THE 2020 EMPLOYMENT LAW UPDATE

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Jon Light has more than 30 years of experience in the field of employment law, is AV-rated by Martindale Hubbell, and has been named multiple times as one of Southern California's "Super Lawyers" by Los Angeles Magazine. As the managing attorney at LightGabler, Jon and his team members consult with over 1,500 companies throughout California regarding their day-to-day employment law needs.

Jon has successful jury trial, court trial, appellate, Labor Commission and binding arbitration results in lawsuits and administrative claims involving wrongful termination, sexual harassment, race discrimination, class action, wage & hour, and other employment related matters. He has also appeared on behalf of employers with the federal EEOC and Labor Department, the state Department of Fair Employment and Housing, the National Labor Relations Board, and other government agencies involved with employment law issues.

Mr. Light frequently speaks to employer and human resources groups, including the Ventura County Employers Advisory Council (EAC), PIHRA, NHRA, and numerous business associations such as CPA forums, manufacturers associations, Dental and Medical Societies, and Chambers of Commerce. He lectures on topics such as avoiding sexual harassment claims, wage and hour issues, business and employment law pitfalls, diversity in the workplace, supervisor strategies, employment law updates, and preparing employee handbooks.

Beyond frequently lecturing to business groups and civic organizations on employment issues, Jon serves the community where he lives and works, as is evident by his past or present participation in the following organizations: CSUCI Business School Advisory Council; Ventura County Fair Political Practices Commission (Member); Ventura County Bar Association (Past President); Volunteer Legal Services and court-appointed mediator; Footworks Youth Ballet (board member and former Production Manager); and is a former board member of the Channel Islands Ballet (past chair), Ventura County Medical Resource Foundation (past chair), United Way Allocations Cabinet, Ventura County Taxpayers Association, and the Ventura County Boy Scout Council (past president); as well as for several years with the (2009 county champion) Newbury Park High School Mock Trial team (Assistant Coach) and Camarillo Academic Olympics (Superquiz and Test Preparation Chair). He is also a Life Member of the National Eagle Scout Association.

Jon is a graduate of the UCLA School of Law, where he was a member of the Law Review. He is the author of two editions of the nationally acclaimed and award winning book, *The Cultural Encyclopedia of Baseball*. He resides in Camarillo with his wife of 36 years, Angela, a public school teacher. Their 29-year-old twin daughters live on the east coast after attending Yale and Georgetown, but the parents are surviving just fine.

TABLE OF CONTENTS

Page

NEW LEGISLATION AND OTHER HOT TOPICS

NEW CASE LAW

NEW LEGISLATION AND OTHER HOT TOPICS

DISCLAIMER: THIS INFORMATION IS OF A GENERAL NATURE, AND IS NOT MEANT TO SUBSTITUTE FOR THE ADVICE OF LEGAL COUNSEL. IT SHOULD NOT BE RELIED UPON AS AN OPINION OF LIGHTGABLER REGARDING ANY SPECIFIC MATTER. PLEASE CONTACT LIGHTGABLER FOR ADDITIONAL INFORMATION OR LEGAL ADVICE.

Additional information on each of the California bills listed below can be found at: https://leginfo.legislature.ca.gov (enter the bill number into the search box).

1. A SUMMARY OF THE 1ST PART OF THE 2019-2020 LEGISLATIVE SESSION (10/2019)

By the September 13, 2019 deadline, our Legislature sent 1042 bills to Governor Newsom. As of the deadline on October 13, 2019, he had signed 870 (83.5%) of those bills into law and vetoed 172 proposed bills. Of the 870 bills signed, approximately 100 bills (about 11.5%) relate to labor and employment topics. A summary of most of those bills is contained below. Note that several of the bills that did not make the cut in this year's portion of the 2019-2020 legislative session may very well resurface again next year in the second half of the legislative cycle.

2. AGRICULTURE: OVERTIME (2016-2025) (Reminder!)

On September 12, 2016, Governor Brown signed AB 1066 into law. Employers with more than 25 employees should note the overtime change below for 2020. Those with 25 or fewer employees will remain at the same overtime schedule through 2021. This bill phases out the overtime exemption under IWC Wage Order 14 for agricultural workers (see the practice tip below), and phases in overtime according to the following schedule:

More than 25 employees:

YEAR	DAILY OVERTIME	WEEKLY OVERTIME
2020	**9**	**50**
2021	8.5	45
2022	8	40

25 or fewer employees:

YEAR	DAILY OVERTIME	WEEKLY OVERTIME
2017 - 2021	**10 hours**	**60 hours**
2022	9.5	55
2023	9	50
2024	8.5	45
2025	8	40

Like the minimum wage increases discussed below, the sitting Governor has the ability to temporarily suspend or delay implementation of this bill.

Most of the other overtime provisions of Labor Code section 510 also began to apply to agricultural workers starting on January 1, 2019, although double time provisions will not kick in until January 1, 2022. Note also that other provisions of the Labor Code, including meal period provisions, will now apply to formerly-exempt agricultural workers. A new IWC Wage Order 14 has been issued consistent with the amended rules. See:

https://www.dir.ca.gov/IWC/IWCArticle14.pdf.

PRACTICE TIP: AB 1066 is intended to do away with the following section of the former IWC Wage Order 14 section 3(A), which read, ". . . employees shall not be employed more than ten (10) hours in any one workday or more than six (6) days in any workweek unless the employee receives one and one-half (1-1/2) times such employee's regular rate of pay for all hours worked over ten (10) hours in any workday and for the first eight (8) hours on the seventh (7th) day of work and double the employee's regular rate of pay for all hours worked over eight (8) on the seventh (7th) day of work in the workweek." Note that the federal wage and hour laws do not cover agricultural occupations.

3. ARBITRATION: DON'T DELAY, PAY ARBITRATION FEES ON TIME (10/2019)

Apparently, some employers have compelled arbitration, only to then delay arbitration proceedings through strategic non-payment of arbitration fees – leaving an aggrieved employee in litigation limbo. SB 707 seeks to remedy this wrong by amending Sections 1280 and 1281.96, and adding Sections 1281.97, 1281.98, and 1281.99 to the Code of Civil Procedure to prevent strategic delays. Through SB 707, our Legislature declares that, "[a] company's strategic non-payment of fees and costs severely prejudices the ability of employees or consumers to vindicate their rights. This practice is particularly problematic and unfair when the party failing or refusing to pay those fees and costs is the party that imposed the obligation to arbitrate disputes . . . It is the intent of the Legislature in enacting this measure to affirm the decisions in *Armendariz v. Foundation Health Psychcare Services, Inc.*, *Brown v. Dillard's, Inc.*, and *Sink v. Aden Enterprises, Inc*., that a company's failure to pay arbitration fees pursuant to a mandatory arbitration provision constitutes a breach of the arbitration agreement and allows the non-breaching party to bring a claim in court."

SB 707 also requires private arbitration companies to begin collecting and reporting demographic data on the ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators used by that company.

As with any California law impacting arbitration, SB 707 will very likely trigger litigation as to whether or not the Federal Arbitration Act (FAA) preempts the bill's changes, and relatedly, whether SB 707 creates any obstacle to the execution or enforcement of arbitration agreements (recall that the US Supreme Court in *AT&T Mobility LLC v. Concepcion* held (in part) that state law rules creating obstacles to the FAA are subject to federal preemption).

PRACTICE TIP: For now, employers are cautioned to pay arbitration fees on time. If the delay in payment is due to ongoing settlement discussions, obtain the written agreement of the opposing party as well as the arbitration company to extend the deadline for payment.

Under SB 707, if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date, the drafting party is deemed to be in material breach of the arbitration agreement, in default of the arbitration, and waives its right to compel arbitration. If there is a material breach by the drafting party, the employee or consumer has several recourses, including but not limited to: (1) withdrawal of the claim from arbitration and the ability to proceed in a court of appropriate jurisdiction; (2) the right to compel arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration; (3) the right to continue the arbitration proceeding, if the arbitration company agrees to continue administering the proceeding, notwithstanding the drafting party's failure to pay fees or costs. The neutral arbitrator or arbitration company may then institute a collection action at the conclusion of the arbitration proceeding against the drafting party; (4) the right to petition the court for an order compelling the drafting party to pay all arbitration fees that the drafting party is obligated to pay under the arbitration agreement or the rules of the arbitration company; etc.

If the employee or consumer withdraws the claim from arbitration then, (1) the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration are tolled as of the date of the first filing of a claim in any court, arbitration forum, or other dispute resolution forum, and (2) the court must impose monetary and other sanctions on the drafting party in accordance with the new Sections 1281.97, 1281.98, and 1281.99 (including evidentiary sanction, termination sanctions, and contempt sanctions). See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB707.

4. ARBITRATION: FEHA AND LABOR CODE CLAIMS TO BE EXCLUDED (10/2019)

Effective January 1, 2020, AB 51 adds Section 12953 to the Government Code and Section 432.6 to the Labor Code to outlaw forced arbitration of California Fair Employment and Housing Act (FEHA) and Labor Code claims (although the word "arbitration" was intentionally omitted in the drafting of these statutory changes). Through AB 51, the Legislature declared that, "*it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act and the Labor Code.*"

The bill states, "A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the [FEHA] or this code [the California Labor Code]." This ban includes allowing applicants and employees "…the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation." The bill contains very strong anti-retaliation language to prevent an employer from seeking to "threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to [arbitration]."

AB 51 specifically notes that arbitration agreements that require an applicant or an employee to "opt out" (*e.g.,* "You have 30 days to revoke this agreement") or take another affirmative action to be excluded from the arbitration requirement will be deemed an agreement that is a "condition of employment." AB 51 applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.

AB 51 has a few carve-outs: (1) it does not apply to "a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and their employer or any other person as specified by the rules of the self-regulatory organization; and (2) [it] does not apply to post-dispute settlement agreements or negotiated severance agreements."

An applicant or employee seeking to prosecute a violation of AB 51 is provided with the right to seek "injunctive relief" and, if deemed the prevailing party, to collect reasonable attorney's fees. Violations of AB 51 are considered an "unlawful employment practice" under FEHA, as well as a criminal misdemeanor. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5**.**

PRACTICE TIP: Although AB 51 attempts to prevent preemption claims under the Federal Arbitration Act (FAA) by specifically stating, "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)", it is very likely that this bill will be challenged as a violation of the FAA, and it could very well be blocked by a court before the effective date. For years, California has been attempting to outlaw employment arbitration agreements, only to be shot down by federal law preemption. Anticipating this, the bill also notes that its provisions are severable: "If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." The Legislative history provides, "AB 51 seeks to sidestep the preemption issue by not prohibiting, discouraging, or restricting the use of arbitration agreements by employers or workers, but rather requiring applying prior case law that stressed the need for consent in arbitration agreements." For now, until the matter is finally resolved, employers using arbitration agreements are cautioned to work with their employment counsel to ensure that their arbitration agreements are properly drafted and implemented, and also to discuss the pros and cons of continuing to use arbitration agreements should the bill still be alive as of the January 1, 2020 effective date.

5. BOARD OF DIRECTORS: GENDER QUOTAS – WILL IT SURVIVE? (10/2019)

Remember that by no later than December 31, 2019 (unless pending litigation results in a stay), SB 826 (adding Corporations Code Sections 301.3 and 2115.5) will make it mandatory for publicly-held domestic or foreign corporations whose principal executive offices are located in California (according to the corporation's SEC 10-K form) to have a minimum of one female director on the board. California is the first state to make such a rule: See:

http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826.

The Secretary of State has now issued its first report pursuant to SB 826, titled "Corporations with Female Board Members". See the following link for the report:

https://www.sos.ca.gov/administration/news-releases-and-advisories/2019/secretary-state-alex-padilla-releases-first-report-corporations-female-board-members/.

NOTE: On August 6, 2019, a lawsuit was filed in the Superior Court of Los Angeles seeking declaratory and injunctive relief to halt the implementation of SB 826. The pending case is *Robin Crest, et. al. v. Alex Padilla*.

6. CFRA: FLIGHT CREWS HAVE SPECIAL ELIGIBILITY RULES (10/2019)

The California Family Rights Act (CFRA) has several eligibility requirements, one of which is that an employee has to have worked at least 1,250 hours for the employer during the previous 12 months before the requested CFRA leave begins. AB 1748 amends section 12945.2 of the Government Code to specifically address the hours requirements for flight crews (those working for an air carrier as a flight deck or cabin crew member). It modifies the CFRA eligibility requirements for those individuals as follows:

"(1) An employee employed by an air carrier as a flight deck or cabin crew member meets the eligibility requirements [of CFRA] if all of the following requirements are met:

(A) The employee has 12 months or more of service with the employer.

(B) The employee has worked or been paid for 60 percent of the applicable monthly guarantee, or the equivalent annualized over the preceding 12-month period.

(C) The employee has worked or been paid for a minimum of 504 hours during the preceding 12-month period.

(2) As used in this subdivision, the term "applicable monthly guarantee" means both of the following:

(A) For employees described in this subdivision other than employees on reserve status, the minimum number of hours for which an employer has agreed to schedule such employees for any given month.

(B) For employees described in this subdivision who are on reserve status, the number of hours for which an employer has agreed to pay such employees on reserve status for any given month, as established in the collective bargaining agreement or, if none exists, in the employer's policies." See:

https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200AB1748.

PRACTICE TIP: Normally, for an employee to be eligible for CFRA leave, three criteria must be met: (1) the employee has more than 12 months of service with the employer; (2) the employee has at least 1,250 hours of service with the employer during the previous 12-month

period; and (3) the employer employs at least 50 other employees within 75 miles of the worksite where that employee is employed or reports to from a remote location. If all three criteria are met, the employee is then entitled to take up to a total of 12 workweeks in any 12-month period for family care and medical leave (or possibly new child bonding) under CFRA.

7. COMPUTER SOFTWARE EMPLOYEES: INCREASED SALARY BASIS (10/2019)

Effective January 1, 2020, the Department of Industrial Relations (DIR) will adjust the computer software employees' minimum hourly rate of pay exemption from $45.41 to $46.55. The minimum monthly salary exemption will also increase from $7,883.62 to $8,080.71, and the minimum annual salary exemption will be increased from $94,603.25 to $96,968.33. This change reflects the 2.5% increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.

See: https://www.dir.ca.gov/OPRL/ComputerSoftware.pdf.

8. DFEH: BILL EXPANDS DFEH CIVIL ACTION POWERS FOR FEHA VIOLATIONS (10/2019)

AB 1820 amends Section 12930 of the Government Code to authorize the California Department of Fair Employment and Housing (DFEH) to bring civil actions for violations of certain federal civil rights and antidiscrimination laws. The current law allowed the DFEH to bring actions pursuant to Government Code Sections 12965 and 12981. SB 1820 now expands that list to allow the DFEH to prosecute civil actions under "*Title VII of the Civil Rights Act of 1964 (Public Law 88-352; 42 U.S.C. Sec. 2000 et seq.), as amended, the federal Americans with Disabilities Act of 1990 (Public Law 101-336; 42 U.S.C. 12101, et seq.), as amended, or the federal Fair Housing Act (42 U.S.C. Sec. 3601 et seq.).*" See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1820.

9. DISCRIMINATION: CROWN ACT AND HAIRSTYLE DISCRIMINATION (6/2019)

SB 188, better known as the CROWN Act ("Create a Respectful and Open Workplace for Natural Hair"), prohibits employers from withholding employment/promotion, terminating employment or otherwise discriminating against employees based on the protected employees' or applicants' "protective" hairstyles. Effective January 1, 2020, the bill makes California the first state to ban discrimination on the basis of hairstyles associated with race. Specifically, the bill amends section 212.1 of the Education Code and section 12926 of the Government Code to define "protective hairstyles" as including but not limited to, "such hairstyles as braids, locks, and twists." Notably, this bill also expands the FEHA definition of "race" to note that the term includes "…traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." The author notes that the bill is intended to "… prohibit an employer from withholding or terminating employment or promotion based on discrimination against the protected employees' or applicants' hairstyle. It will also prevent schools from disrupting a child's

education based on the way they wear their hair. These protections will help mitigate the unfair scrutiny and significant injustices Black people face because of their hair." See:

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB188.

10. DOL: OPINION LETTERS CONTINUE TO FLOW (10/2019)

Since our last update, the federal DOL has continued to issue numerous opinion letters on varying topics (it issued 28 letters in 2018 and 13 letters through September 2019). Recent topics have included the compensability of overtime spent in a truck's sleeper berth while otherwise relieved of duty, permissible rounding practices, calculating overtime pay for nondiscretionary bonuses, etc. Note that our California State DLSE also issues opinion letters; employers should make it a practice to review these letters. Although neither set of letters is considered binding precedent, they are useful tools to understand the viewpoint of the particular agency on a relevant issue, and courts often look to them for guidance. The DOL's opinion letters can be found at: https://www.dol.gov/whd/opinion/search/fullsearch.htm; and the DLSE's opinion letters at: https://www.dir.ca.gov/dlse/OpinionLetters-bySubject.htm.

11. DOL: PAID PROGRAM (SELF-REPORTING PROGRAM) IS PERMANENT (10/2019)

Last year, we announced that the federal Department of Labor (DOL) had instituted a new *pilot* program called the "Payroll Audit Independent Determination" (PAID) program, which was aimed at more efficiently resolving minimum wage and overtime violation claims under the Fair Labor Standards Act (FLSA) through employer self-reporting. According to the DOL, the purpose of the PAID program is to "ensure that more employees receive back wages they are owed—faster." The DOL has now announced that the PAID program is here to stay.

PAID is a voluntary program that allows an employer to self-report violations. It creates an avenue for employers to achieve compliance by paying back wages without litigation (and accompanying attorneys' fees) or an audit. Under PAID, employees will receive 100 percent of the back wages paid (this is not a mechanism for compromise). Through the PAID program, the DOL will work with the employers and employees to oversee resolution of the potential violations by assessing the amount of wages due and supervising their payment to employees. "The Division will not impose penalties or liquidated damages to finalize a settlement for employers who choose to participate in the PAID program and proactively work with the Division to fix and resolve their potential compensation errors."

Note that the PAID program is not open to employers who are already involved in litigation or who are currently being investigated by the DOL. The program also cannot be used "repeatedly to resolve the same potential violations, as this program is designed to identify and correct potentially non-compliant practices." For more information see: https://www.dol.gov/whd/paid/.

PRACTICE TIP: Keep in mind that resolving these issues with the *federal* DOL, even if you use the PAID program, will not absolve employers of potential liability for penalties and other

costs under California law; the overtime rules are different under federal law and California imposes additional wage and hour requirements and penalties.

12. DOL: WHITE COLLAR OVERTIME (SALARY) RULES FINALIZED (10/2019)

For the first time in over fifteen years, the DOL has updated its overtime regulations under the FLSA. As a part of that process, the DOL has raised the federal "standard salary level" from $455 per week to $684 per week (annualized to $35,568). The changes also codify two additional modifications: (1) the total annual compensation level for "highly compensated employees (HCE's)" was raised from the currently-enforced level of $100,000 to $107,432 per year; and (2) the DOL clarified that employers can use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the standard salary level, in recognition of evolving pay practices. The final rule becomes effective January 1, 2020.

The DOL's news release on the final overtime rule changes can be found at the following link: https://www.dol.gov/newsroom/releases/whd/whd20190924. More information about the final rule is available at: https://www.dol.gov/whd/overtime2019/.

PRACTICE TIP: These changes in the federal salary basis will have almost no impact for companies employing people in California, because our state's salary basis amount is significantly higher than even the newly-increased federal salary amount. The higher state salary basis amount is controlling in California. See #28 below.

13. DOT: CDL DRUG AND ALCOHOL CLEARINGHOUSE (10/2019)

The Department of Transportation (DOT) issued its final rule on December 2, 2016, creating the "Commercial Driver's License Drug and Alcohol Clearinghouse." This clearinghouse will become effective on **January 6, 2020**, and it will create a repository used to identify violations of the DOT's drug and alcohol testing programs for drivers operating vehicles that require a commercial driver's license (CDL). Employers with drivers regulated by the DOT will have to register with the DOT clearinghouse and provide the DOT with certain information related to driver drug testing. See: https://clearinghouse.fmcsa.dot.gov/register.

14. EEOC: COMPONENT TWO TOOK CENTER STAGE FOR A BRIEF MOMENT (10/2019)

The EEOC annually collects workforce data from certain employers. This process is mandatory for affected employers. In years past, the EEOC limited its data collection efforts to the number of employees by job category, gender, and race or ethnicity data (Component 1 data). Now, the EEOC is also collecting compensation data for both 2017 and 2018 (Component 2 data). The EEOC previously attempted to collect this Component 2 data in 2016/2017, but its efforts were delayed by litigation. A recent ruling in *National Women's Law Center, et al., v. Office of Management and Budget, et al.* (April 2019), however, revived the EEOC's collection efforts.

The Component 2 data that had to be submitted as of September 30, 2019, included the number of employees and the hours worked by job category, salary pay band, gender and race/ethnicity data. The EEOC portal for filing this Component 2 data can be found at: https://eeoccomp2.norc.org/login. The pay data to be reported included 12 pay bands: "(1) $19,239 and under; (2) $19,240 - $24,439; (3) $24,440 - $30,679; (4) $30,680 - $38,999; (5) $39,000 - $49,919; (6) $49,920 - $62,919; (7) $62,920 - $80,079; (8) $80,080 - $101,919; (9) $101,920 - $128,959; (10) $128,960 - $163,799; (11) $163,800 - $207,999; and (12) $208,000 and over." Employers were instructed to refer to earnings reported in W-2 Box 1 when selecting a compensation band for each employee.

Because the EEOC did not have the internal capacity to collect this 2017 and 2018 Component 2 data, the EEOC contracted with NORC at the University of Chicago to collect the Component 2 EEO-1 data for 2017 and 2018, on behalf of the EEOC.

NOTE: Employers, including federal contractors, were required to submit Component 2 compensation data for 2017 if they had 100 or more employees during the 2017 workforce snapshot period (the "workforce snapshot period" is an employer-selected pay period between October 1 and December 31 of the reporting year). Such employers, including federal contractors, were required to submit Component 2 compensation data for 2018, if they have 100 or more employees during the 2018 workforce snapshot period. Federal contractors with 50-99 employees are not required to report Component 2 compensation data. Federal contractors with 1-49 employees, and other private employers with 1-99 employees, are not required to file either EEO-1 Component 1 or Component 2 data.

NOTE 2: On September 11, 2019, the EEOC announced that it would **not renew** its request for authorization from the Office of Management and Budget to collect EEO-1 Component 2 pay data after the current authorization expires. This does not change affected employers' previous requirement to file for 2017 and 2018. Going forward, however, the EEOC will only collect Component 1 data because, according to the EEOC, the "unproven utility" of the Component 2 pay data is "far outweighed by the burden imposed on employers that must comply with the reporting obligation." Thus, it appears that affected employers will not have to report this data going forward.

Note 3: As of October 8, 2019, the EEOC reported that 75.9% of eligible filers had submitted Component 2 data. The EEOC has filed a motion with the court seeking an order "determining that the EEO-1 Component 2 data collection is deemed complete." The EEOC apparently is hemorrhaging funds by keeping the collection portal open; reporting that it will cost the EEOC $1.5 million to keep the portal open until November 11, 2019, and $150,000 per week for each week the portal is left open thereafter.

15. FEHA: STATUTE OF LIMITATIONS EXPANDS FROM ONE TO THREE YEARS (10/2019)

The Stop Harassment and Reporting Extension (SHARE) Act (AB 9) amends Sections 12960 and 12965 of the Government Code and extends the deadline to file a complaint alleging "practices made unlawful" under the Fair Employment and Housing Act (FEHA) with the

Department of Fair Employment and Housing (DFEH) from one year to three years. This is a statute of limitations (SOL) six times longer than the current federal SOL, and three times the length of the current FEHA SOL. The statute notes that the expanded SOL applies to a "*complaint alleging any … violation of Article 1 (commencing with Section 12940 – the sections covering discrimination, harassment and retaliation) of Chapter 6 shall not be filed after the expiration of three years from the date upon which the unlawful practice or refusal to cooperate occurred."* According to the bill analysis, this expansion of the SOL is necessary because, "Victims of all forms of discrimination and harassment may be initially unclear about what happened, unaware of their rights, or reluctant to report misconduct to their boss." The Consumer Attorneys of California, the bill's sponsor, noted, "that extending the filing period under FEHA would align it with time limits for other actions … most other types of harm have longer filing deadlines."

