Code of Civil Procedure section 998, which dismissed all but his then-stayed PAGA claim.

After the parties settled Kim's individual claim in arbitration, the court granted a motion by Reins for summary judgment on the PAGA claim. The court held the act of plaintiff having settled his individual claims stripped him of standing to pursue the PAGA claim because he no longer was an "aggrieved employee." More specifically, plaintiff "no longer was suffering from an infringement or denial of legal rights once he agreed on a final resolution of [his] individual claims. Under these circumstances, he no longer has standing to bring a PAGA claim."

Plaintiff's counsel intends to appeal the decision to the California Court of Appeal.

VALUE OF ACCRUED VACATION NOT REQUIRED ON WAGE STATEMENTS.

In *Soto v. Motel 6*, 4 Cal. App. 5th 385 (2016), Soto sued her former employer, Motel 6, for violating Labor Code section 226 by failing to include the monetary amount of accrued vacation pay in employee wage statements. Soto filed suit on behalf of herself and all aggrieved workers under PAGA. The trial court sustained Motel 6's demurrer without leave to amend.

The court of appeal affirmed. Under the California Supreme Court's interpretation of Labor Code section 227.3, which provides for how vested vacation shall be paid, paid vacation is "a form of deferred wages for services rendered, similar to a pension or retirement benefit." Thus, "a proportionate right to a paid vacation vests as the labor is

provided" and, upon termination, the employee must be paid the pro rata share of unused time. But, as other courts have recognized, unused vacation time does not become a quantifiable wage until the employee separates from her employment. Therefore, vacation pay cannot be defined as "gross wages earned" or "net wages earned," as argued by the employee, until the termination of Soto's employment. Until a vacation benefit is required to be paid, the court held, it need not be included in a wage statement under section 226(a).

CALIFORNIA SUPREME COURT GIVES GREEN LIGHT TO USE PERCENTAGE METHOD FOR CALCULATING ATTORNEYS' FEES FROM A COMMON FUND IN A CLASS ACTION SETTLEMENT.

In August 2016, the California Supreme Court unanimously decided *Laffitte v. Robert Half International, Inc.*, 1 Cal. 5th 480 (2016), holding that an attorney fee awarded out of a common fund is not per se unreasonable merely by being calculated as a percentage of the common fund.

Facts and Lower Court Proceedings

Three wage and hour class action lawsuits were filed against Robert Half in state court. The court preliminarily approved the settlement agreement between the parties. Under the settlement agreement, Robert Half would pay $19 million, and class counsel would receive attorneys' fees of not more than $6,333,333.33 (*i.e.*, one-third of $19 million), to be paid from the settlement amount. If a smaller amount was approved by the court, the remainder would be retained in the settlement amount for distribution to claimants, rather than reverting to Robert Half.

A class member objected to the proposed settlement on several grounds, including that the attorney fee was excessive. The trial court overruled the class member's objections and approved the settlement agreement with the attorneys' fee request intact. The trial court accepted the percentage as reasonable and justified by a cross-check using the lodestar-multiplier method (*i.e.*, by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate, and then increasing or decreasing that amount by applying a positive or negative "multiplier" to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented). The objecting class member appealed, arguing that the trial court's award of an attorney fee calculated as a percentage of the settlement amount violated the holding in *Serrano v. Priest*, 20 Cal. 3d 25 (1977),[47] to the effect that every fee award must be calculated on the basis of time spent by the attorney or attorneys on the case.

The court of appeal affirmed approval of the settlement agreement. The California Supreme Court granted review.

California Supreme Court Affirms by Distinguishing *Serrano*

The Court affirmed the order approving the parties' settlement, holding that a trial court may calculate an attorney fee award from a class-action common fund as a percentage of the fund, while using the lodestar-multiplier method as a cross-check of the selected percentage.

