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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *March 2016*

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Jennifer Lutz
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LEGISLATION

The California legislature is currently considering various pieces of legislation that, if passed and signed into law by Governor Brown, may impact California's employers as well as employees. These bills include:

AB 67 (Gonzalez): This bill, referred to as the Double Pay on the Holiday Act of 2016, would require particular large employers (with more than 500 employees) to pay nonexempt employees twice their regular rate of pay for working on Thanksgiving Day. It is important to note that 2015's version of the bill would have applied to almost all employers. AB 67, however, would only apply to employees working in "retail store" or "grocery store" establishments. This bill has been referred to the Committee on Labor and Industrial Relations.

AB 1383 (Jones): This bill would authorize employers to extend a preference during hiring decisions to honorably discharged veterans. This bill unanimously passed the Assembly and is pending in the Senate's Judiciary Committee.

AB 1676 (Campos): Citing a concern that salary history potentially institutionalizes prior discriminatory pay practices, this bill would add Labor Code section 432.3 and prohibit any employer from seeking salary history information about an applicant for employment. Governor Brown vetoed a similar bill (AB 1017) last year. AB 1676 has been referred to the Committee on Labor and Employment.

AB 1843 (Stone): Current California law prohibits employers from requiring applicants to disclose information concerning an arrest or detention that did not result in a conviction. Employers are also prohibited from using this as a factor in determining employment conditions. AB 1843 would expand current California law to also prohibit employers from inquiring about or using information related to specific juvenile court actions or custodial detentions. The bill has been referred to the Assembly Committee on Labor and Employment.

AB 1948 (Wagner): Labor Code section 226.7 prohibits employers from requiring employees to work during a meal or rest or recovery period, and requires employers to pay one additional hour of pay at the employee's regular rate for each type of violation per day of this provision. AB 1948 would amend Labor Code section 226.7 to specify that the one hour of the regular rate of pay shall be the entire penalty awarded for a violation of this section. AB 1948 has been referred to the Committee on Labor and Employment.

SB 1001 (Mitchell): This bill would amend California's Fair Employment & Housing Act to specify that it would be an unlawful employment practice for an employer to: (a) request more or different documents than required under federal law for employment verification purposes; (b) refuse to honor documents that appear reasonably genuine; (c) discriminate against immigrants with authorization to work based upon their

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immigrant status or because of their work authorization; or (d) attempt to reinvestigate or re-verify an incumbent employee's authorization to work unless legally required to do so. SB 1001 has been referred to the Committee on Judiciary.

SB 1063 (Hall): SB 1063, which seeks to amend sections 1197.5 and 1199.5 of the California Labor Code, would prohibit employers from paying an employee at a wage rate less than the rate paid to employees of another race or ethnicity for substantially similar work when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions. As with the present version of the California Fair Pay Act, the employer would bear the burden of demonstrating that the wage differential is based upon one or more of the following factors: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) a bona fide factor other than race or ethnicity, such as education, training or experience. This bill has been referred to the Committees on Labor and Industrial Relations and Judiciary.

SB 1166 (Jackson): This bill, referred to as the New Parent Leave Act, would require employers with five or more employees to provide up to 12 weeks of parental leave for an employee (male or female) to bond with a new child within one year of the child's birth, adoption or foster care placement. The California Family Rights Act ("CFRA") already provides this protection to an employee who works for an employer with more than 50 employees if he or she works 1,250 hours in the preceding 12 months. As with the CFRA, under this new potential law, an employer must guarantee the employee reinstatement in the same or a comparable position. The bill would also authorize an employee to use accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off as negotiated with the employer during this parental leave. Employers would also be required to maintain and pay for medical coverage for an eligible employee who takes parental leave. This parental leave would run concurrently with the CFRA and the Family and Medical Leave Act ("FMLA"), except for leave taken because of disability due to pregnancy, childbirth or a related medical condition. The aggregate amount of leave taken under this new section, the CFRA or the FMLA, or any combination (except for pregnancy/childbirth-related disabilities), shall not exceed 12 weeks in a 12-month period. SB 1166 has been referred to the Committees on Labor and Industrial Relations and Judiciary.

SB 1167 (Leyva): Since 2006, California's Division of Occupational Safety and Health ("DOSH") has adopted and enforced regulations establishing a heat illness prevention standard for outdoor workers. This bill would require DOSH, by July 1, 2017, to propose for adoption a heat illness and injury prevention standard applicable to indoor workers that provides equal or greater protection than that for outdoor workers. SB 1167 has been referred to the Committee on Labor and Industrial Relations.

We will continue to keep employers apprised of the status of these bills throughout the legislative session.

AGENCY

California

Proposed Regulations Seek to Limit Employers' Ability to Rely on Criminal Background Checks as a Basis for Employment Decisions

Marking a continued trend toward limiting when and how criminal history of applicants and employees may be considered, California's Fair Employment and Housing Commission ("FEHC") has issued proposed regulations aimed at further curtailing the ability of employers to utilize and rely upon criminal history information when making employment decisions.

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The FEHC has proposed the addition of section 1107.1 (the "Proposed Legislation") to the California Code of Regulations, which would both summarize existing state law prohibiting the use of certain criminal history information to influence employment decisions and create additional restrictions on California employers' ability to rely upon criminal history information in making those decisions.