AB 9, also amended the extension for filling beyond the SOL to now provide that a claim may be filed beyond the three-year statutory deadline, "(1) For a period of time not to exceed 90 days following the expiration of, *the applicable filing deadline,* if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice *during the 90 days following the expiration of the applicable filing deadline."* For purposes of this bill, filing a complaint means, *"filing an intake form with the department and the operative date of the verified complaint relates back to the filing of the intake form."* Despite the changes outlined above, AB 9 makes clear that the SOL for claims alleging violations of the Unruh Act (Sections 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code) remain one year. A final note of import in the bill: "*This act shall not be interpreted to revive lapsed claims*." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB9.

PRACTICE TIP: This bill gives employees a longer period of time to initiate employment discrimination-related claims. This means that employers must be more vigilant than ever to prevent all forms of discrimination, harassment and retaliation in the workplace. This process starts with up-to-date policies and procedures, the implementation of safeguards, proper and ongoing training and instituting a practice of documentation on an ongoing basis. Remember also that employees will also have one additional year after the receipt of a DFEH Right-to-Sue letter in which to file a civil action in court. This means that employers may now find themselves defending claims for FEHA-related workplace incidents up to *four years* after the incident occurred. These delays will make it very hard for an employer to uncover accurate facts about a complaint, given the potential gap of several years.

16. GENDER: PRICING BASED ON SEX, A COSTLY MISTAKE (10/2019)

In our update two years ago, we reminded employers that setting different pricing for the same goods or services, based solely on a person's gender or sex, is risky business for any company. State law requires that businesses charge the same price for the same services (or services of similar kind) regardless of the customer's gender or sex (see the Unruh Civil Rights Act and the Gender Tax Repeal Act of 1995). That note was occasioned by the passage of AB 1615, which created the "Small Business Gender Discrimination In Services Compliance Act." This year, the concept is back on the legislative table with the passage of AB 1607. This bill provides that

commencing January 1, 2021, any city, county, or city and county that issues business licenses must provide a business, at the time the business is issued the business license or when the license is renewed, with a written notice of these provisions, discussing the requirements of the Gender Tax Repeal Act. The notice must be provided in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean. To comply with this paragraph, a city, county or both may provide the business with the notice created by the Department of Consumer Affairs. Cities and counties also are authorized to increase their fees for that license in an amount not to exceed the reasonable costs of providing the written notice. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1607.

17. HEAT REGULATIONS: DRAFTS TO BE FINALIZED FOR INDOOR WORKERS (10/2019)

SB 1167 required that by January 2019, the California Division of Occupational Safety and Health (DOSH) propose to OSHA a heat illness and injury prevention standard applicable to workers working in indoor places of employment. DOSH did so on January 29, 2019. The proposed rules then underwent revisions, and are now in "Revised Draft Standard" form as of April 22, 2019. The progress of the proposed rules and the current draft regulations can be found at the following link: https://www.dir.ca.gov/dosh/doshreg/heat-illness-prevention-indoors/.

18. HOME CARE: REGISTRY DISCLOSURES OF CONFIDENTIAL INFORMATION (10/2019)

The Home Care Services Consumer Protection Act requires in part that the State Department of Social Services establish and maintain a registry of registered home care aides and home care aide applicants on the Department's Internet website. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2455.

PRACTICE TIP: All families must take great care to pay home care workers properly, as the shock of a six-figure liability has hit several of our clients who come to us with caregiver claims after paying "daily rates," failing to pay for sleep time, or failing to pay for overtime.

19. INDEPENDENT CONTRACTORS: AB 5 COVERS MOST EMPLOYERS (10/2019)

On September 18, 2019, Governor Newsom signed AB 5, codifying and expanding the pro-employment "ABC test" first outlined in the Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*. His signature makes the ABC test a fixture of the California Labor Code (adding Section 2750.3), Unemployment Insurance Code (amending Section 3351) and the California Industrial Commission Wage Orders. AB 5 is effective on January 1, 2020, but is retroactive to misclassification cases before that date.

AB 5 is not all bad news, however, as it creates exemptions to the application of the ABC test for a limited number of professions and specific types of contractual relationships commonly used in certain industries. These limited exemptions, where applicable, will allow for the continued use of the former "control" test used by California as outlined in *S G. Borello & Sons, Inc. v. Department of Industrial Relations* (test provided below), instead of the stricter ABC test.

With the passage of AB 5, all companies using independent contractors now face an increased risk of misclassification claims by workers and government agencies (the latter through audits). As such, employers are strongly advised to immediately review their independent contractor relationships with competent employment counsel.

A Quick *Dynamex* "ABC Test" Refresh

Before getting into the weeds of AB 5 and the exemptions, below is a brief refresher on the *Dynamex* ABC test (as codified in AB 5). The ABC test provides that:

"A person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) [*CONTROL*] The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) [*USUAL COURSE OF BUSINESS*] The person performs work that is outside the usual course of the hiring entity's business.

(C) [*INDEPENDENTLY ESTABLISHED TRADE*] The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."

The ABC test – in particular, Prong B – makes it much harder for an individual worker in California to be classified as an independent contractor. Remember also that under the ABC test, the worker in question is "presumed" to be an employee UNLESS the hiring entity can prove ALL THREE PRONGS of the ABC test; this burden falls on the employer. Although the ABC test is over a year old, it is likely that the passage of AB 5 will require tens of thousands of employers to reclassify many workers formerly classified as contractors under the *Borello* test.

Limited Exemptions to the ABC Test Under AB 5 (the *Borello* Test Still Governs)

In additional to codifying *Dynamex* and expanding the application of the ABC test beyond just the Wage Orders, AB 5 also carved out a limited number of exemptions for specific professions, as well as certain types of contractual relationships.

IMPORTANT NOTE: Even if a specific profession or a certain type of contractual relationship is exempted from coverage under the AB 5/ABC Test, that does not automatically mean that independent contractor status is legally viable Rather, employers looking to institute (or maintain) independent contractor relationships must still run the potential independent contractor through the former 12-factor "control" test (*Borello* test – see below for the factors). As an upside, if the exemptions apply to the circumstances, employers have decades of jurisprudence and regulatory guidance on how to apply the *Borello* test appropriately, and the *Borello* test is much more flexible and employer-friendly than the ABC test.

The ABC test is **NOT applicable** to the following **PROFESSIONS** (the applicable test is the "*Borello*" test):

1. "A person or organization who is licensed by the Department of Insurance" [licensed insurance agents];
2. "A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California";
3. "An individual who holds an active license from the State of California and is practicing one of the following recognized professions: lawyer, architect, engineer, private investigator, or accountant";
4. "A securities broker-dealer or investment adviser or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority";
5. "A direct sales salesperson"[*e.g.,* Avon reps];
6. "A commercial fisherman working on an American vessel" (there is a sunset clause);
7. "A real estate licensee licensed by the State of California [and] for whom the determination of employee or independent contractor status shall be governed by subdivision (b) of Section 10032 of the Business and Professions Code"; and,
8. "A repossession agency licensed pursuant to Section 7500.2 of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by Section 7500.2 of the Business and Professions Code."

The ABC test is also **NOT applicable** to the following types of **CONTRACTUAL RELATIONSHIPS** (the applicable test is the "*Borello*" test):

1. ***"a contract for 'professional services'*** ["professional services" is defined below] –
    a. Professional services means:
        i. Marketing (that is creative and original);
        ii. Administrator of human resources;
        iii. Travel agent services;
        iv. Graphic design;
        v. Grant writer;
        vi. Fine artist;
        vii. Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service;
        viii. Payment processing agent through an independent sales organization;
        ix. Still photographer or photojournalist who does not license content submissions to the putative employer more than 35 times per year;
        x. Freelance writer, editor, or newspaper cartoonist who does not provide content submissions to the putative employer more than 35 times per year;
        xi. Services provided by a licensed esthetician, licensed electrologist, licensed manicurist**, licensed barber, or licensed cosmetologist, so long as they set their own rates, process their own payments, get paid directly by the customer, set their own hours, etc.).

1. **For manicurists, this subdivision will be revoked on January 1, 2022.

b. so long as the individual:
   i. … maintains a business location, which may include the individual's residence, that is separate from the hiring entity;
   ii. [if the work is performed more than *six months* after the effective date of AB 5] has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession;
   iii. has the ability to set or negotiate their own rates for the services performed;
   iv. has the ability to set the individual's own hours (outside of project completion dates and reasonable business hours);
   v. is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work;
   vi. customarily and regularly exercises discretion and independent judgment in the performance of the services…"

2. **"*bona fide business-to-business contracting relationships*" –**
   a. … a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation [that] contracts to provide services to another such business…if the contracting business demonstrates that all of the following criteria are satisfied – the business service provider is:
      i. free from the control and direction of the contracting business entity…'
      ii. providing services directly to the contracting business rather than to customers of the contracting business;
      iii. The contract is in writing;
      iv. [If required by the jurisdiction] has the required business license or business tax registration;
      v. customarily engaged in an independently established business of the same nature as that involved in the work performed;
      vi. actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity;
      vii. advertises and holds itself out to the public as available to provide services;
      viii. has its own tools, vehicles, and equipment to perform the services;
      ix. can negotiate its own rates;
      x. consistent with the nature of the work… can set its own hours and location of work;
      xi. not performing the type of work for which a license from the Contractor's State License Board is required.

3. "***the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry***… if the contractor demonstrates that all the following criteria are satisfied"
   a. The subcontract is in writing.

b. The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
c. If the subcontractor is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.
d. The subcontractor maintains a business location that is separate from the business or work location of the contractor.
e. The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.
f. The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds, or warranties relating to the labor or services being provided.
g. The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.
h. Note that there are also special provisions for a "subcontractor providing construction trucking services."

4. "***the relationship between a referral agency and a service provider***… if the referral agency demonstrates that all of the following criteria are satisfied" – the service provider:
   a. is free from the control and direction of the referral agency in connection with the performance of the work for the client…
   b. has the required business license or business tax registration (if required).
   c. if the work for the client requires the service provider to hold a state contractor's license… the service provider has the required contractor's license.
   d. delivers services to the client under service provider's name, rather than under the name of the referral agency.
   e. provides its own tools and supplies to perform the services.
   f. is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.
   g. maintains a clientele without any restrictions from the referral agency and the service provider is free to seek work elsewhere, including through a competing agency.
   h. sets its own hours and terms of work and is free to accept or reject clients and contracts.
   i. sets its own rates for services performed, without deduction by the referral agency.
   j. is not penalized in any form for rejecting clients or contracts.
   k. Additional rules apply for "construction trucking services".

5. "***the relationship between a motor club holding a certificate of authority… and an individual performing services pursuant to a contract between the motor club and a third party to provide motor club services utilizing the employees and vehicles of the***

third party…if the motor club demonstrates that the third party is a separate and independent business from the motor club".

The Catch-All Exemption (*Borello)*

AB 5 also created a general exclusion as follows, "If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (Borello)."

A Quick *Borello* Test Refresh:

If the ABC test does not apply, then the validity of independent contractor status is determined through application of the Borello test:

Most important factor: "Who controls the means of production?"

Additional Factors:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal;
3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
4. The alleged employee's investment in the equipment or materials required by his task;
5. The skill required in the particular occupation;
6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
7. The alleged employee's opportunity for profit or loss depending on his managerial skill;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job; and
11. Whether or not the parties believe they are creating an employer-employee relationship.

Although beyond the scope of this summary, the Employment Development Department, the Division of Labor Standards Enforcement, the federal Department of Labor and the Internal Revenue Service, each has its own internal tests for determining control and properly applying the *Borello* or similar tests. There is also significant case law guidance available.

Retroactive Application Has Now Been Codified:

AB 5 states that it is deemed to be declaratory of existing law, "this act does not constitute a change in, but is declaratory of, existing law with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders". This means that as of January 1, 2020, the ABC test will be applied retroactively to the misclassification analysis.

To that point, AB 5 states explicitly that its effective date applies to, "…work performed on or after January 1, 2020," AND that if AB 5 or its exemptions "…would relieve an employer from liability, those subdivisions shall apply retroactively to existing claims and actions to the maximum extent permitted by law." See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.

RELATED CASE NOTE 1 (FRANCHISING): On September 24, 2019, in *Vazquez v. Jan-Pro Franchising International, Inc.*, the Ninth Circuit "re-established the remaining holdings from the now-withdrawn opinion" (*i.e.,* those portions of the holding that were not certified to the CA Supreme Court). Specifically, the Panel stated that "the special features" of franchising do not necessarily prevent the application of the ABC test to franchisors. That means that the ABC test can now also be used to determine if an individual (like a franchise owner) is an employee rather than an independent contractor, if the facts so warrant (recall that most franchisees in the *Jan-Pro* case were actually individual owner-operators performing janitorial services contracts for a master franchisor using a multi-leveled franchise model). Recall also that the Ninth Circuit certified the actual question of "retroactivity" back to the CA Supreme Court for a final determination ("Does the Court's decision in *Dynamex Operations West Inc. v. Superior Court*, 4 Cal.5th 903, 232 Cal.Rptr.3d 1, 416 P.3d 1 (2018), apply retroactively?"); that issue is still pending decision.

RELATED CASE NOTE 2 (RETROACTIVITY): In *Gonzales v. San Gabriel Transit* (October 2019) the Second District Court of Appeal held "that (1) the ABC test adopted in *Dynamex* is retroactively applicable to pending litigation on wage and hour claims; (2) the ABC test applies with equal force to Labor Code claims that seek to enforce the fundamental protections afforded by wage order provisions; and (3) statutory claims alleging misclassification not directly premised on wage order protections, and which do not fall within the generic category of "wage and hour laws," are appropriately analyzed under what has commonly been known as the "*Borello*" test." The Second District is the second state court to hold that *Dynamex* should be applied retroactively.

What Are the Consequences of Misclassification?

The consequences of misclassifying an employee as an independent contractor can include potential liability for:

1. Unpaid wages, including overtime, meal periods and rest periods;
2. Unpaid payroll taxes and penalties imposed by taxing authorities like the IRS or EDD;
3. Workers' compensation liability;
4. Private Attorneys General Act and/or Unfair Competition Law claims;

5. Civil penalties of no less than $5,000 and no more than $15,000 for each violation, and civil penalties between $10,000 to $25,000 for a pattern and practice of violations [California Labor Code Section 226.8(b) and (c). Section 226.8 does not create a private right of action, the penalty for a violation is enforceable only through the Labor Commission];
6. Being required to prominently display a notice (signed by an officer of the company) on the company website for one year admitting to violating the law; and
7. AB 5 also explicitly creates an action for injunctive relief by the Attorney General (or a local prosecutor in certain circumstances) which is brought "…in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association."

PRACTICE TIPS: Although it is very likely that AB 5 will be amended through future legislation (or possibly a ballot measure) and clarified through future case law, employers are cautioned to act now. Although AB 5 goes into effect on January 1, 2020, the *Dynamex* ruling and the ABC test have been operative since 2018. To assist you in the process, here are three things employers can do now to prepare:

1. ***Review your "independent contractor" potential exposure with employment law counsel –*** if you currently use "independent contractors", they may actually be "employees" under the ABC or *Borello* tests. Prepare a list of those contractors and review them with your counsel.

2. ***Review your vendor relationships –*** Business-to-business, personal services, or other types of contractual relationships should also be reviewed to ensure compliance with the law, and to make sure the ABC test is not applicable. Remember that if the vendor does not have a separate business location, or has no other clients, these are red flags.

3. ***Make corrections ASAP –*** Work with employment counsel to review whether or not you need to reclassify contractors as employees to comply with the law and avoid significant liability.

20. INDEPENDENT CONTRACTORS: DYNAMEX ≠ NEWSPAPER DISTRIBUTORS (10/2019)

AB 170 is another very narrow – and time-limited – exception to the application of the ABC test. Under this bill, until January 1, 2021, a newspaper distributor working under contract with a newspaper publisher, as well as a newspaper carrier working under contract with a newspaper publisher or newspaper distributor, also are exempted from the *Dynamex* provisions and AB 5 described above. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB170.

21. IRS: CHANGES TO THE FORM W-4 ON THE HORIZON (6/2019)

In May 2019, the IRS announced its intention to revise the Form W-4 for 2020. It also published a draft of the new form, which can be viewed at https://www.irs.gov/pub/irs-dft/fw4--dft.pdf. The revisions are substantial and mirror provisions of the Tax Cut and Jobs Act. Some of the major changes include the elimination of withholding allowances (tied to personal exemption amounts), and a replacement of the former worksheet with questions to be answered. According to the IRS website, and important to HR practitioners handling payroll, "Employees who have submitted a Form W-4 in any year before 2020 will not be required to submit a new form merely because of the redesign. Employers can continue to compute withholding based on the information from the employee's most recently submitted Form W-4." Further information can be found in the form of Frequently Asked Questions at: https://www.irs.gov/newsroom/faqs-on-the-early-release-of-the-2020-form-w-4.

22. JANITORS: "JANITOR SURVIVOR EMPOWERMENT ACT" (10/2019)

AB 547 amends multiple sections of the Labor Code (1420, 1425, 1429, 1429.5, 1431 and 1432) to create the Janitor Survivor Empowerment Act and expands already existing laws protecting Janitors. For example, current law requires employers of at least one employee and one or more covered workers who provide janitorial services to register with the commissioner annually, and prohibits them from conducting business without registering.

AB 547 requires the DLSE to issue two types of registrations (one for registrants without employees and one for registrants with employees), and prohibits the DLSE from approving a registration if the employer does not include in their written application (among other things) the name of any subcontractor or franchise servicing contracts affiliated with branch locations and the name of any subcontractor or franchise servicing the contracts. If an employer makes a material misrepresentation in the application process, a civil penalty of up to $10,000 per violation may be imposed.

Another example of a change from the former law includes the former requirement that the DLSE establish biennial in-person sexual violence and harassment prevention training requirements. This bill requires the DIR to convene a training advisory committee to assist in compiling a list of qualified organizations and peer trainers that employers would be required to use to provide the biennial training, and it requires the DLSE to make the list of qualified training organizations available on its website by January 1, 2021. For the full content of the additional changes, see:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB547.

23. LACTATION ACCOMMODATION: DOES YOUR ROOM COMPLY? (10/2019)

SB 142 is modeled after the San Francisco lactation accommodation laws. It amends Labor Code Sections 1030, 1031 and 1033, and adds Section 1034 to expand the protections for lactation accommodation requests. The bill clarifies that the employer's duty to provide a

reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child is triggered, "each time the employee has need to express milk." This bill also makes clear the requirement that an employer "shall provide" an employee with the use of a "room or other location" that is not a bathroom (the former standard was only to "make reasonable efforts to provide such a space"). The provided location must be in "close proximity to the employee's work area, shielded from view, free from intrusion" (while the employee is expressing milk), and also must meet the following criteria:

- Be safe, clean, and free of hazardous materials;
- Contain a surface to place a breast pump and personal items;
- Contain a place to sit; and,
- Have access to electricity or alternative devices, including, but not limited to, extension cords or charging stations, needed to operate an electric or battery-powered breast pump.

The bill also notes that employers now have a duty to provide "access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace. If a refrigerator cannot be provided, an employer may provide another cooling device suitable for storing milk, such as an employer-provided cooler." Note that if several employers share a building, they can comply with this bill by providing a shared space in the building that complies with all of the other requirements. If an employer provides for the use of a multipurpose room for lactation uses, the lactation use must take precedence over any other use.

For employers or general contractors coordinating a multi-employer worksite, this bill requires that they must "either provide lactation accommodations or provide a safe and secure location for a subcontractor employer to provide lactation accommodations on the worksite, within two business days, upon written request of any subcontractor employer with an employee that requests an accommodation."

The bill also provides two carve-outs:

- "An employer may comply with this section by designating a lactation location that is temporary, due to operational, financial, or space limitations. These temporary spaces shall not be a bathroom and shall be in close proximity to the employee's work area, shielded from view, free from intrusion while the employee is expressing milk, and otherwise compliant with this section."
- "An employer that employs fewer than 50 employees may be exempt from a requirement of this section if it can demonstrate that a requirement would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. If that employer can demonstrate that the requirement to provide an employee with the use of a room or other location, other than a bathroom, would impose such undue hardship, the employer shall make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet

stall, in close proximity to the employee's work area, for the employee to express milk in private."

SB 142 did not change the law related to agricultural employers, discussed in last year's update. Agricultural employers may comply by providing the affected employee with a private, enclosed and shaded space including, but not limited to, an air-conditioned cab of a truck or tractor.

SB 142 also beefs up the penalty provisions of Section 1033, adding that the DLSE "… may issue a citation and may impose a civil penalty in the amount of one hundred dollars ($100) for each day that an employee is denied reasonable break time or adequate space to express milk." It also notes that, "The denial of reasonable break time or adequate space to express milk in accordance with this chapter shall be deemed a failure to comply for purposes of Section 226.7 (recovery and rest periods)," and it gives an affected employee the right to "file a complaint … with the Labor Commissioner …." As California employers know all too well, the penalty for failing to provide a recovery or rest period is one hour of additional pay, at the employee's regular rate of pay, for each workday in which any rest or recovery period is not provided.

Finally, SB 142 adds Section 1034 to the Labor Code to require that employers "develop and implement a policy regarding lactation accommodation that includes the following:

- A statement about an employee's right to request lactation accommodation;
- The process by which the employee makes [the request for accommodation];
- An employer's obligation to respond to the request [for accommodation] as outlined in subdivision (d) [subdivision (d) provides: "If an employer cannot provide break time or a location that complies with the policy described in subdivision (a), the employer shall provide a written response to the employee]; and
- A statement about an employee's right to file a complaint with the Labor Commissioner for any violation of a right under this chapter.

This policy must be included in an employee handbook or other set of policies that the employer makes available to employees. The employer must distribute the policy to new employees upon hiring, and whenever an employee makes an inquiry about or requests parental leave. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB142.

PRACTICE TIP: SB 142 will require handbook or policy updates for all employers. Employers should assess their office spaces to ensure that they will be able to comply when necessary.

24. LEAVES: ORGAN DONATION PROTECTIONS EXPANDED (10/2019)

AB 1223 amends and adds to various California laws (listed below) to expand the Michelle Maykin Memorial Donation Protection Act, which now requires public employers as well as

private employers with 15 or more employees to grant an employee *an additional unpaid* leave of absence, not exceeding 30 business days in a one-year period, for the purpose of organ donation (this unpaid leave is in addition to the required paid leave provided for organ donation). It also requires a public employee (but not a private employee) to first exhaust all available sick leave before taking that unpaid leave. With regard to a life, disability, or a long-term care insurance policy (not a health insurance policy), as of January 1, 2020, AB 1223 will prohibit a policy or certificate issued, amended, renewed, or delivered, from declining or limiting coverage of a person, charging a person a different rate for the same coverage, or otherwise discriminating in the offering, issuance, cancellation, amount of coverage, price, or any other condition of the insurance policy for a person based solely and without any additional actuarial risks upon the status of that person as a living organ donor. According to the legislative history, proponents of this bill state, "An organ transplant acts as a literal lifeline for patients suffering from organ failure, offering the chance for a longer, healthier life. But the severe shortage of available organs from deceased donors in the United States means that many Californians are left on a donor waiting list, for example more than 19,000 California residents are waiting for a kidney, many for several years or more. This bill could help increase the organs available for transplant by eliminating barriers that may prevent someone from becoming a living donor."

NOTE: This bill amends Sections 89519.5 and 92611.5 of the Education Code, Section 19991.11 of the Government Code and Section 1510 of the Labor Code. It also adds Sections 10110.8 and 10233.8 to the Insurance Code. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1223.