First, the Court recognized that "empirical studies show the percentage method with a lodestar cross-check is the most prevalent form of fee method in practice," and that California courts, for many years, followed national practice in allowing a percentage fee in common-fund cases.

Second, the Court distinguished *Serrano* as restricted to the private-attorney-general context in which that case was brought. In fact, the Court noted that even *Serrano* cited with approval decisions using the percentage method in common-fund cases. In short, the Court found no clear precedent prohibiting the use of a percentage method in common-fund cases.

Third, the Court stated "that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its

equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." Further, trial courts have discretion to use a lodestar-multiplier method as a cross-check of the selected percentage from the fund (or to forgo a lodestar-multiplier cross-check if some other means to evaluate the reasonableness of a requested fee percentage exists).

Importantly, the Court did not go beyond its common-fund rationale. That is, because the settlement agreement provided for a true common fund fixed at $19 million, without any reversion to defendant and with all settlement proceeds, net of fees and costs, going to pay claims by class members, the Court did not address whether (or how) the use of a percentage method may be applied when there is no conventional common fund out of which the settlement and fee awards are to be paid.

JOINT EMPLOYERS CAN BE HELD LIABLE FOR MISCLASSIFICATION.

Summary

In *Noe v. Superior Court*, 237 Cal. App. 4th 316 (2015), the court of appeal held that penalties for misclassifying workers as independent contractors rather than employees may apply to joint employers who knew that the co-employer had misclassified the workers.

The facts and procedural background of *Noe* are straightforward. Anschutz Entertainment Group (AEG) contracted with Levy Premium Foods to manage the food and beverage services at several entertainment venues located in Southern California. Levy, in turn, contracted with Canvas Corporation to provide laborers who sold food and beverages at AEG venues. In 2013, several vendors filed a wage and hour class action against AEG, Levy, and Canvas, alleging failure to pay minimum wage and willfully misclassifying them as independent contractors in violation of Labor Code section 226.8.

AEG and Levy filed motions for summary judgment, arguing that they were entitled to summary adjudication of plaintiffs' section 226.8 claim because the evidence showed Canvas, not AEG or Levy, actually classified the vendors as independent contractors. Although the trial court denied the motions for summary judgment, it agreed that plaintiffs could not pursue a section 226.8 claim against AEG or Levy because neither entity had made the misclassification decision. Plaintiffs filed a petition for writ of mandate in the court of appeal.

The court of appeal denied the petition. The court agreed with plaintiffs that section 226.8 is not limited to employers who make the misclassification decision, but also extends to any employer who has knowledge that a co-employer has willfully misclassified their joint employees and fails to remedy the misclassification. However, the court in *Noe* ultimately concluded that section 226.8 cannot be enforced through a direct private action, and denied the plaintiffs' writ on that ground.

TAKEAWAYS

Plaintiffs argued that the court should impose joint and several liability on all defendants under section 226.8, even if they had no knowledge that Canvas willfully misclassified their joint employees. The court rejected that argument. But, in doing so, the court noted that other sections of the Labor Code demonstrate that when the Legislature intends to impose joint and several liability for Labor Code violations committed by a third party, it is capable of stating as much. For example, the court mentioned that under Labor Code section 2810.3, any business entity that obtains workers from a labor contractor shall share with the labor contractor all civil legal responsibility and civil liability for paying the wages of any workers supplied by the labor contractor. Thus, even if the business entity is not the wage claimant's employer, and therefore owes no duty to pay

overtime, the entity is nonetheless liable because section 2810.3 imposes joint liability. The importance of citing to section 2810.3 is that joint liability of the employer and the contracting company that supplies employees may become more of a hot-button issue following the decision in *Noe*. A full synthesis of the concept of joint employer liability is beyond the scope of this discussion, but suffice it to say that the joint employer test is highly fact specific—taking into account such factors as who hired and pays the workers, who controls or directs the workers, and who sets the workers' schedules—and depends on applicable law.

