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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *February 2016*

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Jennifer Lutz
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AGENCY

Federal

EEOC Seeks to Include Pay Data on EEO-1 Form

On January 29, 2016, the Equal Employment Opportunity Commission ("EEOC") announced that it was proposing revisions to the Employer Information Report (known as "EEO-1") to include pay data. The announcement took place on the seventh anniversary of the passage of the Lilly Ledbetter Fair Pay Act, a federal statute extending the time period for filing complaints of employment discrimination regarding compensation. The agency's proposed revisions reflect the continued efforts of the EEOC and the White House to achieve equal pay in the workplace. According to the White House, women working full time in the United States earn approximately 79% of what is earned by men working full time.

Currently, private employers with more than 100 employees (and contractors with more than 50 employees) are required to complete the EEO-1 form, which seeks information regarding the race, ethnicity, and sex of employees in relation to ten job categories. If the proposed revisions to the EEO-1 form are adopted, then starting in September 2017, private employers with more than 100 employees must also submit information regarding aggregate pay data and hours worked. Contractors with fifty to ninety-nine employees will not be required to submit this additional information.

According to the proposed changes, covered employers must look to employees' W-2 earnings as the measure of pay. The revised EEO-1 form will include 12 "pay bands" for the ten job categories. Employers will be required to count and report the number of employees in each pay band, based on the employees' W-2 wages.

Covered employers must also report the total number of hours worked by the employees included in each EEO-1 pay band cell. Employers are only required to report data that they already maintain; the EEOC is not proposing that employers begin collecting data on the hours worked by salaried employees if such information does not already exist.

The EEOC is now seeking public comment on the proposed revisions. Comments are welcome through April 1, 2016.

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JUDICIAL

California

Court of Appeal Denies Class Certification to Putative Class of Farm Labor Contractors

In *Cruz v. Sun World International, LLC*, agricultural employees sued Sun World International, LLC ("Sun World") for various wage and hour violations. The group of plaintiffs included employees that had been directly hired by Sun World as well as employees that were supplied by farm labor contractors ("FLC"). The plaintiffs alleged that Sun World required employees to perform pre-shift and post-shift work without compensation, failed to provide them their full rest and meal breaks or compensate them for breaks that were not provided, required them to provide their own tools without reimbursement, failed to provide them with accurate wage statements, and failed to timely pay all wages due at the time of termination. The trial court denied the plaintiffs' motion for class certification, and the Court of Appeal affirmed.

In its decision, the appellate court noted that the FLC workers were not a sufficiently ascertainable group for class treatment because Sun World did not maintain records identifying all of the FLC workers, and efforts to obtain that information did not appear to be effective. While the plaintiffs argued that the grower was the FLC workers' joint employer and that it had the legal obligation to maintain this information, they failed to prove the alleged joint employment relationship.

As to the putative class of Sun World's direct employees, common issues did not predominate. More specifically, the plaintiffs failed to demonstrate that Sun World had a uniform policy or practice that violated the law and that affected employees outside of Kern County or employees who worked with any crop other than grapes. Accordingly, the trial court did not err in denying class certification.

Court of Appeal Approves Use of Federal Formula to Calculate Overtime Wages on Flat Sum Bonuses

In *Alvarado v. Dart Container Corporation of California*, a California Court of Appeal held that an employer's calculation of flat sum bonuses was lawful despite the fact that the formula applied differed from that in the Division of Labor Standards Enforcement's ("DLSE") Policies and Interpretations Manual. Plaintiff Hector Alvarado ("Alvarado") worked as a warehouse associate for the Dart Container Corporation of California ("Dart").

Dart's policy awarded an attendance bonus to employees who were scheduled to work—and completed—a full weekend shift. Employees received $15 for working a full shift as scheduled on a Saturday or Sunday, regardless of the number of hours worked beyond the scheduled shift length. Alvarado filed a complaint alleging that Dart improperly computed overtime on the attendance bonuses.

Areas of Practice

Appellate

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Transportation

Dart's calculation of overtime paid on the bonuses during a particular pay period was adopted from a federal regulation, 29 C.F.R. sections 778.209.

Dart argued that the federal regulation could be utilized because no California law provided a formula for calculating overtime when flat sum bonuses are awarded. Alvarado disagreed, arguing that the federal formula's dilution of the regular rate of pay violates California public policy by discouraging overtime. Alvarado asserted that Dart's calculation must comply with the formula in sections 49.2.2.4 and 49.2.4.3 of the DLSE Manual.

The appellate court found that while the DLSE Manual formula is a reasonable way to calculate overtime wages, it is not the only reasonable method. The court emphasized that while the DLSE Manual provisions can be persuasive, they are "void regulations" which are not binding on the court. The court stressed that the only source cited in the DLSE Manual for the flat sum bonus rule is "public policy," and no applicable California statute or regulation requires employers to use the DLSE formula. Accordingly, Dart lawfully used the federal formula for computing overtime on Alvarado's flat sum bonuses.

Alvarado serves as a good reminder that the DLSE's policy are not necessarily California law. However, employers are advised to consult with counsel before instituting practices that arguably run afoul of the DLSE's guidance.

Court of Appeal Holds Employee Reimbursement Agreement Enforceable

In *USS-POSCO Industries v. Floyd Case*, a California court of appeal found that an employer's reimbursement agreement was enforceable where the agreement was voluntarily entered into by the employee. USS-POSCO Industries ("UPI") hired defendant Floyd Case ("Case") in 2007 as an entry level laborer and side trim operator. Case thereafter became a member of the United Steelworkers of America ("the union"). Due to a shortage of skilled Maintenance Technical Electrical ("MTE") workers within its ranks, UPI decided to implement a learner program to train ten current employees, in an effort to qualify them as MTE workers. UPI and the union agreed that UPI may require candidates in the learner program to sign a reimbursement agreement requiring reimbursement for a portion of the training should a candidate voluntarily terminate employment within thirty months of completing the program. Enrollment in the program was voluntary, and Case was informed of the reimbursement requirement during a training session for prospective participants. Case was specifically told the reimbursement obligation would be $46,000, prorated over 30 months. Case signed the written reimbursement agreement, completed the program, and left UPI approximately two months after completing the program.

UPI sued Case for breach of contract and unjust enrichment, alleging damages of $28,000 (the prorated amount) pursuant to the reimbursement agreement. Case filed a cross-complaint on behalf of himself and a class of individuals who signed the reimbursement agreement, seeking a declaration that the reimbursement agreement was invalid, disgorgement of any payments made by employees under the agreement, and penalties under the Private Attorneys General Act ("PAGA"). UPI filed a motion for summary judgment, which the trial court granted.

The court of appeal affirmed, holding that the reimbursement agreement was entered into voluntarily, did not violate the Labor Code, and was not an unlawful restraint on employment. The appellate court additionally found that Case's cross-complaint failed to set forth a separate PAGA cause of action (i.e., the one-line request for PAGA penalties in the prayer for relief section of the cross-complaint did not constitute a valid PAGA claim), and did not comply (or even reference) PAGA's exhaustion requirements.

While this case lends some support to employers seeking to enforce reimbursement agreements for education and training, employers are advised to consult with experienced employment counsel prior to requiring employee reimbursement of any business-related expenses. This case additionally demonstrates that employers may be able defeat an improperly pled PAGA claim at the outset of a case (although in most cases the employee will be given an opportunity to fix the errors).

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