PRACTICE TIP: If you have 15 or more employees, be sure to update your employee handbook leave law section related to organ donation.

25. MEDICAL PROFESSIONALS: IMPLICIT BIAS TRAINING REQUIRED (10/2019)

AB 241 amends Sections 2190.1 and 3524.5 of the Business and Professions Code and adds Section 2736.5 to create new continuing education and training requirements on implicit bias in treatment for physicians, surgeons, physician assistants and nurses. According to the Stanford Encyclopedia of Philosophy, "implicit bias" can be described as "a term of art referring to relatively unconscious and relatively automatic features of prejudiced judgment and social behavior".

Specifically, by January 1, 2022, all CE courses for physicians and surgeons will be required to contain curriculum that includes specified instruction in the understanding of implicit bias in medical treatment. The bill will also require that by January 1, 2022, the Board of Registered Nursing and the Physician Assistant Board must adopt regulations requiring all CE courses for its licensees to contain curriculum that includes specified instruction in the understanding of implicit bias in treatment. Beginning January 1, 2023, the bill will require CE providers to "comply with these provisions and would require the board to audit education providers for compliance." The bill summary notes that these changes are necessary because "… 'most health care providers appear to have implicit bias in terms of positive attitudes toward whites and negative attitudes

toward people of color.' Additional studies have been published suggesting that implicit bias in regards to gender, sexual orientation and identity, and other characteristic has resulted in inconsistent diagnoses and courses of treatment being provided to patients based on their demographic." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB241.

Related Statute: AB 242 is a similar bill authorizing the Judicial Council to develop training on implicit bias and to require all court staff who interact with the public to complete two hours of any training developed every two years. The Judicial Council is authorized to adopt a rule of court, effective January 1, 2021, to implement these requirements. AB 242 also requires the California State Bar to adopt regulations to require the MCLE curriculum to include training on implicit bias and the promotion of bias-reducing strategies. Licensees of the State Bar will be required to meet the requirements for each MCLE compliance period ending after January 31, 2023. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB242.

26. MILEAGE REIMBURSEMENT RATES FOR 2020 (10/2019)

Effective **January 1, 2020**, the standard mileage rates for cars, vans, pickups or panel trucks will be changed as follows:

- 57.5 cents per mile driven for **business** use, down one half of a cent from the rate for 2019;
- 17 cents per mile driven for **medical** or **moving** purposes, down three cents from the rate for 2019; and
- 14 cents per mile driven in service of **charitable** organizations. The charitable rate is set by statute and remains unchanged.

You can find the 2020 rates at: https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2020.

PRACTICE TIP: Remember that employers are required to reimburse employees for work-related mileage, other than the usual commute to and from work. Employers may choose to pay rates lower than the IRS standard if the chosen rates fully compensate the employee for travel-

related costs (including fuel, insurance, repairs, and depreciation). However, payment of the IRS standard rates will be deemed to be reasonable and sufficient reimbursement as a general rule. If an employer pays a rate higher than the IRS rate, the difference could become taxable income to the employee.

27. MINIMUM WAGE: 2019 INCREASE FOR FEDERAL CONTRACTORS (10/2019)

As of January 1, 2020, the minimum wage for federal contractors (those working on contracts covered by Executive Order 13658 ("Establishing a Minimum Wage for Contractors")), will be increased from $10.60 to $10.80 per hour. This applies to individuals and legal entities awarded a Federal Government Contract or subcontracts under a Federal Government Contract entered into after January 1, 2015 (including new, amended, or modified contracts). The wage rate for tipped employees will also increase from $7.40 to $7.55 per hour. You can expect ongoing increases in years to come, as the U.S. Secretary of Labor reviews the rate on an annual basis to determine whether to increase these wage rates. You can find the rates at: https://www.federalregister.gov/documents/2019/09/19/2019-19673/establishing-a-minimum-wage-for-contractors-notice-of-rate-change-in-effect-as-of-january-1-2020.

28. MINIMUM WAGE: CA'S MINIMUM WAGE HIKE CONTINUES (2017) (Reminder!)

On April 4, 2016, Governor Brown signed Senate Bill 3 into law. This bill created groundbreaking legislation to increase California's minimum wage to $15.00 per hour by 2022/2023 (an overall increase of 50%). These minimum wage increases occur incrementally.

For employers with 26 or more employees, the minimum wage will increase as follows:

Year	***Amount***
January 1, 2020 to December 31, 2020	**$13.00**
January 1, 2021 to December 31, 2021	$14.00
January 1, 2022 to December 31, 2022	$15.00

For employers with 25 or fewer employees, and certain non-profit employers, the minimum wage will increase as follows:

Year	***Amount***
January 1, 2020 to December 31, 2020	**$12.00**
January 1, 2021 to December 31, 2021	$13.00
January 1, 2022 to December 31, 2022	$14.00
January 1, 2023 to December 31, 2023	$15.00

An annual incremental increase can be temporarily suspended by Governor Newsom or his successors as the result of economic downturns, based on certain specified criteria (*i.e.,* decreases in total non-farm employment, downturns in retail sales, or if the Director of Finance finds that an increase would push the State budget into a deficit in the current fiscal year or in either of the two following fiscal years).

Once the $15.00 minimum wage marker is attained, the bill also creates annual inflation-related increases tied to the U.S. Consumer Price Index (which are not to exceed 3.5% in a year, with the resulting amount rounded to the nearest $0.10). This "inflation" increase will be calculated each year on August 1st, and any change will take effect on January 1st of the following year.

These minimum wage increases will also **impact California's exempt workers**. California law requires exempt employees to meet both a "salary basis test" and a "duties test." The "salary basis test" requirement is directly tied to the minimum wage – an exempt employee must earn at least twice the minimum wage. Here is how that breaks down in terms of salary dollars:

- **At $12.00 per hour, the salary basis will be $49,920 annually;**
- **At $13.00 per hour, the salary basis will be $54,080 annually;**
- At $14.00 per hour, the salary basis will be $58,240 annually; and,
- At $15.00 per hour, the salary basis will be $62,400 annually.

Given these realities, it is not hard to imagine employers attempting to lessen the impact of each new increase in labor costs by reducing employees, employee benefits, or passing along the increased labor costs to the consumer through increased pricing.

29. MINIMUM WAGE: LOS ANGELES – $15 BY 2020 (2015) (Reminder!)

On May 19, 2015, in a 14-to-1 vote, the Los Angeles City Council made its move to increase the City's minimum wage to $15.00 per hour by the year 2020. Shortly thereafter, the Los Angeles Board of Supervisors gave its approval to extend this change to all workers in the unincorporated areas of Los Angeles County and for County employees.

Note that the salaried exempt calculation is based on the California state minimum wage and not the Los Angeles city minimum wage.

The increases come in staggered waves and must be implemented sooner than the state's plan above:

Employers with **26 or more** employees shall pay a wage of no less than the hourly rates set forth below:

1. **On July 1, 2020, the hourly wage shall be $15.00** (2019 rate is $14.25).

Employers with **25 or fewer** employees shall pay a wage of no less than the hourly rates set forth below:

1. **On July 1, 2020, the hourly wage shall be $14.25** (2019 rate is $13.25); and,
2. On July 1, 2021, the hourly wage shall be $15.00.

Unfortunately for employers, being located outside of the City of Los Angeles does not deter application of this minimum wage. The ordinance contains very broad definitions of

employer and employee and it attempts to cast the widest net possible in order to ensnare as many employers as possible. Specifically:

"**City**" is defined to mean the City of Los Angeles.

"**Employee**" means any individual who:

1. In a particular week **performs at least two hours of work within the geographic boundaries of the City** for an Employer; and

2. Qualifies as an Employee entitled to payment of a minimum wage from any Employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission.

"**Employer**" means any person, as defined in Section 18 of the California Labor Code, including a corporate officer or executive, who directly, indirectly or through an agent or any other person, including through the services of a temporary service or staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of any employee.

For example, if a weed abatement crew from Orange County or Ventura goes into Los Angeles City for a day project, the affected employees must be paid at the above-noted hourly rates, so long as the two requirements above are met. This issue was clarified in the FAQs posted by the City of Los Angeles.

"Does the Los Angeles Minimum Wage apply to all employers who have employees performing work in the City of Los Angeles?

Yes. Regardless of where an employer's place of business is located, an employer must pay an employee who performs at least two hours of work in a particular week within the City of Los Angeles for all hours worked in the City of Los Angeles." You can find the full FAQs here: https://wagesla.lacity.org/sites/g/files/wph471/f/MWO-FAQ-2017-03.pdf.

Note, however: "An Employee not covered by the MWO is an individual traveling through the City with no employment related stops. Time spent in the geographic boundaries of the City solely for the purpose of traveling through Los Angeles (from a point of origin outside Los Angeles to a destination outside Los Angeles) with no employment-related or commercial stops in Los Angeles except for refueling or the Employee's personal meals or errands is not covered by the MWO."

NOTE: Other California cities and counties are considering (or have passed) similar wage hikes including, among others (listed in Alphabetical order): *Alameda, Belmont, Berkeley, Cupertino, Daly City, El Cerrito, Emeryville, Freemont, Los Altos, Los Angeles (city and county), Malibu, Milpitas, Mountain View, Oakland, Palo Alto, Pasadena, Petaluma, Redwood City,*

Richmond, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica and Sunnyvale (and the list continues to grow). Employers are strongly advised to check the local wage rules (and local notice posting requirements) for each city or county in which they are located, as well as any city or county in which they do business. You can find the current minimum wage rates for any of these cities, along with those of other states throughout the United States, at the UC Berkeley Labor Center:

http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/.

30. NLRB: POSTER UPDATES FOR FEDERAL CONTRACTORS (10/2019)

Under Executive Order 13469, federal contractors and subcontractors are required to inform employees of their rights under the National Labor Relations Act (NLRA). This is done in part by displaying the "Employee Rights Under National Labor Relations Act" poster. Be advised that the Office of Federal Contract Compliance Programs recently updated that poster to include minor changes, such as listing a new telephone number for the NLRB, as well as hearing-impaired contact information. Regardless, affected government contractors and subcontractors must replace their current outdated poster with the new updated version. See:

https://www.dol.gov/olms/regs/compliance/EO13496.htm?utm_campaign=&utm_medium=email&utm_source=govdelivery.

31. NOTICES: DEPENDENT CARE NOTICE (10/2019)

As any California employer knows, employees must be provided with a multitude of notices regarding their employment and benefits. Add one more to the list: AB 1554 adds Section 2810.7 to the California Labor Code, requiring employers to notify employees who participate in a flexible spending account (including without limitation a dependent care flexible spending account, a health flexible spending account, or adoption assistance flexible spending account) of any deadline to withdraw funds before the end of the plan year. The notice must be made in two different forms, one of which can be electronic. The other options include telephone communication, text message notification, postal mail notification, or in-person notification. According to the bill analysis, this additional notice requirement is necessary because, "Under federal law and regulations, if an employee does not claim all of the money in their FSA account during their plan year, any remaining funds are forfeited to the employer. In certain plans, the employee also forfeits remaining funds if they fail to file for reimbursement prior to the tax deadline of March 31. It is truly a 'use it or lose it' proposition for the employee." See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1554.

32. OSHA: CONSTRUCTION EMPLOYERS MUST TRAIN ON VALLEY FEVER (10/2019)

AB 203 adds Section 6709 to the Labor Code to require that by May 1, 2020, construction employers engaging in work activities (such as digging, grading, or other earth moving operations,

or vehicle operation on dirt roads or in high winds) or vehicle operation in the Counties of Fresno, Kern, Kings, Madera, Merced, Monterey, San Joaquin, San Luis Obispo, Santa Barbara, Tulare, and Ventura, must provide effective awareness training on Valley Fever. Valley Fever is caused by a microscopic fungus known as *Coccidioides immitis*, which lives in the top 2 to 12 inches of soil in many parts of the state. When soil is disturbed by activities such as digging, grading or driving, or is disturbed by environmental conditions such as high winds, fungal spores can become airborne and can potentially be inhaled, causing illness.

Affected employers must provide training to all employees annually, and before an employee begins work that is reasonably anticipated to cause substantial dust disturbance. "Substantial dust disturbance" means visible airborne dust for a total duration of one hour or more on any day. The training must contain specific information (see bill link) and would authorize the training to be included in the employer's injury and illness prevention program training or as a stand-alone training program. The bill provides that the training is not required during the first year that the county is listed as highly endemic, but would be required in subsequent years. Highly endemic means that the annual incidence rate of Valley Fever is greater than 20 cases per 100,000 persons per year. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB203.

PRACTICE TIP: The training can be included in an employer's IIPP or it can be stand-alone. It must include several additional topics too numerous for this update. Construction and other employers are encouraged to work with their OSHA consultants or OSHA experts to comply with this new requirement.

33. OSHA: HIGH LEAD LEVELS = INVESTIGATIONS (10/2019)

OSHA has a department called the Occupational Lead Poisoning Prevention Program (OLPPP). AB 35 amends Section 105185 of the Health and Safety Code, and adds Section 147.3 to the Labor Code to expand OLPPP and to grant OSHA additional investigative and prosecution rights when it receives a report of employee high blood lead levels. Specifically, AB 35 now requires that the OLPPP must consider a report of an employee's blood lead level *at or above 20 micrograms per deciliter* to be injurious to the health of the employee and the OLPPP must then report that case within *five business* days to the Division of Occupational Safety and Health (DOSH). When DOSH receives that report from the OLPPP, the report shall be deemed to "constitute a complaint from a government agency representative charging a serious violation," and DOSH must initiate an investigation within *three working days*. If violations are found upon the completion of the investigation DOSH can issue citations and fines, and any citations and fines imposed by DOSH will be made publicly available on an annual basis. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB35.

34. OSHA: IMMEDIATE REPORTING OF SERIOUS INJURIES (10/2019)

AB 1804 amends Section 6409.1 of the Labor Code to require the *immediate* reporting of serious occupational injury, illness, or death to OSHA. This immediate reporting by telephone or through an online mechanism will be created by OSHA for this purpose. Until OSHA makes the online mechanism available, employers are permitted to make the immediate report by telephone or email. Violations can result in a civil penalty of not less than $5,000. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1804.

35. OSHA: SERIOUS INJURY / ILLNESS & SERIOUS EXPOSURE CLARIFICATION (10/2019)

AB 1804 amends Section 6302 of the California Labor Code to "recast" the terms "serious injury or illness" and "serious exposure." Specifically, with regard to the term "serious injury or illness" this bill removes the 24-hour minimum time requirement for qualifying hospitalizations (excluding those for medical observation or diagnostic testing, and explicitly including the loss of an eye as a qualifying injury), and it deletes the "loss of a body member" from the definition of serious injury, replacing it with amputation. The bill also eliminates the exclusion of injury or illness caused by certain violations of the Penal Code and would narrow the exclusion of injuries caused by accidents occurring on a public street or highway to include those injuries or illnesses occurring in a construction zone. For the definition of "serious exposure," AB 1804 expands that term to now include, "exposure of an employee to a hazardous substance in a degree or amount sufficient to create a realistic possibility that death or serious physical harm in the future could result from the actual hazard created by the exposure." The bill also makes changes to how OSHA will determine when a serious violation exists. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1805.

36. OSHA: SUICIDE PREVENTION RESOURCES (6/2019)

According to the CDC, suicide rates in the United States have increased by 34% between 2006 and 2016. To combat this concerning rise, OSHA recently published a new webpage providing employers and management with confidential resources and key information regarding signs, prevention and where to locate help. See:

https://www.osha.gov/preventingsuicides/.

37. OSHA: WILDFIRE SMOKE REGULATIONS (10/2019)

As a law firm located in wildfire-prone areas, we have lived through several recent wildfires with substantial impacts upon our staff and their families. We also recognize that exposure to wildfire smoke is a serious health issue.

On September 30, 2019, Cal/OSHA formally announced that the "emergency regulation requiring employers to protect [outdoor] workers [and workers in semi-outdoor work spaces] from hazards associated with wildfire smoke is now in effect." Examples of affected positions

include agricultural workers, construction workers and landscape workers. Although these regulations are currently temporary in nature (a January 28, 2020 sunset, with two possible 90-day extensions), OSHA is expected to create permanent rules in the near future. For now, in the event of a wildfire, employers covered by the emergency regulations must take the following steps to protect workers from wildfire smoke exposure:

- Identify harmful exposure to airborne particulate matter from wildfire smoke at the start of each shift and periodically thereafter by checking the Air Quality Index (AQI) for PM 2.5 in regions where workers are located;
- Reduce harmful exposure to wildfire smoke if feasible, for example, by relocating work to an enclosed building with filtered air or to an outdoor location where the AQI for PM 2.5 is 150 or lower;
- If employers cannot reduce workers' harmful exposure to wildfire smoke so that the AQI for PM 2.5 is 150 or lower, they must provide: (1) respirators such as N95 masks to all employees for voluntary use, and (2) training on the new regulation, the health effects of wildfire smoke, and the safe use and maintenance of respirators .

For the emergency regulations approved by the OAL see:

https://www.dir.ca.gov/oshsb/documents/Protection-from-Wildfire-Smoke-Emergency-apprvdtxt.pdf.

38. PAID FAMILY LEAVE: EXIGENCY LEAVE ADDED (10/2018) (Reminder)

Paid Family Leave (PFL) currently can be used to provide eligible employees with up to six weeks of partial wage replacement benefits to care for a seriously ill child, spouse, parent, grandparent, grandchild, sibling, or domestic partner, or to bond with a minor child within one year of the birth, or placement of the child in connection with foster care or adoption. Effective **January 1, 2021**, SB 1123 will expand PFL benefits to also allow eligible employees to collect PFL to participate in a qualifying exigency related to the covered active duty or call to covered active duty of the individual's spouse, domestic partner, child, or parent in the Armed Forces of the United States.

Covered duty means ". . .with respect to a member of the regular Armed Forces of the United States, duty during the deployment of the member with the regular armed forces to a foreign country and, with respect to a member of the reserve components of the Armed Forces of the United States, duty during the deployment of the member of those reserve components to a foreign country under a federal call or order to active duty."

A "qualifying exigency" means either:

a) "Activities undertaken within seven calendar days from the date that a spouse, domestic partner, child, or parent has been notified of an impending call or order to covered active duty in the Armed Forces of the United States to address any issue that arises from the call or order.

b) Attendance in either or both of the following:

1. An official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty of the spouse, domestic partner, child, or parent.

2. A family support or assistance program and informational briefing sponsored or promoted by the military, military service organizations, or the American Red Cross that is related to the covered active duty or call to covered active duty of the spouse, domestic partner, child, or parent." See:

https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB1123.

39. PAID FAMILY LEAVE: TIME EXPANDED (6/2019)

On June 27, 2019, Governor Newsom signed SB 83, fulfilling (in part) his campaign promise to expand California's Paid Family Leave ("PFL") benefits. The changes in SB 83 are effective July 1, 2020, and expand the maximum duration of the PFL's partial wage replacement benefits from **six to eight weeks** in any 12-month period.

Notably, the benefits noted above under SB 83 will only be in effect until January 1, 2021, after which time SB 83 will be repealed. The bill notes, however, "This legislation represents an initial step forward by increasing paid family leave..." and, by no later than November 2019, SB 83 also requires the Governor to propose additional benefit increases both in terms of duration (the Governor previously discussed 12 weeks) and benefit amount (up to 90% for low wage earners). "By November 2019, the Office of the Governor, through consultation with a task force, will develop a proposal to increase paid family leave duration to a full six months by 2021–22, for parents to care for and bond with their newborn or newly adopted child. This proposal must assess and address job protections for employees, wage replacement rates up to 90 percent for low wage workers and provide a plan to implement and fund expanded paid family leave benefits, as well as other findings and recommendations of interest."

PRACTICE TIP: During your annual handbook update process, make sure to address the SB 83 changes to your PFL policy.

40. PHYSICIAN EXEMPTION: INCREASED SALARY BASIS (10/2019)

Effective January 1, 2020, the California Department of Industrial Relations (DIR), will adjust the licensed physician and surgeon employee's minimum hourly rate of pay exemption amount from $82.72 (the 2019 rate) to $84.79. This change reflects a 2.5% increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. The full DIR Memorandum can be found at the following link: https://dir.ca.gov/oprl/Physicians.pdf.

41. POSTINGS: ANNUAL UPDATES ARE A MUST (10/2019)

Every year in our office, we take down our required postings and we put up the latest and greatest. Because the laws change so frequently, this is an annual must-do. For example, just this past year, the DFEH has released a new Transgender Rights posting, and it has indicated that changes are coming for its anti-discrimination posting. The minimum wage is changing for 2020, as are other provisions. One of the simplest way to be compliant is to purchase and post a new all-in-one poster each year. Remember that employers must fill in the blanks on the poster to include information specific to their workplace. Employers also must separately post their Wage Order and may be required to post other additional items specific to their industry or workplace (Prop 65, etc.)

42. PREVAILING WAGES: DEFINITION OF "PUBLIC WORKS" EXPANDED (10/2019)

AB 1768 expands the definition of the term "public works" set forth in Labor Code Section 1720 to now include, "…*design, site assessment, feasibility study, and other* preconstruction phases of construction, including, but not limited to, inspection and land surveying work, *regardless of whether any further construction work is conducted*…." Employers subject to prevailing wage obligations should take note of the expanded scope of coverage. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1768.

43. PRIVACY: CALIFORNIA CONSUMER PRIVACY ACT AMENDMENT (10/2019)

The California Consumer Privacy Act (CCPA) was enacted in 2018, but goes into effect on January 1, 2020 (with the Office of the Attorney General beginning enforcement in July 2020). In very general terms, the CCPA creates new consumer (including employee) rights relating to the access to, deletion of, and sharing of personal information collected by businesses. For example, the CCPA will grant a consumer the right to request that a business disclose the personal information it has collected, or to have the personal information held by that business deleted. Relatedly, the CCPA will require a business to disclose and deliver the required information to a consumer free of charge within 45 days of receiving a verifiable consumer request from the consumer. The CCPA also requires businesses to implement reasonable security procedures to protect personal information collected about consumers.

In this year's legislative session, a key amendment passed which has a direct impact on business, and how businesses deal with the personal information collected about employees. AB 25 provides a business with a one-year exemption (until January 1, 2021) from all CCPA requirements related to employee personal data – the data HR collects (so long as the personal information is collected and used by the business solely within the context of the applicant's/employee's/owner's, officer's, etc., roles or former roles), EXCEPT for the duty to implement security measures to safeguard employee personal data (hopefully all employers were already doing this), and the duty of a business to disclose to employees and applicants the categories of personal data they are collecting and the purpose(s) for which that data is collected. In other words, the CCPA does not apply to businesses collecting employee information for

employment purposes for the next year. AB 25 also authorizes businesses to require reasonable authentication of a consumer based on the type of the personal information requested. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB25.

44. RESTRAINING ORDERS: GUN VIOLENCE WORKERS & EMPLOYER RIGHTS (10/2019)

AB 61 amends various sections of the California Penal Code to provide employers, workers and others (including immediate family members) with the right to seek a "gun violence restraining order", to prevent an individual who presents a threat to self or others from, "having in [the individual's] custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition." According to the bill's author, this bill is necessary because "gun violence and mass shootings can no longer be tolerated or accepted. We need to provide the people in all our communities with more tools to take firearms out of the hands of individuals that pose a deadly threat to themselves and others. Family members, co-workers, employers, and teachers are most likely to see early warning signs if someone is becoming a danger to themselves or others." See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB61.

45. REGISTERED DOMESTIC PARTNERS: NEW EXPANDED DEFINITION (10/2019)

Effective January 1, 2020, SB 30 will amend and repeal several sections of the California Family Code relating to domestic partnerships. Most importantly, this bill will remove the former requirement that persons be either: (1) of the same sex; or (2) of the opposite sex and over 62 years of age in order to enter into a domestic partnership. Now, under this bill, all couples (barring limited exceptions) can enter into registered domestic partnerships.