EMPLOYER INTENT MAY BE IRRELEVANT TO LIABILITY ON REASONABLE ACCOMMODATION CLAIMS.

In *Wallace v. County of Stanislaus*, 245 Cal. App. 4th 109 (2016), the court of appeal clarified that FEHA does not require an alleged victim of disability discrimination to prove "animus or ill will," but only that discriminatory intent was a "substantial motivating factor" for the employer's actions.

Factual background

The County of Stanislaus hired plaintiff, Dennis Wallace, in 1997 as a sheriff. Ten years later, he injured his left knee and filed a workers' compensation claim. He later reinjured the same knee on the job, requiring surgery. Wallace took a paid leave of absence after the surgery and later returned to light duty. The following year he took additional paid leave because of the knee injury and returned to a light-duty assignment in the property and evidence room with restrictions on climbing, running, and walking on uneven ground. After a few months, Wallace took another paid leave because of his knee.

Wallace returned again, this time working light duty as a bailiff. The County requested Wallace to undergo a medical exam with a physician, who issued a report containing numerous job limitations due to his knee. In response, County officials met with Wallace to discuss looking at other positions that could better accommodate his work restrictions and removed him from his assignment as a bailiff.

Wallace insisted that he could perform the functions of a bailiff and was only interested in positions providing certain retirement benefits. The County, however, placed Wallace on an unpaid leave of absence. Wallace filed suit, alleging violations of FEHA based on disability discrimination, failure to accommodate his disability, failure to engage in the interactive process, and failure to prevent discrimination.

The Modified Jury Instruction was Incorrect, says Court of Appeal

At trial, the parties disagreed over how to instruct the jury on the disability discrimination claim. The trial court told counsel that it believed plaintiffs must "prove that the actions taken by the employer were done with the intent to discriminate," which the court equated with "animus." The judge modified the jury instruction accordingly. At trial, the jury was asked "Did the County of Stanislaus regard or treat Dennis Wallace as having a physical disability in order to discriminate?" The jury, finding no discriminatory intent, ruled in favor of County. Wallace appealed.

The appellate court reversed, finding that the jury instruction was incorrect and prejudicial. Based on the California Supreme Court's decision in *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013), the court concluded that an employer has treated an employee differently "because of" a disability under FEHA when the disability is a "substantial motivating reason" for the employer's decision to subject the employer to an adverse employment action. In other words, an employer can violate FEHA by taking an adverse employment action against an employee "because of" the employee's physical disability, even if the employer harbored no animosity or ill will against the employee.

RETIRING EMPLOYEES MUST BE PAID FINAL WAGES PROMPTLY.

Under Labor Code section 202, California employers must pay all wages to an employee who quits within 72 hours, unless the employee has given 72 hours' notice of the intent to quit, in which case the wages are due at the time the employee quits. Employers that violate section 202 are subject to waiting time penalties (up to 30 working days of wages) under Labor Code section 203.

In *McLean v. State of California*, 1 Cal. 5th 615 (2016), the California Supreme Court addressed whether an employee who "retires" is an employee who "quits" under section 202. The Court in McLean held that employees who retire qualify as employees who quit and thus are entitled to prompt payment of termination wages under section 202.

TAKEAWAYS

- A reminder for employers that, "in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the [Labor Code is] to be liberally construed with an eye to promoting such protection.'" *McLean*, 1 Cal. 5th at 622 (citing *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1026-27 (2012)). For example, in *McLean*, because the Labor Code and the DLSE regulations do not define the term "quit," the Court stated that it must consider the ordinary meaning of the word. Under the dictionary definition, to "quit" is "to stop doing a thing; to cease" and, in the employment context, "to leave one's employment." With this definition in mind, the Court concluded that a retiring employee is one who is quitting.

- While arising in the context of public employment, *McLean* is not limited to government employers.

CALIFORNIA SUPREME COURT ENFORCES ARBITRATION AGREEMENT DESPITE UNCONSCIONABILITY CLAIMS.