The bill also made several administrative changes:

- It exempts domestic partners from paying the $23 filing charge when filing a domestic partner registration if one or both of the domestic partners is 62 years of age or older.
- It requires the Secretary of State make all necessary forms for filing for domestic partnership available at the office of the Secretary of State or on the Secretary of State's internet website;
- It requires that instructions to the "Declaration of Domestic Partnership" form and the internet website both include an explanation that registered domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under the law as are granted to and imposed upon spouses, as well as an explanation of how to terminate a registered domestic partnership.

The bill can be viewed at:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB30.

PRACTICE TIP: Employers will need to update any policy that references "registered domestic partnerships" under the prior definition and rules.

46. RETIREMENT PLANS: STATE-SPONSORED RETIREMENT PLAN – IT'S A GO (1/2019)

Back in 2016, SB 1234 created the "California Secure Choice Retirement Savings Program" (the CalSavers Program), a state-managed retirement savings program for private-sector employees whose employers do not already provide a retirement savings program. The program is meant to apply to almost all private sector employers with five or more employees and who do not offer a retirement savings program. Specifically, the CalSavers program allows employees to save for retirement through a state-operated Roth IRA.

Although the law was initially slated to become effective January 1, 2018, implementation stalled when litigation ensued between California (along with other states) and the federal government over whether the federal ERISA laws preempted state implementation of a retirement program. The wait appears to be over. In the very near future, employers who do not offer retirement savings plans to their employees will be required to register with the CalSavers Program as follows:

- Voluntary registration for employers of all sizes: June 1, 2019;
- Mandatory registration for employers with more than 100 employees: **June 30, 2020**;
- Mandatory registration for employers with more than 50 employees: June 30, 2021;
- Mandatory registration for employers with more than five employees: June 30, 2022.

Voluntary CalSavers registration opened through a pilot program in November of 2018. Since that time, registration can be completed at: https://www.calsavers.com/.

There are no fees for employers to facilitate the program, and employers are not required to make contributions to the state-sponsored plan. Instead, the employer's role is that of a facilitator – registering with the state, and then facilitating the program by submitting employees' contributions.

According to the CalSavers website, once an employer registers, the employees will be automatically enrolled into the program within 30 days. The default contribution rate is 5% of the employee's pay, though employees can change their rate at any time. If an employee does not wish to participate, the employee must affirmatively opt out. Employers should provide advance notice of this requirement to employees.

NOTE: The federal government contends that the CalSavers program is preempted by ERISA and is therefore invalid. Although the validity of the program has yet to be finally determined, Employers should prepare for compliance at this time.

47. SCHOOLS: COLLEGE ATHLETES' COMPENSATION AND REPRESENTATION (10/2019)

SB 206, known as "The Fair Pay to Play Act," adds Section 67456 to the Education Code (and it repeals Section 67457), and will allow college student athletes to earn compensation for the use of their own name, image, or likeness (athletic endorsements) without jeopardizing scholarship eligibility, and to obtain professional legal representation (*e.g.*, a sports agent), in relation to their college athletics, among other changes. The bill also prohibits California postsecondary educational institutions (except community colleges which are exempted from this bill), and every athletic association (NCAA), conference, or other group or organization with authority over intercollegiate athletics, from providing a prospective intercollegiate student athlete with compensation in relation to the athlete's name, image, or likeness, or preventing a student participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness or obtaining professional representation relating to the student's participation in intercollegiate athletics. According to the authors, "SB 206 allows athletes at California's public and private colleges to earn income through sponsorships and endorsements. SB 206 does not require colleges to pay or employ athletes and its provisions do not put a cost on colleges. SB 206 also relieves the pressures to turn pro before graduating by allowing students to provide for themselves financially without facing loss of their athletic scholarship." This bill makes additional changes and becomes operative on **January 1, 2023**. Note that SB 206 is at odds with NCAA policy, leaving affected schools in a curious situation. It is expected that the NCAA or others may challenge the validity of this bill. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206.

48. SCHOOLS: CYBER BULLYING TRAINING FOR STUDENTS (10/2019)

SB 366 is a very short bill that reads "*The Trustees of the California State University shall provide, and the Regents of the University of California are requested to provide, as a part of established campus orientations, educational and preventive information about cyberbullying to students at all campuses of their respective segments*." The point of the bill is for California schools to provide educational and preventive information about cyberbullying to students.

PRACTICE TIP: This is another expansion of the "abusive conduct" (anti-bullying) rules. Forward-thinking employers should create and disseminate similar materials, as approximately one in two workers state that they have experienced bullying in their career. As we move into a more technology-driven world, incidents of cyberbullying are certain to increase. The bill can be viewed at:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB366.

49. SETTLEMENT AGREEMENTS: NO PRECLUSION OF FUTURE EMPLOYMENT (10/2019)

Restraints on trade are unlawful in almost all instances. Indeed, the law provides that every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is void to the extent that the contract restrains that person. Effective January

1, 2020, AB 749 adds Chapter 3.6 (commencing with Section 1002.5) to Title 14 of Part 2 of the Code of Civil Procedure to extend the restraint on trade protections to settlement agreements. Specifically, this bill prohibits settlement agreements (related to an employment dispute) that contain a provision that, "prohibits, prevents, or otherwise restricts a settling party that is an aggrieved person, from working for the employer against which the aggrieved person has filed a claim or any parent company, subsidiary, division, affiliate, or contractor of the employer." Any such provision will be deemed void as a matter of law and against public policy. For purpose of this bill, an aggrieved person means, "a person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process." There are specific carve-outs that allow an employer and an aggrieved person to end a current working relationship, or if a good-faith determination is made that the person committed sexual harassment or sexual assault, to restrict the aggrieved person from obtaining future employment with the employer. The bill does clarify that an employer is not required to continue to employ or rehire a person, if there is a legitimate non-discriminatory or non-retaliatory reason for terminating or refusing to rehire the person. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB749.

NOTE: This bill stems from the #MeToo movement, and ongoing concerns that victims of harassment should not be punished through settlement agreement terms permanently barring them from future re-employment with an employer or its related entities.

50. SEXUAL HARASSMENT: TRAINING DEADLINE EXTENDED ONE YEAR (10/2019)

The California FEHA requires employers with 50 or more employees to provide at least two hours of training and education regarding sexual harassment, abusive conduct, and harassment based upon gender, to all supervisory employees within six months of their assumption of a supervisory position and, thereafter, once every two years.

In 2018, SB 1343 (amending Government Code Sections 12950 and 12950.1) expanded the sexual harassment prevention training requirement to encompass employers with five or more employees (including temporary or seasonal employees) and to require that non-supervisory employees receive an hour of such training every two years; it also set a compliance deadline of January 1, 2020.

Most recently, Governor Newsom signed SB 778 into law. This bill was an urgency measure, effective immediately on August 30, 2019. The bill extends the current deadline (January 1, 2020) for employers to provide sexual harassment prevention training by one extra year, until January 1, 2021. The bill provides, however, that employers who have provided the required training to employees in 2019 will not need to provide a refresher training to employees for two years after the date of the training.

Additionally, the bill clarifies the requirements as to when an employer must provide training to its employees: "… each employer … shall provide sexual harassment training and

education to each employee in California once every two years. New nonsupervisory employees shall be provided training within six months of hire. New supervisory employees shall be provided training within six months of the assumption of a supervisory position." This training can be provided in conjunction with other training provided to the employees, and may be completed by employees individually or as part of a group presentation. The training may also be completed in shorter segments, as long as the applicable hourly total requirement is met.

The bill still requires the DFEH to develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace, and to post those courses on the DFEH's Internet Website. As of early October 2019, the DFEH has not done so. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB778.

RELATED LAW: SB 530 amends Section 12950.1 of the Government Code to provide special rules for an employer that employs workers pursuant to a multi-employer collective bargaining agreement in the construction industry. Under that bill, affected employers can demonstrate compliance with training requirements by showing any of the following: (1) training was given while the employee was employed by another employer that is also signatory to a multi-employer collective bargaining agreement with the same trade in the building and construction industry; (2) training was given while the employee was an apprentice registered in a building and construction trades apprenticeship program approved by the Division of Apprenticeship Standards; or (3) the employee received training through a building and construction trades apprenticeship program approved by the Division of Apprenticeship Standards, a labor management training trust, or labor management cooperation committee.

PRACTICE TIP: Given the current #MeToo climate, the expanded FEHA statute of limitation (AB 9), and increasing harassment claims, employers should train their employees on harassment and bullying prevention at the earliest possible opportunity. LightGabler offers in-person training at your office or ours, an online video training option, and regularly-scheduled group sessions. More information on how to schedule a training session or purchase the online video training can be found at: https://www.lightgablerlaw.com/training/.

51. UNEMPLOYMENT BENEFITS: FOR MOVIES, OUT-OF-STATE WORK COUNTS (10/2019)

SB 271 amends Section 602 of the California Unemployment Insurance Code to provide that, for purposes of determining employment of a *motion picture production worker*, if part of the work is out of state, but some of the work is performed in the state, the entire work qualifies as employment if the worker's residence is in the state. Under this bill, work performed by a motion picture production worker outside the state is considered temporary or transitory if the worker is a resident of the state, is hired and dispatched from the state, and intends to return to the state to seek reemployment at the conclusion of the assignment outside the state. According to the declarations in this bill, these changes are necessary because, "Originally, production workers were employed directly by major motion picture studios, and almost all work was performed on the studio's lot. Today, however, it is more common for work on a given production

project to be performed in multiple states… [and] production workers are craft specialists who are no longer permanently employed by a single employer, but instead move from production engagement to production engagement as a short-term, mobile workforce." See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB271.

52. VOTING: VOTE-BY-MAIL BALLOTS AT WORK? (10/2019)

AB 17 creates the "Voter Protection Act" by amending Section 14002, and adding Sections 14004 and 18503 to the Elections Code. This bill states that "*An employer shall not require or request that an employee bring the employee's vote by mail ballot to work or vote the employee's vote by mail ballot at work."* Violation of this section subjects an employer to civil fines up to $10,000 per election. According to the bill comments, this amendment is necessary because requiring an employee to bring a ballot to work creates the opportunity to unfairly "influence" votes cast or election outcomes.

PRACTICE TIP: Remember that existing law also provides that if an employee's normally-scheduled work hours prevent the employee from voting in any statewide election, the employee may take up to two hours of paid time off to vote at the beginning or end of the work day. The employee must request voting time off at least two days in advance. Employers cannot require employee to vote by mail, or bring the vote by mail ballot to work in order to get around the two-hour rules.

53. WAGES: CALIFORNIA UNIVERSITIES MUST ESTABLISH REGULAR PAY DAYS (10/2019)

SB 698 amends Section 204 of the Labor Code relating to the payment of wages for employees of the Regents of the University of California. Specifically, those university employees who are paid on a *monthly basis* must be paid no later than five days after the close of the monthly payroll period, and those employees who are paid on a more frequent basis must be paid in accordance with the pay policies announced in advance by the university. According to the declarations in the bill, "The University of California has experienced errors in its new Payroll, Academic Personnel, Timekeeping and Human Resources (UCPath) system, which has led to delayed, missed, or smaller-than-expected paychecks for its employees." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB698.

54. WAGES: PENALTIES FOR WAGES LESS THAN CONTRACT (10/2019)

SB 688 expands the citation authority of the DLSE under Labor Code Section 1197.1 to include the ability to seek restitution from an employer who pays an employee less than contract wages, even if the minimum wage was paid for all regular hours. Contract wages, as used in this bill, means wages based upon an agreement, in excess of the applicable minimum wage, for regular, non-overtime hours. This bill is intended to close a gap in the DLSE's citation authority, and allow the DLSE, through the citation process, to now recover all contractually-owed wages on behalf of an impacted employee.

PRACTICE TIP: Labor Code Section 1197.1 allows for recovery of penalties as follows: (1) For any initial violation that is intentionally committed, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee is underpaid. This amount shall be in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203; (2) for each subsequent violation for the same specific offense, two hundred fifty dollars ($250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. This amount shall be in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203; and (3) wages, liquidated damages, and any applicable penalties imposed pursuant to Section 203, recovered pursuant to this section shall be paid to the affected employee.

55. WAGES: PAY REQUIREMENTS DEFINED FOR PHOTO SHOOT EMPLOYEES (10/2019)

SB 671 is an urgency measure (effective immediately) that extends various protections from the California Labor Code to "print shoot" employees, and makes clear that for employers of print shoot employees, they must pay final wages owed *on the next regular payday*, rather than immediately. This change mirrors an exception that exists for certain motion picture employees. Prior to this bill's enactment, print shoot employers were required to pay employees final wages on the last day of employment (under Labor Code Section 201). The bill is known as the "Photoshoot Pay Easement Act." This bill amends Labor Code Sections 203, 203.1, and 220, and adds Section 201.6. A photo shoot employee is "an individual hired for a period of limited duration to render services relating to or supporting a still image shoot, including film or digital photography, for use in print, digital, or internet media."

With regard to these types of employees, this bill provides with regard to the payment of wages that:

- "Next regular payday" means the day designated by the employer, pursuant to Section 204, for payment of wages earned during the payroll period in which the termination occurs.
- "Time of termination" is when the employment relationship ends, whether by discharge, layoff, resignation, completion of employment for a specified term, or otherwise.
- A print shoot employee is entitled to receive payment of the wages earned and unpaid at the time of termination by the next regular payday.
- The payment of wages to employees covered by this section may be mailed to the employee or made available to the employee at a location specified by the employer in the county where the employee was hired or performed labor. The payment shall be deemed to have been made on the date that the employee's wages are mailed to the employee or made available to the employee at the location specified by the employer, whichever is earlier.

See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB671.

56. WAGES: PRIVATE RIGHT OF ACTION FOR FAILURE TO PAY WAGES (10/2019)

AB 673, a bill sponsored by The California Employment Lawyers Association, Legal Aid at Work, California Rural Legal Assistance Foundation and the Center for Workers' Rights, amends Section 210 of the Labor Code (penalties for unpaid/late payment of wages) to expand the penalty coverage of Labor Code 210, and to clarify who can collect those penalties. Labor Code Section currently 210 provides, "In addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections 201.3, 204, 204b, 204.1, 204.2, 205, 205.5, and 1197.5, shall be subject to a civil penalty…" of $100 for any initial violation and $200 each subsequent or any willful or intentional violation, plus "25 percent of the amount unlawfully withheld."

This bill adds Section 204.11 (dealing with commissions for licensed barbers or cosmetologists) to the list of Labor Code sections above. However, the more significant change caused by AB 673 is that previously the Section 210 penalties could only be recovered by the DLSE; now, under AB 673, "The penalty shall *either* be recovered by the *employee as a statutory penalty pursuant to Section 98 or by the* Labor Commissioner as *a civil penalty through the issuance of a citation or pursuant to Section 98.3."* The bill does clarify when an employee can recover this penalty, "*An employee is only entitled to either recover the statutory penalty provided for in this section or to enforce a civil penalty as set forth in subdivision (a) of Section 2699, but not both, for the same violation*", *i.e.,* no PAGA double-dipping.

According to the bill's comments, these changes are necessary because, "Employees who are not paid on time have no clear or effective recourse. At present, an employee could file a lawsuit under the Fair Labor Standards Act (FLSA) to recover the unpaid wages plus damages. However, it is unsettled whether an employee can file such a claim for late payments under the equivalent state law provisions." See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB673.

57. WHISTLEBLOWER: PROTECTIONS INCLUDE PATIENT RIGHTS' ADVOCATES (10/2019)

Although current laws protect employee whistleblowers from retaliation, they do not protect contracted employees working for state and local governments and, more specifically, patients' rights advocates (PRAs). AB 333 amends Section 5550 and adds Section 5525 to the California Welfare and Institutions Code to close that loophole. The author stated that there have been many reports of retaliation against PRAs "who were only guilty of conducting the advocacy work for which they were hired. That retaliation could come in the form of a contract not being renewed, and there are no whistleblower protections in place for them. Since a PRA's job exists to govern the wellbeing of patients, and not the hospitals in which they reside, this bill seeks to protect those individuals and the populations whom they serve." The bill also establishes

a private right of action to enforce the rights and protections afforded to county patients' rights advocates. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB333.

NEW CASE LAW

58. ADEA: IT APPLIES TO ALL STATE AND LOCAL GOVERNMENT ENTITIES (1/2019)

The U.S. Supreme Court held in *Mount Lemmon Fire District v. Guido* (October 2018) that the Age Discrimination in Employment Act (ADEA) applies to state and local government employers, regardless of the number of employees they have. Thus, the ADEA's numerosity requirement of 20 only applies to "a person engaged in an industry affecting commerce" – the private sector. The Court's interpretation gives the ADEA a broader reach than Title VII of the Civil Rights Act of 1964, but this disparity occurs only because Congress chose different, broader language for the ADEA. The language in the ADEA is more akin to the language of the Fair Labor Standards Act (FLSA), which also makes state and local government employers subject to the law regardless of the number of employees they employ.

59. AMBULANCE EMT'S: CALIFORNIA SUPREME COURT TO ADDRESS BREAKS (10/2019)

Stewart v. San Luis Ambulance, Inc. (December 2017) involved a class of EMT's that brought claims against their ambulance company employer for violations related to meal and rest periods, failure to pay timely wages and inaccurate wage statements. The Ninth Circuit Court of Appeal certified three questions to the California Supreme Court related to ambulance attendants working 24-hour shifts:

1. Is the employer required to relieve attendants of all duties during rest breaks, including the duty to be available to respond to emergency calls;
2. Can the employer require attendants to be available to respond to emergency calls during their meal periods without a written agreement that contains an on-duty meal period revocation clause and if such a clause is required, would a general at-will employment clause satisfy that requirement; and
3. Do violations of meal period regulations that require payment of a "premium wage" give rise to inaccurate wage statement claims?

On September 18, 2019, the California Supreme Court dismissed consideration of these three questions. The Court found that in light of the passage of Proposition 11, the Emergency Ambulance Employee Safety and Preparedness Act (Gen. Elec. (Nov. 6, 2018), resolution of the questions posed by the Ninth Circuit Court of Appeals is no longer "necessary . . . to settle an important question of law." (Cal. Rules of Court, rule 8.548(f)(1)).

The key meal and rest period sections of Proposition 11 read as follows:

"885. Meal and Rest Periods. (a) All emergency ambulance employees are hereby entitled to meal and rest periods as prescribed elsewhere by the Industrial Welfare Commission. (b) Emergency ambulance employees shall be compensated at their regular hourly rate of pay during meal and rest periods.

886. Staffing for Meal Periods. (a)(1) An emergency ambulance provider shall not require an emergency ambulance employee to take a meal period during the first or last hour of a work shift and must allow an emergency ambulance employee to space multiple meal periods during a work shift at least two hours apart. (2) An emergency ambulance provider shall manage staffing at levels sufficient to provide enough inactivity in a work shift for emergency ambulance employees to meet the requirements of this subdivision.

887. Notwithstanding any provision of law to the contrary: (a) In order to maximize protection of public health and safety, emergency ambulance employees shall remain reachable by a portable communications device throughout the entirety of each work shift. (b) If an emergency ambulance employee is contacted during a meal or rest period, that particular meal or rest period shall not be counted towards the meal and rest periods the employee is entitled to during his or her work shift."

The full proposition can be found at:

https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0043%20%28Emergency%20Ambulance%20Employees%29_1.pdf.

PRACTICE TIP: It is important to make sure that emergency ambulance employees are able to take their meal and rest breaks to the greatest extent possible, even though they remain on call and the meal breaks are paid time. Also make sure your 24-hour shift agreement is in writing and that you have regularly-scheduled sleep time pursuant to Wage Order 9. Also note that Wage Order 9 provides an exemption for daily (but not weekly) overtime.

60. ARBITRATION: DO'S AND DON'TS (10/2019)

Assuming that arbitration agreements covering FEHA and Labor Code claims are still enforceable as to civil lawsuits (or other forums) based on federal preemption of the new state law scheduled to take effect January 1, 2020, employers are encouraged to observe the following best practices. ***See #4 above related to AB 51.***

a. Don't ask potential employees to sign an arbitration agreement on the spot. Don't adopt a "take it or leave" it approach to having employees sign arbitration agreements in which they are not given time to carefully review the employment documents. In *Subcontracting Concepts (CT), LLC v. De Melo*, (April 2019), it was found to be procedurally unconscionable for an employer to give a job applicant an arbitration agreement and ask him to sign it on the spot to get a job. Translate the agreement if the employee's English skills are limited. Clearly identify the rules that would govern arbitration and give the individual a copy of those rules. Failure to comply with any of those can void the agreement as unconscionable. For example, an agreement was found unenforceable in *OTO, L.L.C. v. Kho* (August 2019) under the following circumstances: "a human resources 'porter' approached Kho in his workstation and asked him to sign several documents. Kho was required to sign them immediately and return them to the porter, who waited in the workstation. It took Kho three or four minutes to sign them all. He had no

opportunity to read them, nor were their contents explained. Kho's first language is Chinese. He was not given copies of the documents in either language.")

b. Don't require employees to bear their own costs for arbitration or forego certain remedies. This is especially true when an arbitration agreement specifies a panel of arbitrators, since the presumption here is that the costs will be substantial. Arbitration agreements generally cannot require the employee to bear any type of expense that they would not be required to bear if the employee was free to bring the action in court, such as the cost of the arbitrator. Likewise, an arbitration agreement shouldn't bar an employee from recovering any attorney fees or other costs, and it shouldn't try to restrict the recovery available to the employee to actual monetary damages only (*i.e.,* try to bar the employee from seeking statutory damages, including punitive damages, statutory penalties, and equitable relief). (*Subcontracting Concepts (CT), LLC v. De Melo* (April 2019).

Unconscionable terms can render an agreement unenforceable even when both parties are sophisticated in contracts. Unfair terms that were included in an arbitration provision within a law firm partnership agreement, including that plaintiff was required to pay half of the arbitration costs, that plaintiff had to pay her own attorneys' fees (contrary to FEHA), restrictions on the arbitration panel's ability to override or substitute its judgment for that of the partnership, and a strict confidentiality clause rendered the agreement unenforceable. (*Ramos v. The Superior Court of San Francisco County* (November 2018)).

PRACTICE TIP: Consult legal counsel when preparing and modifying your Arbitration Agreement. Each word can make a big difference. Make sure that your employees have adequate time and ability to review and consider the Arbitration Agreement. Pressuring an employee to sign can result in the Court refusing to enforce your Arbitration Agreement.

PETITION FOR REVIEW OF THE *SUBCONTRACTING CONCEPTS* CASE HAS BEEN GRANTED. WHILE THE REVIEW PROCESS IS PENDING, THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

c. When existing employees sign arbitration agreements: At least one court has held that an existing employee's act in maintaining her employment status constituted consent to employer's dispute resolution policy requiring claims to be arbitrated. *Diaz v. Sohnen Enterprises* (April 2019). In this case, the employee was expressly told that her continued employment was sufficient to agree to this new policy. Be cautious here, as the court did not specifically address the idea of punishing employees for failing to agree to arbitration. Best practice is still to offer some form of consideration, such as an extra vacation day, to induce reluctant employees to sign new arbitration agreements.

d. Arbitration agreements may apply retroactively in certain instances. In certain circumstances with clear language, an arbitration agreement may be enforceable even if the employee signs after filing a claim against the company, but the manner in which the arbitration agreement was delivered and asked to be signed may be significant. (*Salgado v. Carrows Restaurants, Inc.* (February 2019); *Franco v. Greystone Ridge Condominium* (August 2019)).

e. Avoid ambiguity: Employers should ensure that class action waivers are clearly stated in the arbitration agreement. In *Lamps Plus, Inc. v. Varela* (April 2019), ambiguity in the language of the agreement almost forced the entire class action into arbitration. Arbitration on a class-wide basis is not beneficial to employers because it would be extremely expensive and burdensome. *Lamps Plus, Inc. v. Varela* was decided by the U.S. Supreme Court. California courts might have reached a different result.

f. Class action waivers are valid. In a 5-4 ruling issues in May of 2018 in *Epic Systems Corporation v. Lewis* the Supreme Court of the United States declared that the Federal Arbitration Act (FAA) protects employers' rights to enforce class action waivers in arbitration agreements and to require individualized arbitration of claims. "The policy may be debatable but the law is clear: In the Federal Arbitration Act, Congress has instructed courts to enforce arbitration agreements according to their terms - including terms providing for individualized proceedings." The lesson: make sure your arbitration agreement contains a class action waiver.

g. Federal Arbitration Act (FAA) preempts California's rules. The FAA should be referenced in the arbitration agreement to ensure that this federal law applies to the agreement; which then allows employers to force employees to waive their right to participate in a class action. Note *Carbajal v. CWPSC, Inc.* (February 2016), in which the court enforced the state's unconscionability standards against the employer, despite the federal preemption argument, because the agreement was so poorly drafted against the employee.

h. Transportation workers. Transportation workers (usually drivers, but can include mechanics) engaged in interstate commerce (and other workers in transportation) may be excluded from arbitration because the Federal Arbitration Act doesn't protect them; so the more employee-friendly California law may apply. *Garcia v. The Superior Court of Los Angeles County* (*Southern Counties Express, Inc.*) (May 2015). *See also Nieto v. Fresno Beverage* (March 2019), in which an employee was found to be a transportation worker engaged in interstate commerce, and thus his employment/arbitration contract fell within the exemption to coverage of the Federal Arbitration Act, and he could not be compelled to arbitrate his claims. *See also Muller v. Roy Miller Freight Lines, LLC*, (May 2019), in which a driver was found to be exempt from the Federal Arbitration Act and thus did not have to arbitrate his cause of action for unpaid wages, since California law controlled, and California law authorizes Labor Commission claims for unpaid wages even if the parties agreed to arbitrate these claims.

The FAA's exclusion of "contracts of employment" of certain transportation workers also applies to independent contractor agreements. The decision as to whether or not a contract is excluded from the FAA is a decision for the court, not the arbitrator, even if the parties attempt to contract otherwise. *New Prime Inc. v. Oliveira* (January 2019).

i. Arbitrator or Court to decide enforceability? The agreement must contain clear language delegating arbitration enforceability to the arbitrator, or the court will decide. *Mohamed v. Uber Technologies* (December 2016). Recently, in *Henry Schein Inc. v. Archer and White Sales Inc.* (January 2019), the U.S. Supreme Court reaffirmed this principle by holding that that when the parties' contract delegates the question of arbitrability of a particular dispute to

an arbitrator, a court may not override the contract, even if it disagrees that the arbitration agreement applies to a dispute.

j. Labor Commission claims. Don't push arbitration in DLSE claims. It's less expensive to go to the Labor Commission and the company may be able to compel arbitration of its appeal of the DLSE decision. Arbitration forces the employee to retain an attorney and miss out on the streamlined process of the DLSE, with no provision for recovery of fees, which led one court to deny a motion to compel arbitration by the company.

k. Business and Professions Code 17200 Claims. Other than claims for "public" injunctive relief, it appears that claims for unfair competition under Section 17200 of the Business and Professions Code, including claims for private injunctive relief, are arbitrable. In *Clifford v. Quest Software Inc.* (August 2019) the court held, "*Cruz* [*v. PacifiCare Health Systems, Inc.*] does not bar arbitration of a UCL claim for private injunctive relief or restitution, which is precisely what the UCL claim here seeks. The employee's UCL claim therefore is subject to arbitration, along with his other causes of action." This is a four-year statute of limitation that is routinely include in wage and hour claims, for which the California Labor Code only covers three years.

l. Update old agreements. One company's arbitration agreement was found to be defective because it simply said it was between "Employer and Employee," but wasn't signed by any employer; certain disputes were excluded because there was a union involved, but the document didn't identify which disputes; the agreement referenced Arbitration Association rules, but didn't identify which rules (and the attorneys presented rules to the court that were created 12 years after the employee signed. (*Flores v. Nature's Best Distribution, LLC* (December 2016)).

m. Injunctive/provisional relief. An employee is stealing your trade secrets and you can't wait for arbitration. You can have a provision that allows for provisional relief in court without voiding the arbitration agreement. (*Baltazar v. Forever 21, Inc.* (March 2016)).

n. Don't put it in the employee handbook. The handbook is not an agreement. The arbitration agreement is an agreement, so don't bury it in the handbook, even if separately signed. Otherwise, it may be void (*Esparza v. Sand & Sea, Inc.* (August 2016)). At least one court found this to be enforceable where the employee signed an acknowledgment with enough bells and whistles (*Harris v. Tap Worldwide, LLC* (June 2016)). Still, it is a riskier option.

o. Don't hide the ball/translate carefully. Provide the agreement in Spanish to Spanish-speakers and make sure the translations match (unlike the company in *Ramos v. Westlake Services LLC*). Don't try to shorten the statutes of limitation. Explain the process. Don't try to shift the fees to the employee. All of those will void the agreement as unconscionable (*Penilla v. Westmont Corporation* (September 2016)). Don't just hand an employee an agreement at his work station and require that it be signed immediately. Give the employee time to consider the agreement. If the employee refuses to sign, you may not be able to force a signature.

p. PAGA claims cannot be waived. California has consistently ruled that employees can't be forced to waive PAGA claims even if they are required to waive class action claims. The California Supreme Court affirmed this in the *Iskanian* case and there have been no changes in California on this issue. Under *Iskanian*, "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents - either the Labor and Workforce Development Agency [LWDA] or aggrieved employees - that the employer has violated the Labor Code." *Iskanian* was again followed in *Tanguilig v. Bloomingdale's, Inc*. (November 2016). The court once again held that an employer cannot compel arbitration of PAGA claims. (*Correia v. NB Baker Electric, Inc.* (February 2019.)

q. "Opt-Out" clauses. Uber's arbitration agreements with its drivers had a clause allowing them to opt out of arbitration and not sign the agreement. That was deemed to have helped make the agreement procedurally "conscionable" according to the Ninth Circuit. *Mohamed v. Uber Technologies, Inc.* (December 2016). Although California has not ruled that opt-out provisions are required, it may be a safer strategy to include an "opt-out" provision to further safeguard enforceability.

r. Union employees. There must be a clear and unmistakable reference in the collective bargaining agreement that employees intend to arbitrate all statutory rights, or otherwise union employees may not be forced into arbitration for all claims (such as Labor Code claims). (*Vasserman v. Henry Mayo Newhall Memorial Hospital* (February 2017)).

s. Don't sit on your right to arbitrate. Check the file to see if the employee signed an arbitration agreement, and then don't wait during the litigation to move to compel arbitration. That could void your right to proceed in arbitration. (*Martin v. Yasuda* (July 2016)). One company withdrew its motion to compel arbitration of a class action, and then after the class was certified, moved to compel arbitration: motion denied. (*Sprunk v. Prisma LLC* (August 2017)).

t. Third parties related to your company (temporary agencies, etc.): A background checking company was named in one of the Uber lawsuits, and that company was not allowed to compel arbitration based on Uber's agreement with its workers because the third party company was not named in the agreement. (*Mohamed v. Uber Technologies Inc.* (December 2016)).

A temporary agency had its employees sign arbitration agreements and then assigned the workers to a client's ("host employer") worksite. The employee then sued both companies and the court forced the employee to arbitrate against both, even though the host employer was not named in nor signed the arbitration agreement. The case may have been fact-specific because the employee's complaint did not differentiate among "defendants." (*Garcia v. Pexco, LLC* (April 2017)). The safer strategy is to insist that the temporary agency include the host employer's name in the arbitration agreement or at least reference that the agreement covers any employer to which the temp worker is assigned.

In *Vasquez v. San Miguel Produce, Inc.* (April 2019) (currently on appeal to the Supreme Court), a wage and hour dispute was forced to arbitration based upon the employees' arbitration

agreement with staffing agency Employer's Depot, Inc.'s ("EDI"). EDI hired the employees and entered into an arbitration agreement with each employee that covered "all disputes that may arise within the employment context" against the "Worksite Employer" and "Temporary Employment Agency." EDI assigned the employees to work temporarily as produce packers for San Miguel Produce, paid them and issued their wage statements. San Miguel Produce supervised the employees' work and reported their hours to EDI.

The employees filed a wage and hour lawsuit against San Miguel but did not name EDI as a defendant. San Miguel brought EDI into the case on a cross-complaint. Both companies then sought to enforce EDI's arbitration agreements. The employees recognized that EDI and San Miguel were joint employers, but sought to avoid application of the arbitration agreement on the basis that EDI was not named as a defendant in their complaint.

The Court of Appeal held that the host and staffing agency's co-employer relationship and identity of interest with regard to their mutual employees allows them to compel arbitration of the employment dispute. The employees were not permitted to void the arbitration agreement by opting not to name EDI as a defendant in their complaint.

PRACTICE TIP: Consider working with your staffing agency to ensure that it has arbitration language that will protect you as the "host" or "on-site" employer.

THIS CASE IS NOT PUBLISHED AND MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

u. Electronic signatures. Bad idea, unless you can readily prove that it is definitely the employee who electronically signed the document. If there are other documents proving it was the employee, it may be enforceable -- but there is significant risk. (*Espejo v. Southern California Permanente Medical Group* (April 2016)).

PRACTICE TIPS FOR E-SIGNATURES: If you must use them, minimize risks by implementing safeguards:

1. The procedures used in any online orientation platform should fully comply with all the statutory requirements of California's Uniform Electronic Transactions Act and the federal E-SIGN Act;
2. Employers should ensure that employees affirmatively agree to complete the employment documents using an electronic signature;
3. Each employee should have a unique username and password to access the HR system, which should require all users to create a private password before signing electronic documents. The employee-created password should be known only to the employee. This will allow the employer to show that the electronic signature on any particular agreement is the "act of" the employee;
4. Employers should inform their employees of the need to review every document and provide them with sufficient time to do so before employees electronically sign the document;

5. Employers should inform employees of their right to ask questions about the process and provide them the opportunity to do so before employees electronically sign the document;
6. Employers should ensure that each electronic signature is accompanied by an accurate date and time stamp, along with the IP address of the device the employee used to sign the document; and,
7. Before implementing any system that provides for the use of electronic signatures, the employer should prepare a sample declaration that includes all the above safeguards. The sample declaration should also include a detailed description of the steps taken to ensure that the employee is the only individual who can affix his or her electronic signature on a document and verification from the online platform provider that the contents of the sample declaration are true and correct.

v. Re-hiring? Make the employee sign again. In *Hartley v. Yucca Valley Auto* (April 2019), an employer learned the hard way to make sure that rehired employees re-signed the company's arbitration agreement as part of the re-hiring/on-boarding process. Here, the employee signed an arbitration agreement during her first stint with the company. She later quit and was rehired. Upon rehire she did not sign a new arbitration agreement related to her second stint with the company. When she later quit and sued, and the company tried to enforce the arbitration agreement the employee signed during her initial stint of employment, the court held that the initial agreement ended with the initial employment stint, and she had not signed an agreement related to her second stint of employment. As such, the case was allowed to proceed to trial.

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w. Collective Bargaining Agreement. State law claims including failure to accommodate, wrongful discharge and retaliation under the Labor Code and FEHA were not subject to arbitration under a Collective Bargaining Agreement when there was no clear and unmistakable intent to arbitrate those claims, and, resolution of the claims did not require interpretation of the CBA. (*Rymel v. Save Mart Supermarkets, Inc.* (December 2018.)

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61. ATTORNEY FEES: FEDERAL LAW APPLIED TO FLSA ACTION IN STATE COURT (10/2019)

Quiles v. Parent (November 2018) raised an issue of first impression; the court was asked to determine whether state or federal law should be used to determine the types of costs that are recoverable by a plaintiff on a federal FLSA claim brought in state court. A jury awarded Quiles FLSA economic damages for loss of past earnings in the amount of $3,000; non-economic damages, including emotional distress damages, in the amount of $27,500; and punitive damages in the amount of $350,000 (later reduced to $175,000). In addition to the damages awarded by the jury, the amended judgment awarded Quiles $689,310.04 in attorney fees and $50,591.69 in

costs of litigation. On appeal, the court held that federal law applied to the FLSA claims for purposes of determining attorney fees and costs.

PRACTICE TIP: Aside from the novel issue decided in this case, employers are cautioned to take note of the substantial difference between the actual damages awarded to the plaintiff ($30,500), and the costs and attorney fees awarded to plaintiff's attorneys ($739,901.73) after trial. Often in employment law matters, the attorney fees can far outstrip the damages awarded, as the case below reiterates.

62. ATTORNEY FEES: FEES CAN OFTEN OUTSTRIP DAMAGES AWARDS (10/2019)

In our 2017 update, we discussed *Stratton v. Beck*, a case in which the Labor Commission awarded Beck $6,060.96 in unpaid wages and penalties. Rather than paying the piper, the employer zealously appealed to the superior court - paying the $435 filing fee. The matter then proceeded to a bench trial (no jury). The trial court sustained the award to Stratton (even adding to it, since Stratton added additional causes of action before trial). After prevailing against Beck once again, Stratton then moved for attorney's fees, and the trial court awarded another $31,365 in attorney's fees. The Court of Appeal affirmed the attorneys' fees award and instructed that the "parties are to bear their own costs of appeal."

Beck is back again this year! The parties have differing opinions as to what the court meant by the "parties are to bear their own costs of appeal" – specifically, whether it included attorneys' fees. The trial court awarded Stratton $114,840 in appellate attorneys' fees. Beck filed a motion for reconsideration, which was denied. Beck appealed the decision. The California Court of Appeal affirmed the trial court's ruling. This means that the original $6,060.96 judgment against Beck from the Labor Commission has now ballooned up to over $150,000.

PRACTICE TIP: Appealing a Labor Commissioner's ruling out to the superior court can be a risky proposition. Unless the appeal results in a $0 dollar award to the plaintiff, the company will likely be forced to pay the plaintiff's attorney's fees incurred during the appeal. Note also that the Labor Commission can't award attorney fees, so it's a safer venue for an employer for that reason alone.

63. CAREGIVERS: PLACEMENT AGENCY CAN BE AN EMPLOYER (10/2019)

In *Duffey v. Tender Heart Home Care Agency* (January 2019), the California Court of Appeal held that a caregiver may be an employee of the caregiving placement agency if the agency maintains control over portions of the placement relationship, including the caregiver's wages. The burden of proof falls on the hiring entity to prove that a domestic worker is an independent contractor under the Domestic Worker Bill of Rights ("DWBR"). The DWBR provides two alternative definitions of employment: (1) when a hiring entity exercises control over the wages, hours, or working conditions of a domestic workers; or (2) when a common law employment relationship has been formed (heavily relying on *Borello*). In *Duffey*, the agency not only placed the workers but also negotiated the initial rate with the client, determined what portion would go to the caregiver and negotiated subsequent rate increases. This level of control

could satisfy the first definition of "employment". The second definition of employment could also be satisfied when the agency selected clients, performed the initial assessments of the client's needs, matched caregivers according to the clients' needs, and retained the right not to refer clients to certain caregivers (similar to an at-will employment relationship).

PRACTICE TIP: This case provides guidance beyond the caregiver industry. It is important that a non-employer entity relinquish control over wages, hours and working conditions. If the relationship looks like an employment relationship, it will likely be considered as such by the courts and administrative agencies.

64. CLASS ACTION: ANONYMOUS SURVEY ≠ SUPPORT CLASS CERTIFICATION (10/2019)

Class certification was denied in *McCleary v. Allstate Insurance Company* (July 2019), a wage and hour misclassification case. Plaintiffs sought certification of a class of property inspectors on the theories that: (1) the property inspectors had been misclassified as independent contractors rather than employees; and (2) multiple service companies and insurance companies were joint employers of the property inspectors.

The California Court of Appeal held that even if the plaintiffs could establish that the property inspectors were misclassified on a class-wide basis, plaintiffs had not submitted a trial plan that established how they could show that the putative class members actually suffered any wage and hour violations while working for any specific company or companies, at any given time. The Court also rejected plaintiffs' expert's class survey results which were intended to be used to show how many hours the inspectors worked, how much time they spent on various tasks and their normal practice for meal and rest breaks. The results were based upon an anonymous, double-blind study of a portion of the purported class. The Court found that allowing anonymous survey data would deny the defendants their fundamental right to cross-examine and challenge the plaintiffs' evidence.

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65. CLASS ACTION: INDIVIDUAL ISSUES PREVAIL (PROPERTY MANAGERS) (10/2019)

In *Modaraei v. Action Property Management* (September 2019), the California Court of Appeal held that class action was <u>not</u> the superior method of trying misclassification claims that were brought by a purported class of residential and commercial property managers. The Court found that individual issues predominated because the managers oversaw various types of properties. The properties differed in type (residential v. commercial), size, location, age, tenant demographic, amenities, and other factors. The variations in the properties affected how each individual manager spent his or her time during the day, including how much of their time was spent on exempt versus non-exempt duties. Accordingly, a class-wide trial would be unmanageable.

PRACTICE TIP: Evaluate each employee and position separately when determining whether the employee can be classified as exempt. *Modaraei* shows that positions with seemingly identical or similar job descriptions can vary greatly in how the employees actually spend their time.

66. COMMUTE TIME: FEDERAL LAW IS DIFFERENT (10/2019)

In *Estorga v. Santa Clara Valley Transportation Authority* ("SCVTA") (January 2019), the United States District Court (Northern District of California) evaluated whether two different types of travel time for bus drivers should be considered "hours worked" for the purpose of calculating overtime.

The bus drivers did not always end their shift at the same bus station where their shift began. At the conclusion of their shift, bus drivers had the option to take a SCVTA bus back to the station where their shift began. They were paid straight time for the time it took to travel back to the station where their shift originated, whether or not they rode the bus to get there. The Court found that the travel time back to the yard did not quality as "hours worked" for the purpose of calculating overtime. The time was commute time, even if the employer chose to pay it at straight time. **[NOTE THAT CALIFORNIA WOULD LIKELY TAKE A DIFFERENT VIEW BECAUSE THE EMPLOYER STILL "CONTROLLED" THE EMPLOYEE'S TRAVEL.]**

The bus drivers sometimes worked split shifts with more than an hour of downtime in between. They often ended their first shift at a different station than their next shift was scheduled to begin. The Court found that time it took for the driver to travel to a different station to begin a second shift did qualify as "hours worked" because it was a necessary, integral and indispensable part of their principal activity to driving a bus throughout their shift; this was not regular commute time to and from home.

The Court allowed SCVTA to offset the split shift overtime pay liability as allowed under the FLSA with other premium payments that went above and beyond what the SCVTA was required to pay.

PRACTICE TIP: True commute time to and from work which is not controlled by the employer is not compensable. Once the employees begin their shifts, any travel throughout the shifts should be treated as compensable time and subject to mileage reimbursement, if the employees use their own vehicles. And remember, California law likely would differ significantly on this issue. Employers are required to follow the law that most favors the employee.

67. COMMUTE TIME: OPTION TO USE COMPANY VEHICLE (10/2019)

Plaintiffs in *Taylor v. Cox Communications* (September 2019) were a class of field technicians who traveled to customers' residences to install and repair television and internet services. The technicians were part of an optional "Home Start" program that allowed them to park their company vehicle at home rather than at the Cox Communications depot. Employees could opt-in to the "Home Start" program and could opt-out for any reason by notifying their

supervisor. The field employees clocked in for the day at home and then drove directly from home to the first assignment for the day. At the end of the day, they drove directly home from their last assignment. Employees were not compensated for the drive home. Employees were not allowed to do any additional work on their way home. If they needed fuel, employees were directed to stop earlier in the day during their shift, not on the way home. The plaintiffs claimed that they were systematically undercompensated because they were not paid for the drive home.

The District Court granted summary judgment in favor of the employer, finding that the employees' drive home was not compensable time. The field technicians were not subject to the control of the employer because they could not show that they were required to commute in the employers' vehicles. The Court rejected the plaintiffs' claim that they were "suffered or permitted to work" because they carried company tools in their work trucks. Transporting the tools did not add any time to their commute and the tools stayed in the trucks overnight without any additional tasks until the next shift. The District Court's holding was affirmed on appeal by the Ninth Circuit on September 5, 2019. [A state appellate court reached the same conclusion in *Hernandez v. Pacific Bell Telephone Company* (November 2018)].

PRACTICE TIP: If you do not want to pay for commute time, allow employees the option of taking the company vehicle home or parking the vehicle at the office and using their personal vehicle to commute. Implement and train your managers and employees on policies that prevent employees from working during the commute.

68. COMPENSATION: BAG CHECK LAW STILL IN LIMBO (10/2019)

In *Frlekin v. Apple, Inc*., a California federal court denied class certification for a class of former and current Apple retail store employees against Apple, Inc. regarding bag check time. The district court held that "time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees" was not compensable under state law, because no employee was ever required to bring to work any bag subject to Apple's bag search procedure. Thus, if the employee chose not to bring a bag, no search was conducted.

The employees appealed to the Ninth Circuit Court of Appeal, and on August 16, 2017, the Ninth Circuit summarily punted the issue back to the California Supreme Court, seeking a response to the following question: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of California Industrial Welfare Commission Wage Order No. 7?" The issue has now been fully briefed and is awaiting formal hearing. Only time will tell how this ultimately shakes out.

PRACTICE TIP: The California Industrial Welfare Commission Wage Orders generally define "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The seminal case on this point of law is *Morillion v. Royal Packing Co.,* 22 Cal.4th 575, 586–87, 94 Cal.Rptr.2d 3, 995 P.2d 139 (2000). In that case, the California Supreme

Court considered this definition of "hours worked" and determined that the compensability of employee time depended on the "level of the employer's control over its employees, rather than the mere fact that the employer require[d] the employees' activity." That decision found that the time employees spent riding an employer-provided bus to work was compensable, not only because their employer required them to ride the bus, but also because the employer prohibited employees from commuting in their own cars and thus employees could not choose to run personal errands along their commutes or to leave work early for a personal appointment. We shall see if the Supreme Court applies similar logic to the *Apple* case. See also the holding of the *Troester* case below.

PETITION FOR REVIEW OF THIS CASE HAS BEEN GRANTED. WHILE THE REVIEW PROCESS IS PENDING, THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

69. DE MINIMIS TIME: NINTH CIRCUIT REJECTS CONCEPT OF *DE MINIMIS* TIME (10/2019)

The Fair Labor Standards Act's (FLSA) *de minimis* doctrine previously allowed employers to forego payment to employees for amounts of time that are small, irregular, or administratively difficult to record. The Ninth Circuit Court of Appeals in *Rodriguez v. Nike Retail Services, Inc.* (June 2019) followed the Supreme Court of California's direction provided in the 2018 *Troester v. Starbucks* case and held that the federal *de minimis* doctrine does not apply to wage and hour claims brought under the California Labor Code.

Nike's employees are required to go through unpaid exit inspections when they leave for breaks and at the end of their shift. Competing evidence from both sides in a wage and hour class action case showed that the exit inspections took a few seconds to several minutes. The Ninth Circuit Court remanded the case to the trial Court to determine liability and damages because the off-the-clock time spent by the employees could not be said to be so irregular or trifling to be considered *de minimis* following *Troester*.

PRACTICE TIP: Take steps to account for and pay for time incurred for exit inspections, donning and doffing, etc. Sometimes employers can add time clocks or search stations to avoid employees standing around waiting to start their shift or leave for the day. Using the Nike example, the employer could consider moving the time clocks to a location outside of the search stations and perhaps adding more time clocks (standing in line is often a frequent complaint and basis for potential liability).