In *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016), the California Supreme Court considered whether a clause authorizing preliminary injunctive relief in court rendered an agreement substantively unconscionable, on the grounds that the employer was far more likely to use that procedure than was the employee. The Supreme Court held that this clause does no more than restate existing statutory law and, thus, does not render the agreement unconscionable.

The Court also found that: (i) the arbitration agreement *was not unfairly one-sided* because it specifically lists only employee claims, not employer claims, in giving examples of the types of claims subject to arbitration; (ii) the arbitration agreement *was not unduly one-sided* because it states "all necessary steps" will be taken to protect Forever 21's trade secrets and other confidential information during the course of the arbitration without defining the steps and without identifying what is protected; and (iii) Forever 21's failure to provide a copy of the AAA's rules *did not render* the agreement procedurally unconscionable.

TAKEAWAYS

As employees continue to challenge new-hire arbitration agreements, *Baltazar* provides guidance on the Supreme Court's view on some arguments that plaintiffs commonly make—especially as to unconscionability—and therefore provides insight for the drafting of enforceable arbitration agreements.

ORDER COMPELLING ARBITRATION OF INDIVIDUAL CLAIMS, BUT STAYING PAGA CLAIM, IS NOT APPEALABLE.

In *Young v. RemX, Inc.*, 2 Cal. App. 5th 630 (2016), plaintiff alleged that defendant failed to pay him final wages at the time of termination. Plaintiff brought suit,

on behalf of herself and a putative class, alleging violations of Labor Code section 201 through 203 and also a representative PAGA claim. Defendant filed a motion to compel arbitration based on an arbitration agreement between the parties that provided any employment-related disputes were subject to arbitration. Defendant also moved to dismiss the class claims, and bifurcate and stay the PAGA claim.[48]

The court granted defendant's motion to compel in its entirety. Plaintiff appealed. The court of appeals held that the trial court's order was not appealable, rejecting plaintiff's argument that the "death knell" doctrine—an exception to the rule that an order compelling arbitration is generally not appealable—applied to the circumstances. The death knell doctrine did not save plaintiff's appeal because the order compelling arbitration did not amount to a de facto judgment against the absent class members' claims because their PAGA claims remained pending. Also, the existence of the PAGA claims gave plaintiff adequate incentive to continue prosecuting the action to a final judgment.

Months after *RemX*, the court of appeals, on similar facts, again ruled that the death knell doctrine is inapplicable where a PAGA claim remains. *See Nguyen v. Applied Med. Res. Corp.*, No. G052207 (Cal. Ct. App. Oct. 4, 2016).

STATE IAW PROHIBITS ON-DUTY AND ON-CALL REST PERIODS.

In *Augustus v. ABM Security Services, Inc.*, ___ Cal. 5th ___ (Dec. 22, 2016, S224853), the California Supreme Court held that, under Labor Code section 226.7 and IWC Wage Order No. 4-2001, employers are prohibited from requiring employees to be on-duty or on-call during rest periods.

In Augustus, plaintiffs worked as non-exempt security guards for Defendant ABM Security Services, Inc. ("ABM"). During rest periods, ABM required its security guards to "keep their radios and pagers on, remain vigilant, and respond when needs arose." Even though ABM merely required its security guards to remain on call just in case – and most of the time, their rest breaks were uninterrupted – the trial court found that "an on-duty or on-call break is no break at all" and awarded the class of security guards a $90 million judgment. The Court of Appeal overturned, holding that state law did not require employers to provide off-duty rest periods, and being "on-call" was not the same as "performing work." The California Supreme Court, however, determined that employers must relinquish control over employees and how they spend their rest periods, and relieve their employees of all work-related duties – including being on-call.

Employers Must Provide Off-Duty Rest Periods

First, the Court found that state law requires employers to provide off-duty rest periods in which employees must be "relieved from all work-related duties and free from employer control." In so holding, the Court gave the term "rest period" in Wage Order 4 its ordinary meaning – "the opposite of work." This reading is consistent with Labor Code section 266.7, which states that employers are prohibited from "requir[ing] any employee to work during any meal or rest period . . . ." Moreover, since this "work" prohibition applies in identical fashion to both meal and rest periods, it "makes sense" that employers must provide duty-free rest periods, as they are required to provide duty-free meal periods. *See Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004 (2014) (holding that employees must be relieved of all duties during meal periods). Further, the absence of language authorizing on-duty rest periods in Wage Order 4 led the court to determine that the IWC did not intend to authorize on-duty rest periods, when it provided such exceptions in other circumstances.

Employees Cannot be "On-Call" During Rest Periods

Second, the Court held that employers cannot require employees to remain on-call during their rest periods. The Court determined that being "on-call" is tantamount to "performing work," and thus employers must relinquish all control over their employees. The Court reasoned that although neither Labor Code section 266.7 nor Wage Order 4 mentions "on-call time" or "on-call rest periods," requiring "employees to

remain at the ready, tethered by time and policy to particular locations or communications devices" does not square with a legally mandated duty-free rest period. This means that merely possessing a pager so an employer can make contact during the employee's legally mandated 10-minute rest period is in violation of state law.

Conclusion

The Court has taken a categorical approach to rest periods by concluding that an employee must be relieved of all work-related duties during his or her legally mandated rest period, including being on-call because being on-call subjects an employee to employer control. The Court stated, however, that this ruling does not completely prohibit its employees from being called back to work during a rest period. It just means that if the employer recalls an employee during his or her rest period, the employer must either "reasonably reschedule" the break or pay the fine for the violation.

TAKEAWAYS

Employers can no longer require employees to remain on-call during rest periods. Thus, it would be prudent for employers to review and redraft policies and practices on rest periods in order to be compliant with state law. Employers then should be sure that employees receive these new policies and understand them. It is also important for employers to train managers and supervisors in rest period compliance, so that they do not inadvertently violate state law. Moreover, employers may find it in their best interest to require employees to surrender their radios, phones or pagers before going on their rest breaks to ensure that the employees cannot be contacted during a rest period.

Since employees cannot be on-call during rest periods, employers should review staffing needs in order to make sure they are covered. Employers with single-employee shifts will be more significantly impacted.

Moreover, the term "employer control" was not clearly defined in this decision. Here, the Court was considering whether being "on-call" subjected employees to employer control; however, there will likely be more litigation over.

V. KEY EMPLOYMENT CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

Alvarado v. Dart Container Corp. of California

This case will decide the proper method for calculating the rate of overtime pay when an employee receives both an hourly wage and a flat sum bonus.

Connor v. First Student, Inc.

This case will decide whether the Investigative Consumer Reporting Agencies Act (Civ. Code, § 1786 et seq.) (the "Act") is unconstitutionally vague as applied to background checks conducted on a company's employees, because persons and entities subject to both that Act and the Consumer Credit Reporting Agencies Act (Civ. Code, § 1785.1 et seq.) cannot determine which statute applies.

Dynamex Operations West, Inc. v. Superior Court

This case presents the following issue: In a wage and hour class action involving claims that the plaintiffs were misclassified as independent contractors, may a class be certified based on the IWC definition of employee as construed in *Martinez v. Combs*, 49 Cal. 4th 35 (2010), or should the common law test for distinguishing between employees and independent contractors discussed in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), control?

Hernandez v. Muller

This case presents the following issue: Must an unnamed class member intervene in the litigation in order to have standing to appeal?

Kim v. Toyota Motor Corp.

This case will determine whether evidence of industry custom and practice is admissible in a strict products liability action.

Liberty Surplus Ins. Corp. v. Ledesma & Meyers Construction Co., Inc.