70. DISCIPLINE: IS A KNOWN / SUSPECTED DISABILITY CAUSING POOR WORK? (10/2019)

The plaintiff in *Avery v. Community Hospital* (October 2018) had been a computer operator for the hospital for almost 20 years. Avery was underperforming at least in part due to the time and emotional strain placed on her in caring for her chronically-ill husband. In the summer of 2010, a new supervisor noticed Avery's lack of progress on multiple projects. Avery was given a written warning. In April 2011, her supervisor suggested that she "might be depressed" and urged Avery to see someone and to take a few months off to "get [her] head

together." Avery was placed on a 90-day PIP in May 2011. The hospital noted that Avery "has been dealing with some personal issues" but her performance needed to improve. The hospital continued to allow Avery to modify her work schedule and take leave when necessary to care for her husband.

On September 30, 2011, Avery was placed on a one-week unpaid suspension while the company decided whether she would be terminated for performance issues. On the intervening Monday, October 3, 2011, a clinical psychologist diagnosed Avery with major depression and chronic PTSD. Avery presented her employer with the medical certification that indicated she needed to be out of work on disability leave through January 3, 2012. Avery requested FMLA/CFRA leave. The Company's Wellness Department received and approved the requested leave.

On October 5, 2011, four supervisors met and determined that termination was appropriate. Only one of the four supervisors was aware of the FMLA/CFRA leave request, but did not tell the others due to the timing and circumstances of the request. The remaining supervisors did not learn of the leave request until October 7 when Avery requested that the meeting regarding her termination be postponed due to her disability leave status. The hospital notified Avery of her termination by letter dated October 10, 2011.

Avery sued the hospital for multiple causes of action including failure to accommodate, failure to engage in the interactive process, disability discrimination, wrongful termination and retaliation. The trial court sustained the employer's motion for summary judgment, finding that the hospital had shown a lawful, non-pretextual reason for Avery's termination.

The Court of Appeal overturned the trial court's ruling, in part, finding that although it agreed that the hospital had a legitimate reason for termination, a jury could find that the hospital's conduct was also *substantially motivated* by disability discrimination. A jury could infer from the totality of the evidence that Avery's supervisor either knew that Avery was depressed or regarded her as being depressed and that the supervisor might have attributed Avery's poor performance, at least in part, to that depression.

This decision would not necessarily prevent a successful mixed motive defense as discussed in *Harris v. City of Santa Monica* (February 2013) at the time of trial. In mixed motive cases where pretext cannot be established because the adverse employment action is based in part on legitimate nondiscriminatory grounds, a plaintiff can avoid summary judgment by offering sufficient evidence to establish a triable issue of material fact as to whether discrimination was a substantial motivating reason for the adverse employment action. (*Husman v. Toyota Motor Credit Corporation* (2017)). "If triable issues of material fact exist whether discrimination was a substantial motivating reason for the employer's adverse employment action, even if the employer's professed legitimate reason has not been disputed [like *Avery*], the FEHA claim is not properly resolved on summary judgment." (*Husman*.)

PRACTICE TIP: Employees who fear they are about to be disciplined will often disclose a disability and/or request leave. The fact that performance issues or a termination decision

occurred prior to the disability or leave status does not warrant disregarding the request. Also, remember that if an employee's poor performance might be caused by a disability, the employer must attempt to work with the employee to confirm and accommodate the medical issue before (or as a corollary to) implementing the already pending discipline.

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71. DISABILITY DISCRIMINATION: PERCEIVED DISABILITY (10/2019)

In *Nunies v. HIE Holdings, Inc.* (November 2018), the Ninth Circuit Court of Appeal held that an employer could be found to have discriminated against Nunies for a perceived disability after the employee informed his supervisor that he was having shoulder pain.

Nunies decided that he wanted to transfer from his full-time water delivery job to a part-time warehouse position. He found another employee who was willing to switch jobs with him. HIE tentatively approved the arrangement. Shortly thereafter, Nunies notified the operations manager that he was having shoulder pain. Two days later, HIE told Nunies that they would not extend him a part-time warehouse position and that his last day with the company would be two weeks later. HIE claimed that the layoff was due to budget cuts and the elimination of the part-time position (although they posted an ad to fill the position shortly after Nunies left). The day after Nunies was notified that he would be laid off, he saw a doctor for the first time and obtained a doctor's note that required him to be off work until his shoulder could be evaluated.

The Court found that the employer may have perceived Nunies as being disabled when he said he was having shoulder pain, and that may have been a substantial factor in the purported elimination of his position. Discrepancies in the employer's statements and the fact that it posted an ad to fill the purportedly-eliminated position brought the employer's knowledge and motive into question.

PRACTICE TIP: Disability discrimination claims can arise before there is documentation of a medical condition and before there is certainty that the condition meets the legal definition of a disability. If an employee is not performing satisfactorily, focus on the substandard performance. Let the employee raise the possibility that a condition or disability may be interfering with their ability to perform. Speculating or initiating a conversation about a potential disability can give rise to a discrimination claim based on a perceived disability. If the employee has mentioned anything about pain, illness, injury or other potential mental or physical health issues, follow the interactive discussion/reasonable accommodation process before making a final decision. And, it should go without saying, but…don't advertise or fill a position that you have just eliminated.

72. DISCRIMINATION: DENIAL FOR USING MULTIPLE SSN'S = DISCRIMINATION (10/2019)

The federal district court in *Guerrero v. Department of Corrections & Rehabilitation* (November 2018) found that the Department's disqualification of a correctional officer applicant

based on his affirmative answer to the question: "Have you ever had or used a social security number other than the one you used on this questionnaire?" was discriminatory. Guerrero was a "Dreamer" who had been brought from Mexico to the United States at age 11. At age 15, he created a false Social Security number that he used for the purpose of holding employment for the next 12 years until he obtained a legitimate Social Security number. He applied to be a correctional officer and passed the first stage of the eligibility process that included written and physical exams. After this process, Guerrero was disqualified as an applicant based on his use of multiple social security numbers, despite having provided the Department with the explanation discussed above.

The federal district court found that Guerrero had suffered individual discrimination, but rejected his claim that the Department's use of the question was categorically invalid because it furthered the Department's legitimate interest in maintaining the integrity, honesty and good judgment of its corrections officers. The question was a business necessity. The Ninth Circuit Court of Appeal upheld the decision against the Department.

[The issue in the California Court of Appeal case was the *res judicata* (binding) effect of the federal decision on the severed state court claims.]

PRACTICE TIP: Keep in mind that a process may be discriminatory in its impact even if the employer has a legitimate reason for its implementation or doesn't intend to discriminate. In *Guerrero,* although the Department was allowed to ask the question of it applicants, it should have considered each individual's' explanation for an affirmative response and then made a case-by-case determination of eligibility.

73. DISCRIMINATION: RANDOM WORKPLACE BEHAVIORS ARE ENOUGH (10/2019)

In *Mackey v. Board of Trustees of the California State University* (January 2019), the California Court of Appeal held that five female African-American basketball players could maintain racial discrimination and retaliation claims under Title VI and the Unruh Act based upon improper treatment by their coach. The totality of the coach's actions including singling the African-American players out and referring to them as "the group", treating them more harshly than other players, excluding one player from team text messages, attempting to revoke a scholarship, refusing to give playing time and forcing a player to play through painful shin splints was enough for the players to make a prima facie showing that they had suffered an adverse action even if the players were not kicked off the team.

PRACTICE TIP: Although this case addressed conduct toward student athletes, the same concept would apply in the workplace. Remember that there does not have to be a clear adverse action such as a termination or demotion. The totality of multiple less obvious or severe actions can be considered as a whole to determine whether there was an adverse employment action based upon a protected characteristic.

74. DISCRIMINATION: DISABILITY IS A BROADLY-DEFINED TERM (6/2019)

The case of *Ross v. County of Riverside* (June 2019), is a reminder to California employers that the term "disability" is broadly defined under the Fair Employment and Housing Act. Proceed with caution! Here, Ross was a deputy District Attorney for the County of Riverside. In the middle of an ongoing dispute with his boss about whether to prosecute a particular case, Ross learned that he might be ill with a serious neurological condition, and began undergoing testing. He then told his supervisor that he was ill and asked for a transfer. He also asked that he not be assigned to any new matters while he completed his testing. The supervisor declined his requests, noting that they would consider transfer or other accommodations once they were notified that Ross could not continue doing his present duties. Shortly thereafter, Ross was offered a transfer to the filing division, which he declined along with renewing his request that he be given no new cases. This time, senior management agreed to his request. Unfortunately, Ross's direct supervisor continued to assign new cases to him.

Senior management then got involved. The discussions between Ross and management became increasingly contentious as he began to miss work to attend medical appointments, to the point where Ross left the County but asserted that he was constructively terminated because the work environment became intolerable. Ross then filed disability and whistleblower claims against the County. Although the County initially prevailed on summary judgment, the appellate court reversed, noting "The physical impairment limited the major life activity of working because it required Ross to be absent from work periodically over several months to travel to an out-of-state clinic for medical testing. As this evidence meets Ross's burden of demonstrating there is a triable issue of material fact on the question of whether he had a physical disability under the FEHA, the court erred in granting summary judgment on Ross's claims for disability discrimination, failure to reasonably accommodate, failure to engage in the interactive process, and failure to prevent disability discrimination."

PRACTICE TIP: The concept of "what is a physical disability" under the FEHA is very broad. It includes any physical impairment that affects the neurological or immunological systems and limits a major life activity. A physical disability "limits a major life activity if it makes the achievement of the major life activity difficult. [W]orking is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments." Repeated or extended absences from work for medical appointments constitute a limitation on the major life activity of working. When handling a disability situation, the employer's approach should be, "what can we do to help you?" rather than "how do we deal with you?"

75. DISCRIMINATION: DOCUMENT YOUR REASON FOR TERMINATION (6/2019)

We still hear employers say that another lawyer told them not to say much to a problem employee, and not to put any reasons for the termination on paper. This is incorrect advice, as the City of San Francisco learned the hard way in *Ramirez v. San Francisco* (April 2019). In that case, Ramirez was terminated after the city learned that she had (allegedly) engaged in wage theft over a period of years – she would regularly leave her job at the city and work in the family

restaurant, while still on the clock for the city. When she was terminated, the city provided her with a bland termination letter that said nothing about the actual reasons for the termination, instead stating only that her services were no longer needed. She then sued for age discrimination, and the city was stuck defending a meritless lawsuit. Although the city ultimately prevailed on summary judgment (affirmed on appeal), the entire litigation could have been avoided if the city clearly laid out the legitimate business reasons for the employee's termination in the separation letter.

PRACTICE TIP: When thinking about terminating a poor performer, ensure that you have clear and detailed documentation of the termination reasons. Even new employees must receive documentation as to why their employment is ending. "At-will status" is not fail safe, and it is not a clear defense to claims of discrimination, harassment and retaliation. Employers should provide legitimate business reasons to the employee in writing before finalizing a termination, and preserve that documentation in the employee's personnel file. Also, begin the documentation process sooner than later: if an employee claims a disability or some other discrimination, harassment, etc., subsequent discipline may look like retaliation.

PETITION FOR REVIEW OF THIS CASE HAS BEEN GRANTED. WHILE THE REVIEW PROCESS IS PENDING, THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

76. DISCRIMINATION: FEDERAL LAW TO INCLUDE TRANSGENDER STATUS? (10/2019)

Currently pending at the U.S. Supreme Court is the issue of whether federal Title VII's reference to "sex" also prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*. (*R.G. & G.R. Harris Funeral Homes v. EEOC*, oral argument 10/8/19.)

California already prohibits discrimination against transgender and gender non-conforming people in the areas of housing, employment and public accommodations. The Department of Fair Employment and Housing has created a "Transgender Rights in the Workplace" form that can be found at www.dfeh.ca.gov.

77. DISCRIMINATION: "SUBSTANTIAL FACTOR" STANDARD (10/2019)

In *Murray v. Mayo Clinic* (June 2019), the Ninth Circuit court clarified for employers that in federal discrimination claims brought under the federal Americans with Disabilities Act (ADA), the appropriate standard is one of "but for causation," and not the "motivating factor" standard. Here, the plaintiff sued the clinic, claiming that his disability was "a reason" for the clinic's decision to discharge him. The clinic contended that the appropriate standard required the plaintiff to prove that "but for" his disability, he would not have been fired. The district court and the Ninth Circuit agreed with the clinic that the appropriate standard in federal ADA cases (42 U.S.C. § 12112) is that the plaintiff must show that the adverse employment action (here a termination) would not have occurred *but for* the disability.

NOTE: The Ninth Circuit reached a similar decision in *Valtierra v. Medtronic* (June 2019). In that case, plaintiff claimed he was terminated from his employment because of his morbid obesity. The employer contended it terminated the plaintiff for falsifying work records; plaintiff even admitted to closing 12 assignments as completed when he had not done the work. The panel found that, even if plaintiff's obesity were an impairment under the ADA, he could not show a causal relationship between these impairments and his termination (*i.e.,* he could not show "but for" causation), and therefore the employer was able to prevail.

PRACTICE TIP: Remember that the standard in California is more favorable to employees. When a discrimination claim is brought under the California Fair Employment and Housing Act, an employee is required to demonstrate that the discriminatory reason for the termination was a "*substantial factor*" motivating the employer's decision to terminate (or for the adverse employment action).

78. DOMESTIC WORKERS: NO OVERTIME WAGES DUE BEFORE 1/1/14 (10/2019)

In *Liday v. Sim* (September 2019), Liday was a "personal attendant" under Wage Order No. 15, working for appellants as their children's live-in caretaker for a fixed salary of $3,000 per month. After she was dismissed, she sued appellants for unpaid wages incurred from April 2010 to April 2014. At issue before the court in a claim for unpaid minimum wages was the following question: does the fixed salary paid to a live-in domestic worker—who is exempt from overtime but subject to minimum wage laws—cover only the regular, non-overtime work hours mandated for nonexempt workers? Or, does the court determine the worker's unpaid minimum wages by calculating the difference between the total number of hours she worked at the prevailing minimum wage rate and the amount she received through her salary? Here, the appellate court held "Because personal attendants were exempt from overtime requirements before 2014, we conclude California law in effect at the time did not limit the number of hours a personal attendant's salary could cover, except to require that it pay at least the minimum wage of $8 per hour for each hour worked." You might ask why it matters: using the minimum wage, appellants owed $75,000, but under the other standard (had it been used), the amount owed would have been $265,720.26.

PRACTICE TIP: Since January 1, 2014, the California "Domestic Worker Bill of Rights" has required overtime pay for domestic workers who work more than 9 hours in a workday or 45 hours in a workweek. Under federal law, as of October 15, 2015, domestic workers must be paid overtime for all hours worked beyond 40 in a workweek. Putting the California and federal standards together, domestic workers must be paid overtime for all hours worked beyond 9 hours in a workday, or 40 hours in a workweek. Unlike in the case above, if an employer pays a fixed salary under these new rules, the court will conclude that the worker has been compensated only for non-overtime hours and the employer will have paid nothing for overtime hours – and the higher figure in the case above would apply.

79. FAIR CREDIT REPORTING ACT: STAND ALONE MEANS STAND ALONE (10/2019)

In *Gilberg v. California Check Cashing Stores, LLC* (January 2019), the Ninth Circuit Court of Appeals held that a prospective employer's disclosures were unclear and did not comply with the stand-alone document requirement of the Fair Credit Reporting Act (FCRA). The FCRA requires employers who obtain a consumer report on a job applicant to provide the applicant with a "clear and conspicuous disclosure" that the employer may obtain such a report "in a document that consists solely of the disclosure" before procuring the report. California Check Cashing Stores, Inc.'s disclosure was contained in a separate, conspicuous pre-hire document that was presented to the prospective employee for signature before hire. The form was not FCRA compliant, however, because in addition to the FCRA disclosures, the form contained descriptions of applicant rights under various state laws that were inapplicable to the applicant and to extraneous documents that were not part of the FCRA-mandated disclosure.

PRACTICE TIP: The best practice is to work with a background check company to make sure you are using the correct forms. Avoid adding any language to forms that are required to "stand alone," including FCRA disclosures and similar state-mandated disclosures. Employers often run afoul when they add language that they believe is similar in purpose to the disclosure or helpful to its understanding. The best practice is to create additional forms or handouts if you believe that they are helpful, but avoid combining or cross-referencing documents.

80. FRANCHISES: FRANCHISOR IS NOT JOINT EMPLOYER (10/2019)

In *Salazar v. McDonald's* (October 2019), a wage and hour class action lawsuit, the Ninth Circuit Court of Appeals held that the franchisor McDonald's U.S.A., LLC was not a joint employer with its franchisee who operated eight McDonald's locations in California. Plaintiffs sought to hold the franchisor liable as a joint employer because McDonald's U.S.A. maintained some level of control over the franchise locations, provided manager trainings and supplied a computer system that it encouraged its franchisees to use without making modifications. The computer system tracked shifts and recorded hours. The system was not programmed to properly calculate overtime under California law.

The Court found that any control that McDonald's U.S.A. maintained over its franchise locations was limited to quality control. It did not interview, hire, train, discipline or fire employees. It did not set employee schedules or monitor their time entries. Accordingly, McDonald's U.S.A. was not a joint employer of its franchisee's employees.

PRACTICE TIP: Although this is a good result for the franchisor, it is also a cautionary tale for those operating franchises. If the franchisor provides employee policies, procedures or even computer systems that it encourages you to use, make sure everything is California compliant. This includes auditing time records. You, as the franchisee, are responsible for your employees and will be held responsible for any wage and hour or other employment law violations.

81. INSURANCE: REIMBURSEMENT CLAIMS NOT EXCLUDED FROM EPLI (10/2019)

In *Southern Cal. Pizza Co., LLC v. Certain Underwriters, etc.* (August 2019), the Fourth Circuit Court of Appeal held that an Employment Practices Liability Insurance (EPLI) policy that specifically excluded from coverage "wage and hour or overtime law(s)", did not exclude all provisions of the California Labor Code; rather the appellate court held that the exclusion was narrower and concerned only "laws regarding duration worked and/or remuneration received in exchange for work." Here, the allegations in the putative lawsuit claimed that, in addition to wage and hour violations and unpaid overtime, the employer had also "failed to reimburse its delivery drivers for mileage expenses, certain work travel-related costs and cell phone expenses (§§ 2800, 2802)," and other "non-wage" claims (*e.g.,* derivative 17200 and PAGA claim based on failure to reimburse). The court found that these reimbursement-related claims were not subject to the wage and hour exclusion in this EPLI policy. The case was remanded back to the trial court for further preceding and the employer was awarded its costs on appeal.

PRACTICE TIP: Careful scrutiny of your EPLI policy is a must. The current trend is for EPLI carriers to exclude all claims that are related to wage and hour laws. After this ruling, carriers are very likely to close this expense reimbursement loophole as they revise their policies at renewal.

82. JOINT EMPLOYERS: LEGALLY JOINT EVEN IF CONTRACT SAYS OTHERWISE (10/2019)

In *U.S. Equal Employment Opportunity Commission v. Global Horizons, Inc.* (February 2019), the Ninth Circuit Court of Appeals held that fruit growing companies could be joint employers of temporary workers that were provided by a labor contractor to work in the growing companies' orchards. The labor contractor was contractually responsible for recruiting and supplying temporary workers, often from out of the country. The labor contractor was also responsible for making sure the workers were provided with appropriate meals, housing and transportation as required for the work visas, subject to reimbursement from the growers.

Thai workers alleged that they were discriminated against and retaliated against based upon their national origin. The workers claimed that the Thai workers were treated more poorly than their Mexican co-workers. Some of the workers claimed they had complained directly to the growers about the abysmal living conditions, unsafe transportation, and missing or late wages.

The Court found that the growers could be held liable as joint employers for the inadequate meals, housing and transportation. The respective contractual obligations between the growers and the labor contractor did not affect the employees' rights. The growers had the power to require the labor contractor to change its practices and could have stopped using the labor contractor.

The Court also found that the growers could be held jointly liable for discrimination. The allegations gave rise to a possible inference that the growers knew or should have known about the labor contractor's discriminatory practices.

PRACTICE TIP: The best practice for host employers is to expect that you will be considered to be a joint employer, and act accordingly. If you utilize the services of staffing agencies, make sure you are actively monitoring their practices and auditing their payroll records.

83. JOINT EMPLOYERS: GAS STATION FRANCHISOR NOT A JOINT EMPLOYER (10/2019)

Similar to last year's holding in *Curry v. Equilon Enterprises, LLC* (April 2018), the California Court of Appeal held in a wage and hour case, *Henderson v. Equilon Enterprises, LLC* (October 2019), that Shell Oil was not a joint employer of a plaintiff who was employed by Shell Oil's franchisee, Danville.

Shell supplied fuel products and set fuel prices. Shell required that the stations be open 24/7. Shell received revenue from fuel sales, set fuel prices and reimbursed Danville for reasonable labor expenses associated with operating the fuel portion of the service station. Under their operating agreement, Danville had the ability to select, hire, discharge and control the daily work of its employees. Shell retained the right to ask Danville to remove an employee from a Shell-owned station "for good cause shown", but under the agreement, Danville had the sole authority to terminate employees.

The Court held that Shell was not a joint employer. Although Shell required that Danville complete certain tasks under certain parameters, Shell did not exercise sufficient control over Danville's employees or otherwise "suffer or permit" them to work.

84. JURISDICTION: FEDERAL LAW APPLIES TO OUTER CONTINENTAL SHELF (10/2019)

Newton v. Parker Drilling Management Services, LTD (June 2019) is big news for employers with employees working out on the Outer Continental Shelf (OSC). In this case, Newton worked for Parker Drilling on drilling platforms off the California coast. Parker paid Newton for his time on duty but not for his time on standby, during which he could not leave the platform. Newton filed a class action in state court, alleging that California's minimum wage and overtime laws required Parker to compensate him for his standby time. Parker Drilling prevailed in the lower court when the court concluded that California state laws should not be applied because the federal law on the OCS and the FLSA already provided a comprehensive federal wage and hour scheme that left no significant gaps in federal law for state law to fill. The Ninth Circuit vacated and remanded. Parker appealed to the U.S. Supreme Court, which overturned the Ninth Circuit court by holding that all of the laws governing the OCS are federal laws, and state law (to the extent that it is applicable) serves as a supplement only if there is a gap in federal law. If a federal law addresses an issue on the OCS, then state law is preempted. Here, the Court found no gap, and therefore held that Newton's claims were to be determined by federal law rather than state law.

PRACTICE TIP: The OSC begins three miles off the state coast, and includes drilling platforms fixed to the seabed. However, CA law still applies in CA's territorial waters (inside the three mile marker); for employers with employees working on platforms on the OSC, remember to determine if you are on the OSC or CA territorial waters. If you are on the OSC, work with legal

counsel to determine whether there is a gap in the federal law on a particular issue. If there is, then state law likely applies.

85. MEAL PERIODS: CLAIMS FOR IMPROPER WAGE STATEMENTS AND WAITING TIME PENALTIES DO NOT FLOW FROM FAILURE TO PAY PREMIUM PAY (10/2019)

Naranjo v. Spectrum Security Services, Inc. (September 2019) was a class action brought by former and current security officers. Spectrum Security Services is a private contractor for federal prisons and Immigrations and Customs Enforcement (ICE). Spectrum's security officers are responsible for guarding prisoners, detainees and sometimes court witnesses. The security officers often spent their meal periods on duty. The officers also claimed that they were unable to take uninterrupted 10-minute rest breaks due to the level of supervision they were required to maintain.

The Court held that Spectrum's security officers who were paid for on-duty meal periods were also entitled to premium pay during a time when Spectrum had not complied with the strict requirements for using on-duty meal agreement. Even though Spectrum had documented in multiple policy-related documents that security guards were required to remain on duty for their meal periods and then paid them for that time, Spectrum did not utilize a separate written agreement with each employee that included required language indicating that the on-duty meal agreement could be revoked at any time. Spectrum owed one hour of premium pay for each on-duty meal period worked by the class members when they did not have a written agreement with a revocation provision.