Pursuant to Rule 8.548 of the California Rules of Court, the Ninth Circuit Court of Appeals requested that the California Supreme Court decide whether there is an "occurrence" under an employer's commercial general liability policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party.

Los Angeles County Bd. of Supervisors v. Superior Court

This case presents the following issue: Are invoices for legal services sent to the County of Los Angeles by outside counsel within the scope of the attorney-client privilege and exempt from disclosure under the California Public Records Act, even with all references to attorney opinions, advice, and similar information redacted?

Mendoza v. Nordstrom

Pursuant to Rule 8.548 of the California Rules of Court, the Ninth Circuit Court of Appeals requested that the California Supreme Court decide the following questions of California law presented in the matter:

- California Labor Code section 551 provides that every person employed in any occupation of labor is entitled to one day's rest therefrom in seven. Is the required day of rest calculated by the workweek, or is it calculated on a rolling basis for any consecutive seven-day period?

- California Labor Code section 556 exempts employers from providing such a day of rest when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof. Does that exemption apply when an employee works less than six hours in any one day of the applicable week, or does it apply only when an employee works less than six hours in each day of the week?

- California Labor Code section 552 provides that an employer may not cause his employees to work more than six days in seven. What does it mean for an employer to "cause" an employee to work more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else?

Troester v. Starbucks Corp.

Pursuant to Rule 8.548 of the California Rules of Court, the Ninth Circuit Court of Appeals requested that the California Supreme Court decide whether the FLSA's *de minimis* doctrine applies to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197.

Williams v. Superior Court

This case presents the following issues:

- Is the plaintiff in a representative action under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) entitled to discovery of the names and contact information of other "aggrieved employees" at the beginning of the case or is the plaintiff first required to show good cause in order to have access to such information?

- In ruling on such a request for employee contact information, should the trial court first determine whether the employees have a protectable privacy interest and, if so, balance that privacy interest against competing or countervailing interests, or is a protectable privacy interest assumed?

VI. FINAL THOUGHTS...

Employers should confirm that their policies, practices, and any related recruiting and training materials are in compliance with the laws, regulations, and cases discussed in this update.

For more information, or if you have any questions or need further assistance, please contact the lawyers listed below.

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ENDNOTES

[1] Numerous municipalities have recently adopted ordinances that establish local wage-and-hour standards. Oftentimes, these local laws overlap with state and federal law. However, it is difficult for employers to track and comply with this additional layer of law, including, for instance, the City of Los Angeles' recently adopted minimum wage ordinance and sick leave rules and the City of San Francisco's recently adopted paid parental leave ordinance. For more information on, and to ensure compliance with, local ordinances, rules, and regulations, please contact Haynes and Boone.

[2] SB 3 amends Sections 245.5, 246, and 1182.12 of the Labor Code.

[3] This expansive definition includes entities that may be considered joint employers, and *does not* contain any carve-outs for employers in certain sectors or industries.

[4] California law does not provide an overtime exemption for highly compensated employees.

[5] The raising of the threshold for exemption to overtime wages was originally set to take effect on December 1, 2016. However, on November 22, 2016, a federal district court in Texas issued an order enjoining the DOL from implementing and enforcing the new overtime exemption rules. In granting the preliminary injunction, the court declared the new rule unlawful, stating that "nothing in the [FLSA] indicates that Congress intended the [DOL] to define … a minimum salary level." The DOL took an immediate appeal to the Fifth Circuit Court of Appeals. In a December 8 order, the Fifth Circuit granted the DOL's request for expedited briefing of its appeal, with a hearing on the appeal to be heard sometime in February 2017 (*i.e.*, after President-Elect Trump takes office).

[6] Moreover, under both the FLSA and California law, for a white-collar exemption to apply, the employee must also meet a duties test.

[7] PAGA authorizes "aggrieved employees" to file lawsuits to recover civil penalties on behalf of themselves, other "aggrieved employees," and the state for Labor Code violations.