In this landmark decision, the Court of Appeal also held that violations of the Labor Code's meal break provisions by themselves do not entitle employees to pursue derivative claims for improper wage statements and waiting time penalties. The Court reasoned that even though premium pay has been classified as a "wage" for the purpose of the statute of limitations, the underlying harm does not arise from the nonpayment of wages. Rather, the harm arises from the failure of the employer to protect the health and welfare of their employees by providing code-compliant breaks. Because the underlying harm under Labor Code section 226.7 is not the failure to pay wages, derivative claims that flow from the employer's failure to pay wages do not apply. Without the derivative wage statement claim, plaintiffs were also not entitled to seek their attorneys' fees under Labor Code section 226(e).

On the separate issue of failure to provide code-compliant rest breaks, the Court found that common questions of law or fact predominated and class certification was appropriate because the security guard's continuous supervision requirements interfered with their ability to take uninterrupted, ten-minute rest breaks.

PRACTICE TIP: The Court's holding that derivative claims do not flow from meal break violations is a huge win for employers! Keep in mind that because this is such a landmark decision and it limits the potential damages that are available to employees, we can expect that it will be appealed to the California Supreme Court. Continue to carefully draft policies and forms, enforce your meal break policies and audit time records to make sure you are not exposed for meal break

violations in the first place. Also keep in mind that wage and hour cases often involve many causes of action, and most cases will involve claims that could trigger waiting time penalties, improper wage statements and attorneys' fees.

Lastly, don't confuse "on-duty" meal agreements with meal break waivers. Very few employers will be able to utilize on-duty meal agreements. Even when on-duty meal agreements are valid, they do not waive the obligation to provide timely and uninterrupted meal periods of at least thirty minutes.

86. MEAL PERIODS: NON-DISCRETIONARY BONUSES AFFECT MEAL PREMIUMS (10/2019)

Earlier this year, a federal district court awarded $102 million against Wal-Mart for two commonly overlooked violations related to non-discretionary bonuses. (*Magadia v. Wal-Mart Associates, Inc.* (May 2019)).

Wal-Mart paid its employees quarterly incentive-based, non-discretionary bonuses. Wal-Mart was correctly adding the non-discretionary bonus amount back into the regular hours worked during the bonus period to calculate the adjusted overtime rate. Wal-Mart paid the additional amount due for overtime and listed it as a lump sum on a separate line item on the employees' wage statements. The court found that Wal-Mart's wage statements were not code-compliant, however. Although the description and lump sum appeared on the wage statements, the statements did not include the rate of pay or number of hours worked that factored into the overtime gross up formula. The employees therefore could not tell from the wage statement alone exactly how the amount was calculated.

Wal-Mart's second violation also resulted from an oversight related to non-discretionary bonuses. Wal-Mart paid its employees one hour of premium pay at the respective employee's base rate of pay for non-compliant meal periods. The court found that the employees were underpaid for their meal premiums. The court confirmed that if a non-discretionary bonus is paid for a period that includes premium pay, the employer must add the bonus pay to the base pay to calculate the regular rate of pay (just as the employer must do with overtime). Meal and rest period premium pay should be paid at the adjusted regular rate of pay. The court did not specify exactly how this should be done when the pay periods are shorter than the bonus period. The most logical practice is that the employer should do a monthly or quarterly evaluation (the same that applies to overtime) and add the extra money to a subsequent check, making sure to list the additional amount as a separate line item on the employee's check along with a description showing how the amount was calculated.

THIS CASE HAS BEEN APPEALED TO THE NINTH CIRCUIT COURT OF APPEAL. THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

PRACTICE TIP: Keep non-discretionary bonuses in mind when you are doing any calculation based on an employee's regular rate of pay. You should also make sure that the wage statements correctly reflect all applicable hourly rates in effect during the pay period and the

number of hours worked at each respective rate. Periodically self-auditing the wage statements is a great practice for employers whether the payroll is handled in-house or through a separate agency. What seem to be small details can cost millions in statutory damages and penalties if they are not handled correctly.

PRACTICE TIP: This case reiterates California's rejection of a *de minimis* rule. The court noted that 3 to 5 minutes out of a 30-minute period (an average of a 13% reduction) was not *de minimis* and "[w]hen time is scarce, minutes count." Employers should allow sufficient time for employees to clock in and return to their workstations after the completion of their 30-minute meal period. Consider a lock-out system and a short (3-5 minute) paid grace period to clock back in after 30 minutes.

87. MEAL PERIODS: HEALTHCARE WAIVER OF SECOND MEAL AFTER 12 HOURS (1/2019)

The twists and turns of the *Gerard v. Orange Coast Memorial. Medical Center* (December 2018) case have finally ended. Recall that in February 2015, a Court of Appeal initially overturned summary judgment in favor of Orange by holding that a healthcare industry-specific meal waiver under IWC Wage Order 5, section 11(D) was invalid "to the extent it authorizes second meal break waivers on shifts longer than 12 hours" (Gerard I). In a direct response to that decision and the corresponding panic in the healthcare industry, the legislature and Governor Brown enacted SB 327 in October 2015, which again made it valid for certain limited workers in the healthcare industry to waive one of their two meal periods, even if they worked shifts longer than 12 hours. Then, almost two years later, and after being told by the California Supreme Court to take another look, the appellate court admitted that it has been wrong, and openly stated that IWC Wage Order 5, section 11(D), is valid and has been since its adoption (Gerard II). The California Supreme Court then agreed to hear the case and on December 10, 2018, the Court came down on the side of the IWC Wage Order and the healthcare industry, taking us right back to where it started -- that IWC Wage Order 5, section 11(D), is valid, and has been valid since its adoption.

PRACTICE TIP: Employers in the healthcare industry (including hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating twenty-four (24) hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology, or dialysis) should revisit their meal period waiver policies and practices to ensure they have implemented enforceable healthcare meal waivers with all possible employees.

88. MEAL PERIODS: MISSED MEAL PREMIUM PAY REMINDER (10/2019)

In *Esparza v. Safeway, Inc.* (June 2019), Safeway paid no meal premium pay for missed meal periods prior to June 17, 2007, regardless of whether or not an employee had been impeded or discouraged from taking a meal break (see the Practice Tip below). Plaintiffs brought class claims against Safeway under the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.), and also under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.) The UCL claims sought to establish liability for the no-premium-wages policy itself, *i.e.,* plaintiffs claimed that Safeway's policy of refusing to follow the law and pay premium

payments before June 2007 harmed employees in a way that could be measured separately from the missed premium payments themselves. Plaintiffs claimed that they would be able to present a "market value" analysis to establish the alleged harm on a class-wide basis. The PAGA claims sought penalties for violations that occurred before June 17, 2007.

The appellate court affirmed the trial court's grant of summary judgment to Safeway on the UCL claims, noting that appellants "alleged no viable theory upon which [the class] could obtain restitution or injunctive relief" because they had not presented any evidence to show how their "market value" approach would work or evidence of any way to identify any measurable amounts of money or property that Safeway took from the class members by means of its no-premium-wages policy. The court would not allow use of the UCL as a backdoor to maintain a class action, where individual inquiries regarding why employees had not taken meal breaks were required. Plaintiffs had not presented evidence to show a widespread practice of not *providing* meal breaks as required in *Brinker.* The appellate court also affirmed the trial court's decision to strike the PAGA claim as time barred, because appellants asserted it for the first time in February 2009, more than one year after the violations ended in June 2007.

Note that Safeway's failure to provide any premium payments before June 2007 could have exposed it to liability on individual claims if individuals could present evidence showing that business reasons prevented them from taking code-compliant meal breaks.

PRACTICE TIP: This case provides a good opportunity to remind employers of the general *Brinker* standard regarding meal breaks. Under *Brinker*, an employer's duty is not to police meal breaks, nor to ensure that no employees skipped them voluntarily. Rather, the duty is only to provide the opportunity to take the meal break, to free employees from any obligation and control of the employer, and to refrain from impeding or discouraging employees from taking their breaks. If an employer unlawfully dissuades an employee from taking a meal break, or business circumstances prevent the taking of the break (or it is late or short because of business reasons), the Labor Code requires the employer to pay that employee a meal premium equal to one hour's pay.

Despite the *Brinker* standard, best practice requires vigilant employers to audit their employees' time records regularly, and if there are instances of interrupted, late, short or missed meal periods, employers should conduct an individualized inquiry into the circumstances to figure out WHY the meal period was interrupted, late, short or missed. The reason why will determine whether the meal period premium is owed. In general, if the employee's meal period was late, short, missed or interrupted for work-related reasons, even if the employee was not specifically instructed to work, premium pay is required.

89. MEAL PERIODS: ON-DUTY MEAL PERIODS MUST BE AT LEAST 30 MINUTES (10/2019)

In *L'Chaim House, Inc. v. Department of Industrial Relations* (July 2019), the California Court of Appeal held that employers are required to provide employees with 30-minute meal periods, regardless of whether they are on-duty or off-duty.

L'Chaim House operated residential care homes for seniors. Subdivision 11(E) of Wage Order No. 5 creates an exception for "employees of 24 hour residential care facilities for the elderly." But, an on-duty meal period is not the functional equivalent of no meal period at all. On-duty meal periods are an intermediate category requiring more of employees than off-duty meal periods but less of employees than their normal work. Even if an employee cannot be afforded with a completely off-duty meal period, they must at least be afforded a full 30 minutes of limited duty to eat their meal in relative peace.

PRACTICE TIP: On-duty meal period agreements provide the employer with the right to keep the employee on site, but do not waive the other requirements of the meal period, including that it begin by the end of the fifth hour of work and last for an uninterrupted period of at least 30 minutes. For those few employers who can legitimately claim on-duty meal periods as a necessity, navigating what level of interruptions are allowable for different businesses is difficult and fact-specific. The best practice is to relieve the employee of as many duties as possible. This might include having employees cover duties for each other even though they all may have to remain onsite during their meal breaks.

90. MEAL PERIODS: WAGES AND PREMIUM PAY OWED FOR SHORT MEALS (10/2019)

The employees in *Kaanaana v. Barrett Business Services* (November 2018) were belt sorters in two recycling facilities. The employees stood at sorting stations along a conveyor belt and removed recyclable materials placed in separate receptacles. The conveyor belt was turned off for exactly 30 minutes during the meal period. In order to be ready when the belt restarted, employees were required to return and take their positions three to five minutes before the meal period should have ended.

The Court of Appeal held that the belt sorters were entitled to one hour of premium pay for each day their meal period was short and wages for the three to five minutes that they were under the employer's control during the meal period. The right to be paid for all time worked is a distinct and separate right from the right to take a 30-minute, uninterrupted meal break. The employees were also entitled to penalties for the employers' failure to pay minimum wage for all time worked, as well as waiting time penalties to former employees.

91. MISCLASSIFICATION: FURRY'S FUZZY FACTS PREVAILED (10/2019)

In *Furry v. East Bay Publishing, LLC* (December 2018), the California Court of Appeal held that the employee's recollection of the overtime hours he worked, even though it was an imprecise estimate, was enough to meet the relaxed burden of proof where the employee was misclassified as exempt and the employer failed to keep accurate time records. Furry's fuzzy recollection, along with testimony from a few co-workers that knew that he had sometimes worked nights and weekends, was enough. The commissions that Furry received for marketing events that took place outside of regular business hours did not compensate him for the overtime he should have been paid. Rather, the commissions should have been added to his salary to calculate his regular and overtime rates of pay.

Furry was not entitled to relief for his meal break claims, either in the form of additional wages or premium pay. East Bay Publishing undisputedly provided Furry with the opportunity to take meal breaks. Furry's testimony that he usually chose to skip his meal breaks on Mondays and Tuesdays due to publishing requirements, as well a few co-workers' knowledge that he sometimes skipped meal breaks, was insufficient to prove that the employer knew or reasonably should have known that he was working through his authorized meal periods.

The employer's good faith belief that Furry was properly classified as an exempt employee was insufficient to defend against Furry's claim for inadequate wage statements that did not reflect all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each rate.

PRACTICE TIP: If there is any possibility that an exempt employee might be misclassified, keep detailed time records. If the employer fails to keep time records, the employee's recollection will usually prevail in court, arbitration and the DLSE.

92. NLRB: CLASS ACTION WAIVERS ARE PERMITTED (10/2019)

In an abrupt change of course, and for the first time since the U.S. Supreme Court decision in *Epic Systems* last year, on August 14, 2019, the NLRB issued a ruling (*Cordúa Restaurants, Inc. and Steven Ramirez and Rogelio Morales and Shearone Lewis*, August 2019) explicitly stating that employers are permitted not only to require employees to sign class-action waiver or collective-action waiver arbitration agreements, but also to terminate employees who do not sign. According to the NLRB: "This case presents two important issues of first impression regarding mandatory arbitration agreements following *Epic Systems*: (1) whether the Act prohibits employers from promulgating such agreements in response to employees opting in to a collective action; and (2) whether the Act prohibits employers from threatening to discharge an employee who refuses to sign a mandatory arbitration agreement." The Panel held, "Consistent with *Epic Systems*, we find that the Act contains no such proscriptions. The NLRB cautioned employers, however, that employees cannot be fired if they join a class action; that would be actual concerted activity. The remedy there is to seek enforcement of the arbitration agreement. The NLRB said, "We reaffirm, however, longstanding precedent establishing that Section 8(a)(1) prohibits employers from disciplining or discharging employees for engaging in concerted legal activity, which includes filing a class or collective action with fellow employees over wages, hours, or other terms and conditions of employment." The full order can be read at: https://www.nlrb.gov/case/16-CA-160901. **Note: refer to #4 above regarding recent California law**.

93. NLRB: UNIONS CAN BE PREVENTED FROM USING COMPANY PREMISES (6/2019)

In *UPMC Presbyterian Shadyside* (June 2019), the NLRB changed course and years of precedent by holding that, "that an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organization activity." Here, two non-employee union representatives visited a hospital's cafeteria (on the eleventh floor) where they discussed union campaign matters with employees and passed out materials. When an employee complained to

management, security was dispatched and the union representatives were ejected; security informed the union representatives that they had to leave because the cafeteria was only for employees, patients, patients' families and visitors. The union then filed charges claiming violations of Section 8(a)(1) of the National Labor Relations Act. Although the union initially prevailed at hearing in front of an administrative law judge, the ALJ's finding was later overturned by a panel of three NLRB board members who found that the NLRB had departed from existing Supreme Court precedent in a manner that had been heavily criticized by circuit courts of appeal. The panel stated, "to the extent that Board law created a 'public space' exception that requires employers to permit nonemployees to engage in promotional or organizational activity in public cafeterias or restaurants absent evidence of inaccessibility or activity-based discrimination, we overrule those decisions."

The key takeaway from the decision is as follows: "The fact that a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose. Absent discrimination between nonemployee union representatives and other nonemployees – *i.e.,* 'disparate treatment where by rule or practice a property owner' bars access by nonemployee union representatives seeing to engage in certain activity 'while permit[ting] similar activity in similar relevant circumstances' by other nonemployees – the employer may decide what types of activities, if any, it will allow by nonemployees on its property." Given this bright-line holding, employers can now safely bar any non-employees, including union organizers, from their premises, so long as it is done in a nondiscriminatory manner.

94. OUT-OF-STATE EMPLOYERS: IS COMPLIANCE WITH CA LAW REQUIRED? (6/2018)

The California Supreme Court will answer that question in *Oman v. Delta Airlines* (May 2018). Flight attendants, who spent at most 14 percent of their "flight related working hours," in California, filed a putative class action in California's federal court for violations of the state's wage and hour laws. The employees worked for an out-of-state employer, did not work principally in California, and did not spend days at a time in California. Nevertheless, the employees wanted to enforce the California Labor Code (because it was more employee-friendly than federal law). The Ninth Circuit Court of Appeal has asked the California Supreme Court to decide the following: (1) Do California's wage payment (Lab. Code § 204) and wage statement (Lab. Code § 226) statutes apply to wage payments and wage statements provided to an out-of-state employee who, in the relevant pay period, works in California only episodically and for less than a day at a time? (2) Does California's minimum wage law apply under these circumstances? and (3) Does California's bar on averaging wages apply to the pay formula for flight attendants? United Air Lines is also facing similar claims. If California law applies, expect to pay more on your next trip on Delta or United.

THE CALIFORNIA SUPREME COURT HAS GRANTED REVIEW. WHILE THE REVIEW PROCESS IS PENDING, THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

95. OVERTIME: IMPACT OF HOLIDAY PAY UNDER THE FLSA (10/2019)

In *McKinnon v. City of Merced* (December 2018), the United States District Court (Eastern District of California), found that holiday pay for police officers and sergeants was not necessarily exempt from overtime compensation. The City of Merced offered 12 paid holidays per year. If officers or sergeants were scheduled to be off on a designated holiday, they were paid straight time for the day. If officers or sergeants were scheduled to work on the designated holiday, they were paid normally for their hours worked, and were also paid eight hours of straight time for the holiday pay.

Under the FLSA, holiday pay can be excluded for purpose of calculating overtime if the pay was for "periods when no work is performed due to…holiday…or other similar cause", or alternatively, "other similar payments to an employee which are not made as compensation for hours of employment." The court found, however, that for those officers and sergeants that were scheduled to work on the designated holiday, and were not afforded the option to take that holiday off, it was not clear that the pay was for a period when "no work is performed" as work actually was performed. The extra pay also could be considered "compensation for hours of employment" in the form of a higher rate of pay for working an undesirable holiday shift. Based on the facts and issues presented, the District Court refused the City of Merced's request to dismiss the case in its early stages.

PRACTICE TIP: It doesn't seem logical to have to add holiday pay into a regular rate of pay, so we will see where this case goes. Employers currently are not required to add to regular pay any meal and rest break premiums, sick time or vacation pay when calculating overtime – all are considered non-work payments. Holiday pay logically should be treated the same, especially since the employee is already receiving compensation for the actual work performed on the holiday, as was the situation with the city of Merced.

THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

96. PRIVATE ATTORNEYS GENERAL ACT (PAGA) PRACTICE TIPS (10/2019)

a. **No *de minimis* exception for meal breaks, but good faith matters:** A Starbucks barista who had only two late meal breaks without premium pay was an "aggrieved employee" capable of pursuing a PAGA representative action. One court held that Starbucks' policy was unlawful because employees were not entitled to meal break premium pay when their shift went a few minutes more than five hours because they clocked out late rather than because of any specific management decision. The trial court acknowledged Starbucks' good-faith attempts to comply with meal and rest break obligations by awarding penalties of only $5 per initial violation rather than $50 (PAGA allows for court discretion in awarding penalties). (*Carrington v. Starbucks, Corp.* (November 2018)).

b. **Notice:** Employee must specifically allege each claim in their letter to the LWDA. Labor Code claims not asserted in the original PAGA letter are not saved by tolling or the relation-back doctrine. (*Brown v. Ralphs Grocery Co*. (October 2018)

c. **Arbitration:** The court once again held that an employer cannot compel arbitration of PAGA claims. (*Correia v. NB Baker Electric, Inc.* (Court of Appeal February 2019.)

d. **Distribution:** Civil penalties recovered under PAGA must be distributed to all aggrieved employees. (*Moorer v. Noble L.A. Events* (February 2019)).

e. **Unpaid Wages Are Not Recoverable In A PAGA-Only Action And Are Subject To Arbitration:** In *ZB, N.A. et al. v. Superior Court of San Diego County* (September 2019) (originally filed as *Lawson v. ZB, N.A., et al.*), the California Supreme Court held that unpaid wages do not constitute a "civil penalty" under Labor Code section 558 and are therefore not recoverable under the PAGA. In order to recover unpaid wages, an aggrieved employee must seek them through a cause of action separate from PAGA. The unpaid wage claim can be compelled to arbitration with an enforceable arbitration agreement and is subject to a class action waiver.

f. **Plaintiff must have a viable code violation (1/2018):** Although the California Supreme Court has granted review of this issue, in *Kim v. Reins International California, Inc.* (December 2017), the court determined that when an employee has brought individual claims and a PAGA claim in a single lawsuit, and then settles and dismisses the individual employment causes of action with prejudice, the employee is no longer an "aggrieved employee" as that term is defined in the PAGA. Thus, that particular plaintiff no longer has standing to maintain a PAGA claim.

PETITION FOR REVIEW OF THIS CASE HAS BEEN GRANTED. WHILE THE REVIEW PROCESS IS PENDING, THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

97. PAY STUBS: FICTITIOUS NAME OKAY TO USE WHEN REGISTERED (10/2019)

In *Savea v. YRC Inc*., (April 2019), the Court concluded that use of a fictitious business name on a wage statement (rather than its legal company name) was not improper under Labor Code 226. Employer YRC Inc.'s valid fictitious business name, "YRC Freight" appeared on employee's paychecks. YRC Freight was the company name the employer used to transaction all regular business in California, and this name was recorded in San Bernardino and Sacramento Counties. In so finding, the Court noted that this was not an instance in which there was confusion about the identity of the employer, since YRC Freight is the same legal entity as YRC Inc. The employee did not have to look at any document other than his wage statement to determine who his employer was.

The employee also claimed that his employer failed to include the full business address on wage statements, in violation of Labor Code 226, because the employer's address as listed didn't include a mail stop code (*i.e*., the Zip Code plus an additional 4 digits). However, the Court held that these were not required under Section 226.

PRACTICE TIP: In addition to the rules regarding sick leave and certain piece rate pay issues, section 226(a) lists nine items that must be on every pay stub given to an employee: (1)

gross wages earned; (2) total hours worked by the employee. . .; (3) the number of piece-rate units earned and any applicable piece-rate if the employee is paid on a piece-rate basis; (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item; (5) net wages earned; (6) the inclusive dates of the period for which the employee is paid; (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor. . .the name and address of the legal entity that secured the services of the employer; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. (There are also some special rules for temporary service employers.) Employers should be very cautious about following this decision, as the court focused on very specific use of the business name in finding that the employer's use of the fictitious name was sufficient. The best practice would be to use the employer's legal name on the paystub.

98. PAYROLL COMPANIES: CONTRACT DETERMINES LIABILITY FOR MISTAKES (10/2019)

In *Goonewardene v. ADP, LLC* (February 2019), the Supreme Court of California held that an employee was not entitled to pursue a direct action against the payroll company under a negligence, negligent misrepresentation or third party beneficiary theory based on the unwritten contract between the employer and ADP. In the *Goonewardene* case, the contract was unwritten, but the result would likely be the same with the standard written contracts between employers and payroll companies.

PRACTICE TIP: Include an indemnity provision in contracts with payroll companies to allow the employer to pursue the payroll company for liability incurred as a result of the payroll company's wage and hour mistakes. The employer is responsible for damages to the employees either way, but without an indemnity agreement, the employer will have no recourse against the payroll company.

99. PIECE RATE: STATUTE ON PIECE RATE REQUIREMENTS IS CONSTITUTIONAL (10/2019)

In *Nisei Farmers League v. CA Labor & Workforce Dev. Agency* (January 2019), various employer associations brought an action for declaratory relief against state labor agencies and agency officials. The purpose of this lawsuit was to challenge constitutional validity of statutes laying out the wage payment and calculation requirements applicable to employers using a piece-rate model to compensate employees. Unfortunately, the court found the statutes to be constitutional, and held, "Based on our review of the pertinent issues, we conclude that plaintiffs failed to allege an adequate basis for finding the statute to be facially unconstitutional. We also conclude that denial of the declaratory relief requested was appropriate."

PRACTICE TIP: Note that employers are still waiting for the *Certified Tire* case to be resolved by the California Supreme Court. There, employees were paid a guaranteed hourly rate for all hours, and then received piece rate pay on top of the hourly rate based on their productivity. The lower court agreed with the employer that this was not a pure piece rate

structure that required separate pay for rest breaks and other down time, because of the guaranteed hourly pay. If the Supreme Court affirms the appellate court, this would be a huge benefit to employers who provide incentive pay of this type.

100. POLICIES: ENSURE YOUR POLICIES ARE DRAFTED AND APPLIED NEUTRALLY (6/2019)

JPMorgan recently paid $5 million to settle a class action lawsuit filed by a father who claimed he was denied new parent leave benefits based on his gender. According to the allegations in the lawsuit, the employee claimed he was told that new parent leave benefits were primarily offered to new mothers, because the company considered new mothers to be the "primary caretakers". Because of the less-generous leave benefits offered to him based on his gender, the employee then sued on behalf of himself and other company employees. An attorney for the ACLU was quoted to say, "Unfortunately, the gender stereotype that raising children is a woman's job is still prevalent, and is reflected in far too many corporate policies." Notably, JPMorgan is not the only company facing this type of lawsuit: Estee Lauder also recently settled a similar employee-leave discrimination case against fathers for $1.1 million.

PRACTICE TIP: Work with your employment counsel to ensure that your policies are written, and your practices applied, in a gender-neutral fashion to the fullest extent possible. Both state and federal laws make it unlawful to provide employees of one gender with more (or superior) benefits than the company offers to its other employees of a different gender.

101. REIMBURSEMENT: REQUIRED NON-SLIP SHOES, NO PROBLEM (10/2019)

The case of *Townley v. BJ's Restaurant, Inc.* (June 2019) answers the question of whether or not an employer is required to pay for or reimburse an employee for required generic slip-resistant shoes. (Hint – the answer is no.) Plaintiff Krista Townley, brought a PAGA action against BJ's Restaurant, Inc., seeking penalties on behalf of herself and similarly aggrieved employees. She claimed that BJ's should have reimbursed her and other employees under Labor Code section 2802 for the costs they incurred to purchase the black, slip-resistant, close-toed shoes they were required to wear to work. Remember that section 2802 requires employers to reimburse employees for "necessary expenditures . . . incurred by the employee[s] in direct consequence of the discharge of [their] duties." Townley claimed that because the shoes were a requirement of the job – she could not go to work without them – the shoes she purchased for her job were a necessary expenditure, and BJ's should have reimbursed her for the cost of those shoes. Thankfully, the court disagreed with Townley. The court found that, because BJ's shoe policy did not require employees to purchase a specific brand, style, or design of shoes, and the policy did not prohibit employees from wearing their shoes outside of work, "We conclude that BJ's is not required, as a matter of law, to reimburse its employees for the cost of the slip-resistant shoes at issue in this case under section 2802. The cost of the shoes does not qualify as a 'necessary expenditure- within the meaning of the statute. Here […] Townley has not argued that the slip-resistant shoes she was required to purchase were part of a uniform or were not usual and generally usable in the restaurant occupation. Further, she does not cite any authority holding that an employer is required, under section 2802, to reimburse an employee for basic, non-

uniform wardrobe items, such as the slip-resistant shoes at issue in this case." Restaurant owners around the state can now breathe a little easier.

PRACTICE TIP: The DLSE has clarified that, "The definition and [DLSE] enforcement policy is sufficiently flexible to allow the employer to specify basic wardrobe items which are usual and generally usable in the occupation, such as white shirts, dark pants and black shoes and belts, all of unspecified design, without requiring the employer to furnish such items. If a required black or white uniform or accessory does not meet the test of being generally usable in the occupation the employee [sic] may not be required to pay for it."

Despite this ruling and the DLSE position noted above, there is still an open question about whether California's workplace safety laws require an employer to pay for non-specialty safety shoes, like generic steel-toed boots, when the employer allows the employee to wear them off the jobsite. California OSHA requirements do not address this issue. Federal OSHA rules do have an employer-friendly carve-out for work boots, including steel-toed boots. The zero-risk approach would be to offer some sort of reimbursement, at least until we receive clarity on the issue. If you choose not to offer any reimbursement, you will want to make sure that your policy requires only generic protective shoes. Avoid regulating or specifying the color, style, brand or of the shoes, and allow the employees to wear the shoes both on and off the job.

102. RELIGION: MINISTERIAL EXEMPTION NOT LIBERALLY APPLIED (10/2019)

In *Biel v. St. James School* (December 2018), the Ninth Circuit Court of Appeal rejected application of the ministerial exemption. Biel was a fifth grade teacher at St. James, a Roman Catholic parish school. She was given only one performance review, which was largely positive and with only a few minor areas noted for improvement. Less than six months after the review, Biel notified her employer that she needed time off to undergo surgery and chemotherapy treatment. A few weeks later, Biel was advised that her contract was not being renewed because she was not strict enough in her classroom management and it was not fair for the children to have two teachers during the upcoming school year. Biel sued for discrimination under the ADA and St. James sought to have the case dismissed under the ministerial exemption.

The Ninth Circuit found that the ministerial exemption did not apply because there was no religious component to Biel's liberal studies degree or teaching credential, the school did not have any religious requirements for the 5th grade teacher position, Biel's only religious training consisted of a 1/2-day conference, Biel did not limit her work experience to religious schools, and neither Biel nor the school held her out as a "minister".

Similarly, in *Su v. Stephen S. Wise Temple* (3/8/19), the California Court of Appeal held that the Temple's schoolteachers were not "ministers" and were not subject to the ministerial exemption. The preschool curriculum had both secular and religious content. The teachers were not required to have any formal Jewish education, to be knowledgeable about Jewish beliefs and practices, or to adhere to the Temple's theology. Like the St. James School, the Stephen S. Wise Temple did not refer to its teachers as ministers or the equivalent, nor did the teachers hold themselves out as such.

PRACTICE TIP: Religious and ministerial exemptions are generally narrow, and employers have the burden to prove that the exemption applies. If you believe this type of exemption should apply in your religious organization, pay attention to details such as job titles, job requirements, etc. Also, keep in mind that performance of evaluations must be detailed and accurate. A positive performance review followed by an adverse employment action leads to questions about the employer's true motive.

103. RELIGION: SALVATION ARMY SAVED BY EXEMPTION? (10/2019)

The facts of the *Garcia v. Salvation Army* (March 2019) case and its outcome are beyond the scope of this update. However, we want to briefly highlight two important concepts for religious organizations.

First, the religious organization exemption (which, interestingly, the Salvation Army failed to timely raise in this case) provides that the protections against discrimination under Title VII "shall not apply to an employer with respect to ... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Second, there is also a limited ministerial exemption set forth in the U.S. Supreme Court case of *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.* That ministerial exemption holds that the First Amendment's Establishment and Free Exercise Clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers." Given these special rules, religious organizations should take care in drafting their policies, procedures, and employment contracts, taking into consideration these particularized rights.

104. REPORTING TIME: REQUIRED CALL-IN DEEMED "REPORTING FOR WORK" (10/2019)

In *Ward v. Tilly's, Inc*. (February 2019) the Second District Court of Appeal held that sales clerks at Tilly's clothing stores were entitled to reporting time pay for on-call shifts. Tilly's utilized a few different forms of on-call shifts: (1) the employee was only scheduled for an on-call shift for the day and was required to call in two hours before the shift to see if the employee needed to appear for work; (2) the employee was scheduled for a regular shift which provided for a definite number of hours plus an on-call shift scheduled before the regular shift, and the employee was required to call in two hours before the on-call shift; (3) the employee was scheduled for a regular shift plus an on-call shift after the regular shift, in which case the employee would learn during the regular shift if the employee was needed for the on-call shift. The employee was subject to discipline if the employee failed to call in to see if the employee needed to appear for work.

The Court of Appeal found that a telephone call constituted "reporting for work" under Wage Order No. 7. Today, "reporting for work" is not limited to physically appearing at the jobsite, as might have been contemplated when the language was drafted. To hold otherwise would leave the employee uncompensated for time the employee devoted to being available for

the on-call shift and remaining available to call in rather than committing to other paid employment, school or social opportunities.

The Court of Appeal held that each version of the on-call shift required the employee to "report for work". For days when the employee was scheduled for work, but was not brought in to work an on-call shift either by itself or before a regular shift, the employee was entitled to reporting time pay equal to half of the usual or scheduled day's work for the on-call shift, but in no event less than two hours or more than four hours, at the employee's regular rate of pay. The court did not separately address the third scenario where an employee worked a regular shift and was told during that regular shift that they were not needed for the subsequent on-call shift. The concurring appellate opinion notes that this scenario was not specifically addressed by the trial court that ruled on the underlying demurrer. Accordingly, it does not appear that the Court of Appeal felt it necessary to address the required pay in more detail. The important part of this case is that a telephone call can constitute "reporting for work" and the trial court was directed to proceed with the case based upon that understanding.

PRACTICE TIP: The employer should schedule employees based on the anticipated needs of the business. The courts have not been receptive to allowing employers to have a group of employees "on call" to be ready only in case they are needed. This practice is viewed as benefiting the employer at the employee's expense and necessitates reporting time pay.

105. RETALIATION: ME TOO EVIDENCE APPLIES (10/2019)

Gupta, an American woman of Indian national origin and ancestry, sued the State of California for discrimination and retaliation after she was denied tenure and ultimately fired. (*Gupta v. Trustees of the California State University* (September 2019)). Over the first three years of her employment as an assistant professor in the School of Social Work, Gupta received steadily increasing Student Evaluation of Teaching Effectiveness (SETE) scores. In her third year, she received positive reviews from three other faculty members.

In November 2009, Gupta and several other women of color complained to the Provost and Dean of Faculty Affairs that they were being micromanaged, bullied and subjected to a hostile work environment. They also expressed concerns about discrimination against people of color. Less than two months later, Gupta received a fourth-year review in which she was criticized in multiple areas of her performance, including for purported defects in her syllabi, which turned out to be inaccurate. The review only briefly discussed her SETE scores, which were significantly better than the department mean, and made no mention of the fact that she had published enough articles to meet the requirements for tenure. Shortly thereafter, Gupta again complained that the workplace was hostile toward women of color. In March 2010, in a meeting with the Dean of the College of Health and Social Sciences, the Dean became visibly angry at Gupta and said "I know about [the emails]" and "I'm going to get even with you." Twice over the next two years, Gupta was denied tenure despite having met all of the requirements. She was then terminated.

The year after Gupta was terminated, another professor in the School of Social Work who had not previously complained was granted tenure despite having lower SETE scores than Gupta and failing to meet the minimum publication requirement under the tenure track. The California Court of Appeal found that this evidence was properly allowed to support Gupta's case for retaliation. Gupta was not required to show that her qualifications were clearly superior to those of the other professor. The comparison to a similarly situated individual who had not complained was admissible and persuasive to show discriminatory and retaliatory conduct.

106. RETALIATION: PROXIMITY IN TIME (10/2019)

Hawkins v. City of Los Angeles (September 2019) was a whistleblower retaliation case brought by two former hearing examiners for the city's Department of Transportation (DOT). The hearing examiners claimed that they were fired in retaliation for complaining that their supervisor often pressured them to change their hearing decisions. Specifically, their supervisor pressured them to find drivers liable for violating the Vehicle Code, in which case the City would keep the fine that was paid prior to the hearing rather than returning it to the accused driver. The California Court of Appeal held that there was sufficient evidence to support the hearing examiners' retaliation case. The City's claim that the hearing examiners were terminated for performance problems, some of which happened a year or two before the termination, was not persuasive. The Court found that the closeness in time between the complaints and the terminations established the requisite causal link for retaliation.

107. ROUNDING: BEST PRACTICES (10/2019)

In *Donohue v. AMN Services, LLC* (March 2019), the California Court of Appeal held that AMN's rounding policy was fair and neutral, in compliance with California law. AMN's employees clocked in for the day, out for lunch, back in after lunch and out for the day. For each time punch, AMN's timekeeping system tracked the actual punch time and a rounded time that went up or down to the nearest ten-minute increment. When AMN was sued on a wage and hour class action lawsuit, AMN's expert analyzed the raw and rounded data and was able to show the Court that when all punches were considered, the rounding resulted in an overall net surplus of work hours that were paid to the employees. The Court declined to follow plaintiffs' reasoning based on their own expert's analysis that the policy was unlawful because when only the meal break punches were considered, it resulted in a disadvantage to the employees.

The Court found that there was no evidence of a uniform policy or practice to deny code-compliant meal periods. The rounding practice was not found to be unlawful, even as it related to meal breaks. AMN also had code-compliant meal break policies and procedures and encouraged its employees to report meal break violations. AMN's timesheets also had a statement that the employees had to sign at the end of each pay period indicating that they were either provided the opportunity to take all breaks, or, if not, that they had documented all non-compliant breaks on their timesheet. The representative plaintiff had signed this statement on each of her timesheets. When a late or short punch was recorded, the AMN time clock was set to automatically prompt employees to pick an explanation from a drop-down menu. The employee could report that it was a personal choice to take a short or late meal break, or, that it

was directed or necessitated for a business reason. If a business reason was indicated, the time clock would automatically trigger payment of one hour of premium pay.

PRACTICE TIP: The employer's practice of rounding all working time, including meal periods, was found to be acceptable for payroll purposes in this specific case. However, this would not necessarily occur in other cases. In addition, rounding would not have protected the employer from paying meal period premiums when applicable. Employers are cautioned to ensure that rounding practices are not used to avoid meal period premiums. Overall, the general rule is that rounding practices must benefit the employee, not the employer. (See #108.)

108. ROUNDING: MAKE SURE YOUR POLICY MEETS BOTH REQUIRED CRITERIA (10/2019)

Although the case of *Ferra v. Loews Hollywood Hotel* (October 2019) has several key issues that were addressed by the California Court of Appeal (Second District), this summary will focus only on the court's holdings related to the concept of rounding. Here, Ferra alleged that Loews unlawfully paid her (and other similarly situated employees) by "shaving or rounding time from the hours worked by Ferra." Ferra worked as a bartender for Loews from June 16, 2012 to May 12, 2014. Ferra and other Loews hourly employees clocked in and out of work using an electronic timekeeping system which automatically rounded time entries up or down to the nearest quarter-hour. Surprisingly, the court found the rounding policy to be neutral because "It 'rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding." The Court also found that the policy did not systematically undercompensate employees over a period of time. Strangely, the court noted that "Ferra's time records showed she lost time by rounding in 55.1 percent of her shifts, gained time in 22.8 percent, and the remaining shifts were not affected by rounding." According to the court, "This is not sufficient to show that the rounding policy " 'systematically undercompensate[s] employees' … [a] fair and neutral" rounding policy does not require that employees be overcompensated, and a system can be fair or neutral even where a small majority loses compensation."

PRACTICE TIP: In California, an employer is entitled to use a rounding policy "if the rounding policy is fair and neutral on its face" and "it is used in such a manner that it will not result, over a period of time, in the failure to compensate the employees properly for all the time they have actually worked." To ensure compliance, employers should do periodic audits to identify that the system is working properly. Unfortunately, we often find that the employer's rounding practice regularly favors the employer rather than the employee.

For example, an employee clocks in a minute or two early so as not to be "late". At the end of the day, the employee clocks out a minute or two after the appointed end of the day, so as not to be perceived as "leaving early". As a result, each day the employee loses a couple of minutes on both ends of the shift. Over a week that could be 10-20 minutes or more, and over the 50 weeks worked in the year, the loss would be 500-1000 minutes. Over four years (within the statute of limitation) the loss would be 2,000-4,000 minutes per employee. It is easy to see how the percentages under this type of scenario wildly favor the employer and harm the

employees. That is the significant downside to a rounding practice – and the potential exposure to litigation for the couple of minutes lost per workday.

109. SUMMARY JUDGMENT: TRIABLE ISSUES ABOUND WITH DISCRIMINATION (10/2019)

The case of *Galvan v. Dameron Hospital Assn.* (June 2019), demonstrates the difficulty for an employer to obtain summary judgment in cases of alleged discrimination, harassment or wrongful termination, because those claims are so fact specific; and questions of fact must be decided by a jury. Here, the plaintiff alleged age and national origin discrimination, harassment and constructive wrongful termination because her supervisor alleged discriminated against and harassed Filipino employees who, like her, "could not speak English," had "been [at the company] too long," and "made too much money."

The employer initially prevailed on a motion for summary judgment based solely upon declarations and other documents. The appellate court then overturned the trial court's ruling, in part because it found that the plaintiff had provided sufficient evidence and facts to create "triable issues" that should be decided by a jury – *e.g.,* that the supervisor's "… statements, coupled with Alvarez's criticisms of the unit coordinators' accents, are sufficient to raise a triable issue of material fact as to whether Alvarez's treatment of Galvan and the other Filipino and foreign-born unit coordinators was motivated by their national origin and age."

PRACTICE TIP: A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party initially bears the burden of making a *prima facie* showing of the nonexistence of any genuine issue of material fact. A *prima facie* showing is one that is sufficient to support the position of the party in question. A defendant moving for summary judgment can meet its burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established. Once the defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action. Courts are usually reluctant to grant such motions brought by the defendant and prefer to let the jury decide the issues.

110. TRADE SECRETS: PROTECTING GENERAL INFORMATION BACKFIRED (1/2019)

In *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (November 2018), the California Court of Appeal confirmed California's strong public policy against non-competition agreements. The court found that a confidentiality and non-disclosure agreement that prevented employees from directly or indirectly soliciting any of its temporary traveling nurse employees to leave AMN was void. The court found that identities and contact information of temporary workers is general in nature and not confidential. Many of the temporary workers had worked for multiple temporary placement agencies, sometimes simultaneously. Also, many traveling nurses were members of a public social networking site. Of the specific employees that were allegedly solicited, the competitor was able to show multiple sources from which the names and contact information could have been derived. AMN was not able to show any particular pieces of information that

were (1) confidential, (2) used by defendant to solicit nurses, and (3) the use of which harmed AMN.

PRACTICE TIP: As a cautionary lesson for employers, be careful about trying to implement and enforce confidentiality and non-compete provisions with employees. In the AMN case, not only did AMN lose its case in chief because the confidentiality provision was void, the court found that AMN's attempt to enforce the agreement, by actions including cease and desist letters, constituted unfair competition. AMN was ordered to stop enforcement attempts and ended up having to pay its competitor's attorney fees.

111. UNEMPLOYMENT: INSURANCE BENEFITS (10/2019)

In *Goldstein v.* California *Unemployment Ins. Appeals Bd.*, (April 2019), plaintiff Goldstein applied for and received unemployment insurance benefits from March 23, 2013, through August 10, 2013. He then ceased receiving unemployment benefits because he began receiving disability benefits, which continued until September 2014. The plaintiff then filed a second claim for unemployment insurance benefits, which had an effective date of March 23, 2014. The Employment Development Department denied the second claim because during the preceding benefit year the employee neither was paid sufficient wages nor performed any work. Goldstein unsuccessfully challenged the denial of the second claim for unemployment benefits before an administrative law judge, the California Unemployment Insurance Appeals Board and the Superior Court of California.

The Court of Appeal, in contrast, held that the plaintiff's earlier receipt of unemployment benefits did not disqualify him from receiving unemployment benefits in the following year, contrary to the Board's determination. However, the plaintiff was still ineligible for additional unemployment benefits because he failed to satisfy the requirement that he perform "some work" during the relevant period.

112. VEHICLES: DON'T REQUIRE PERSONAL USE OF A COMPANY VEHICLE (2/2019)

The California Court of Appeal held in *Moreno v. Visser Ranch, Inc.* (December 2018) that an employer could be held liable for a third party's injuries that were negligently caused by an employee during non-working hours. Visser Ranch required its employee to be on call 24 hours a day, seven days a week, to respond to emergency calls for maintenance and repairs. To make the employee's response time quicker, the employer required the employee to drive a company truck at all times. The truck was equipped with the tools necessary for most maintenance and repair projects. The employee took the company truck to his brother's home for a family gathering. When the employee left his brother's home, he caused the automobile accident that injured the third party plaintiff.

The Court held that a jury could find: (1) that the employee's use of the truck to attend a family gathering was done with the employer's permission; (2) that the injuries to the third party were reasonably foreseeable by the employer; and (3) that Visser Ranch derived some benefit from requiring the employee to use the company vehicle during his personal time because it

increased his ability to respond quickly to emergency calls for work. Accordingly, the employer could be held liable for the third party's injuries.

PRACTICE TIP: If you don't want to be your employee's insurer, set clear guidelines that limit the use of company vehicles to work times and work purposes. Alternatively, you can allow the employee to take the vehicle home as long as it is optional and you do not maintain control over what they do in their spare time.

113. WAGES: UNPAID WAGES DO NOT = TORT OF CONVERSION (10/2019)

A creative plaintiff unsuccessfully tried to turn his run-of-the-mill unpaid wages claims against his former employer into common law tort claims for conversion of property. In *Voris v. Lampert* (August 2019), Voris worked alongside Lampert to launch three start-up ventures, partly in return for a promise of later payment of wages, stock, or both. After a falling out, Voris was fired and the promised future compensation never materialized. Voris initially sued his employers (he worked for various related companies), but not Lambert individually. Voris alleged 24 causes of action, and prevailed against the employers on claims of breach of contract and unpaid wages. When his efforts to collect from the companies failed, Voris then sued Lampert personally, alleging that Lampert (through his companies) had "converted" Voris' personal property to his own uses and, therefore, Voris should be able to go after Lampert personally. The court held that "…neither existing case law nor policy considerations warranted extending the tort of conversion to the wage context … the Labor Code already requires prompt payment of a discharged employee (Lab. Code, § 201) and authorizes penalties for noncompliance." Therefore, the court held that a conversion claim was not an appropriate remedy in this instance, and Lampert prevailed.

THIS CASE IS NOT PUBLISHED AND MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.

114. WORKPLACE INVESTIGATIONS (10/2019)

In *Laker v. Bd. of Trustees of California State Univ*. (February 2019), a state university administrator allegedly made defamatory remarks about another faculty member during an internal investigation. The court held that the internal investigation was an official proceeding authorized by law (specifically authorized by Section 89030 of the Education Code), so the administrator's statements were protected. Although courts have held that employee statements to HR are not part of an "official proceeding authorized by law" because the employer (or its HR representative) is neither a government official nor mandated reporter, these statements may still protected from defamation. To be protected, the communications must be between people who have a common interest in the subject matter of the communication, such as preventing or correcting harassment. *See, e.g., Lugo v. Huntington Mem'l Hosp.* (October 2011) in which a federal district court found that the defendant could not have defamed the plaintiff merely by making a privileged communication with an HR employee.

115. WRONGFUL TERMINATION: LEGITIMATE REASONS MUST MAKE SENSE (10/2019)

Plaintiff in *Rubalcaba v. Albertson's LLC* (March 2019) worked at Albertson's for 33 years in both management and non-management roles. In the 1990s, plaintiff began to experience pituitary gland issues. He provided his manager with various doctor's notes and indicated that he may have memory and balance issues. Despite the notes, management and co-workers never observed any memory or balance issues. Over the course of his employment, plaintiff participated in three separate workplace investigations involving his direct boss. In 2012, plaintiff was written up for an altercation in which plaintiff (who was off the clock at the time and purchasing groceries), became angry with another employee when that employee put his hot fried chicken and ice cream in the same grocery bag. He allegedly grabbed the back of the other employee's neck, jabbed that employee in the ribs, and called him a "dumb ass." Plaintiff was written up.

In June 2013, plaintiff was instructed to take down an in-store display and to throw out the crates from the display. Rather than throwing the crates away, he took the crates home, as he was planning to move. Although plaintiff offered to return or pay for the crates when questioned by Albertson's about the missing crates, Albertson's terminated him for theft. Plaintiff then sued Albertson's for multiple causes of action, including (among others) disability discrimination and wrongful termination.

The appellate court reversed the trial court's decision granting summary judgment in favor of Albertson's on plaintiff's disability discrimination claim. According to the court, FEHA is designed both to protect disabled persons who need reasonable accommodations to perform the essential functions of a job, and *to prohibit discrimination against employees whose disabilities have no bearing on their ability to perform a given job*. The fact that co-workers never observed any of plaintiff's memory or balance issues did not matter. The court found that a factfinder *could conclude* that Albertson's proffered reason for terminating plaintiff (taking three discarded crates and then offering to pay for them when Albertson's objected) was not credible because of plaintiff's long history of employment and the fact that the prior physical altercation did not result in his termination. Although Albertson's had the *right* to terminate plaintiff for any nondiscriminatory reason, even a trivial one, the trivial nature of the violation combined with allegations of disability discrimination was enough to call the employer's true motivation into question. As a result, the court held that the case should be presented to the jury to decide the issue.

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