[8] PAGA requires that 75% of any PAGA penalties go to the LWDA, with the remaining 25% to the "aggrieved employees."

[9] AB 2337 amends Section 230.1 of the Labor Code. Effective July 1, 2017.

[10] AB 908 amends Section 2655 of, amends, repeals, and adds Section 3303 of, and adds and repeals Section 2655.1 of, the Unemployment Insurance Code. Effective January 1, 2017, with certain portions becoming effective on January 1, 2018.

[11] AB 2535 amends Section 226 of the Labor Code. Effective January 1, 2017.

[12] Besides hours worked, section 226(a) lists eight other pieces of information that must be accurately reported on pay stubs, including gross wages earned, all deductions, and the applicable hourly rate and hours worked during the pay period.

[13] In fact, AB 2535 comes at the heels of a recently decided federal case, *Garnett v. ADT, LLC,* 139 F. Supp. 3d 1121 (E.D. Cal. 2015), where the court held that exempt outside salespersons paid solely by commission were entitled to have their total hours worked included on their paystubs. The court in *Garnett* made clear that "[w]hile the usefulness of reporting total hours worked for employees paid solely by commission is not entirely clear, it is nonetheless required by Labor Code Section 226(a)." *Id.* at 1131.

[14] SB 269 amends Sections 55.53 and 55.56 of the Civil Code, amends Sections 4459.7, 4459.8, and 8299.06 of, adds Section 65941.6 to, and adds Article 4 (commencing with Section 65946) to Chapter 4.5 of Division 1 of Title 7 of the Government Code.

[15] AB 2883 amends Sections 3351 and 3352 of, and repeals Section 6354.7 of, the Labor Code. Effective January 1, 2017.

[16] AB 2899 amends Section 1197.1 of the Labor Code. Effective January 1, 2017.

[17] SB 1241 adds Section 925 to the Labor Code. Effective January 1, 2017.

[18] AB 1843 amends Section 432.7 of the Labor Code. Effective January 1, 2017.

[19] SB 1001 adds Section 1019.1 to the Labor Code. Effective January 1, 2017.

[20] AB 1732 defines "single-user toilet facility" as a toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user.

[21] AB 1732 adds Article 5 (commencing with Section 118600) to Chapter 2 of Part 15 of Division 104 of the Health and Safety Code. Effective March 1, 2017.

[22] SB 1234 adds Section 20139 to, and Title 21 (commencing with Section 100000) to, the Government Code, and adds Section 1088.9 to the Unemployment Insurance Code, relating to retirement savings plans, and making an appropriation therefor. Effective January 1, 2017.

[23] AB 1066 amends Section 554 of, and adds Chapter 6 (commencing with Section 857) to Part 2 of Division 2 of, the Labor Code.

[24] AB 1687 adds Section 1798.83.5 to the Civil Code. Effective January 1, 2017.

[25] SB 1007 adds Section 1282.5 to the Code of Civil Procedure. Effective January 1, 2017.

[26] AB 1289 adds Section 5445.2 to the Public Utilities Code. Effective January 1, 2017. AB 1289 comes on the heels of a 2014 lawsuit filed by district attorneys of San Francisco and Los Angeles alleging that Uber misleads customers by suggesting its background checks on drivers are the toughest in the industry. Two dozen drivers in those cities had been found to have committed serious criminal offenses, including sex offenses, kidnap, and murder. Uber later settled the suit for $25 million.

[27] New OSHA anti-retaliation rules, enforceable on December 1, 2016, will require employers to have a reasonable basis for believing an employee's drug use contributed to their illness or injury before administering a post-accident drug test. *Improve Tracking of Workplace Injuries and Illnesses* (Rule), 81 Fed. Reg. 29624 (May 12, 2016).

[28] The FEHC promulgates regulations that implement California's employment and housing anti-discrimination laws, and also conducts inquiries and holds hearings on civil rights issues.

[29] The protected classes under FEHA are: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age (for individuals over 40 years old), military and veteran status, and sexual orientation.

[30] In line with Section 12940(k) of the Government Code, the amended FEHA regulations make clear that employers have an affirmative duty to take reasonable steps to prevent, and promptly correct, discrimination and harassment in the workplace.

[31] "Sex" includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breastfeeding; gender identity; and gender expression.

[32] "Gender identity" means a person's identification as male, female, a gender different from the person's sex at birth, or transgender.

[33] "Transgender" refers to a person whose gender identity differs from the person's sex at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as "transsexual."

[34] "Gender expression" means a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth.

[35] The DFEH may, however, independently seek nonmonetary preventative remedies for failing to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, regardless of whether the DFEH prevails on an underlying claim of discrimination, harassment, or retaliation.

[36] Under Section 12950.1 of the Government Code, the term "abusive conduct" means conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.

[37] The new regulations define "unpaid interns and volunteers" as any individual that works without pay for an employer in an internship or other program providing unpaid work experience, or as a volunteer.

[38] According to the National Employment Law Project (NELP), over 100 cities and counties in have adopted ban the box laws, including two California counties (Alameda and Santa Clara) and eight California cities (Berkeley, Carson, Compton, East Palo Alto, Oakland, Pasadena, Richmond, and San Francisco). At least as to these California municipalities, however, ban the box only applies to government employers, not private companies. For more information on ban the box, see NELP's *Ban the Box – Fair Chance Guide* (last updated September 2016), available at *http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf*.

[39] The term "adverse impact" is synonymous with the EEOC's definition of "disparate impact"—*i.e.*, a facially neutral policy or practice may still be discriminatory if it adversely affects the employment opportunities of a protected class.

[40] Defendant's "Flexible Benefits Plan" provides a designated monetary amount to each employee for the purchase of medical, vision, and dental benefits. While all employees are required to use a portion of these funds to purchase vision and dental benefits, an employee may decline to use the remainder to purchase medical benefits if the employee has alternate medical coverage (*e.g.*, through a spouse). If an employee elects to forgo medical benefits because of alternate coverage, she may receive the unused portion of the benefits allotment as an "in-lieu" payment.

[41] *See* 28 U.S.C. § 2072(b); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

[42] For instance, if plaintiff clocked in at 8:33 a.m., his wage statement would reflect a clock in of 8:30 a.m., in essence crediting him with 3 minutes of work time not actually worked. Likewise, if plaintiff clocked out for the day at 5:33 p.m., the time management system would round that punch to 5:30 p.m., in essence deducting 3 minutes of work for which he was actually working.

[43] In 2012, the California Court of Appeal confirmed that the federal rounding rule applies to state labor code claims, as long as a defendant's "rounding-over-time policy is neutral, both facially and as applied." *See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889, 903 (2012).

[44] *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, 694 (1946); *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984); *see also* 29 C.F.R. § 785.47.

[45] While there is no precise amount of time that represents *de minimis* time per se, most courts have found that 10 minutes is the standard threshold for determining whether time spent working is *de minimis*.

[46] For similar reasons, the court found the evidence would permit a trier of fact to find protected activity to support Castro-Ramirez's retaliation claim, even though he did not use terms such as "unlawful" or "reasonable accommodation" when discussing his schedule with DHE. The court also remanded plaintiff's other claims—failure to prevent discrimination and wrongful termination—for further consideration.

[47] The Court in *Serrano* considered attorney's fees when plaintiffs obtained an injunction against the California public-school financing system. There, the Court approved of a lodestar-based attorney-fee award under a private-attorney-general theory and, in a footnote, stated: "The starting point of every fee award... must be a calculation of the attorney's services in terms of the time he has expended on the case."

[48] The employer conceded that, under California law, the arbitration agreement could not require plaintiff to waive her representative PAGA claim. Thus, defendant moved to stay that claim pending the outcome of the arbitration.

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