The Proposed Legislation has two main components. The first would prohibit employers from relying on criminal history information in making an employment decision if doing so would have an "adverse impact" upon individuals who are members of a protected class. By doing so, the legislation would serve to further widen the protections afforded to protected class members. Employers would also be required to provide an individual with notice of the allegedly disqualifying conviction and give that individual the opportunity to dispute the accuracy of the information giving rise to the decision.

The second revision would prohibit employers from taking adverse employment actions where the employer is unable to demonstrate that the criminal history is job-related and consistent with business necessity. The Proposed Legislation offers specific guidance on how to meet this standard by noting that, if the policy or practice of considering criminal convictions creates an adverse impact on an applicant or employee based on his/her membership in a protected class, the burden shifts to the employer to establish that the policy is both job-related and consistent with a business necessity.

In order to make its determination, the employer must clearly demonstrate its consideration of the following factors: 1) the nature and gravity of the offense or conduct; 2) the time that has passed since the offense or conduct and/or completion of the sentence; and 3) the nature of the job held or sought. If an employer is unable to clearly articulate, based on these factors, that a decision based on criminal history is both job-related and consistent with business necessity, it will be prohibited from making an adverse employment decision.

Moreover, *even if* an employer is able to show that an inquiry regarding criminal history is both job-related and consistent with a business necessity, an applicant or employee would still be able to bring a discrimination claim under the Proposed Legislation if he/she is able to show that there is a less discriminatory alternative means of achieving the business necessity.

If the Proposed Legislation is enacted, California employers will need to take an even closer look at criminal background check policies. Policies which include a bright-line disqualification will need to either be abandoned or more narrowly tailored to fit the morphing legislation, while *all* policies will need to be reviewed for compliance. California lawmakers continue to demonstrate their strong desire to protect individuals from adverse employment decisions based solely on criminal history. California employers should therefore be increasingly reticent of policies which rely on criminal background checks as a basis for decision-making.

The "comment period" on the Proposed Legislation permits the submission of written comments until April 7, 2016, the same day that a public hearing will be held to discuss its viability.

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New FEHC Regulations

California employers will need to comply with a new set of regulations promulgated by California's Fair Employment and Housing Council. The regulations become effective on April 1, 2016. Among other things, the new regulations require employers with five or more employees to have a written policy against unlawful harassment, discrimination, and retaliation in the workplace, and the regulations require the policies to meet certain requirements.

To be in compliance, a company's policy must list all of the protected categories under California's Fair Employment and Housing Act: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status. In addition, the policy must prohibit unlawful harassment, discrimination, and retaliation by supervisors, managers, coworkers, and third parties such as vendors or customers. It must also state that contractors, unpaid interns, and volunteers are protected under the policy.

The policy must establish a complaint process that includes confidentiality to the extent possible, a timely response to a complaint, a timely and impartial investigation by a qualified person, documentation and tracking for reasonable progress, appropriate due process, a reasonable conclusion based on the evidence collected, appropriate options for remedial actions and resolutions, and timely closure. The complaint process must not require employees to complain to their immediate supervisor. Rather, there must be a means for employees to complain to human resources or another neutral manager, to complain via a hotline, to a designated ombudsperson, or to the Department of Fair Employment and Housing or the Equal Employment Opportunity Commission. The policy must also direct supervisors to report any complaints of violations to human resources or another person in the company so that a prompt internal investigation may occur. The policy must specify that employees and others who complain of violations of the policy shall not be exposed to retaliation for bringing a complaint or participating in an investigation.

A California employer must provide a copy of the policy to each of its employees. Employers can provide the policy in a written document with an acknowledgement to sign and return, or via email with an acknowledgement return form. The policy may also be posted on a company's intranet site with a tracking system to ensure employees read and acknowledge it, and it may be presented to and discussed with new hires at orientation. If the workforce at any location contains 10 percent or more employees who speak a language other than English, the policy must be translated into every language that is spoken by at least 10 percent of the workforce.

JUDICIAL

Federal

Ninth Circuit Upholds Regulation Restricting Tip Pooling Practices

In *Oregon Restaurant & Lodging Association v. Perez* (9th Cir. No. 13-35765, Feb. 23, 2016), the Ninth Circuit Court of Appeals ("Ninth Circuit") upheld a regulation promulgated by the U.S. Department of Labor ("DOL"), which prohibits employers from using employees' tips for any purpose other to take a tip credit or to further a valid tip pool. Consequently, employers may not adopt a tip pooling policy that allows employees who are not "regularly and customarily" tipped to participate in the pool, regardless of whether a tip credit is taken.

Pursuant to the federal Fair Labor Standards Act ("FLSA"), an employer may fulfill part of its minimum wage obligation to a tipped employee with the employee's tips (i.e., by taking a tip credit). Under section 203(m) of the FLSA, employers who take a tip credit must (1) give notice to their employees of this practice; and (2) allow employees to retain all tips they receive, unless the employees participate in a valid tip pool. A tip pool is valid if it is comprised of employees who are "customarily and regularly" tipped.

In *Oregon Restaurant*, the employers paid tipped employees at least the federal minimum wage, choosing not to take a tip credit. However, the employers required their tipped employees to participate in tip pools, which were comprised of customarily tipped employees and non-customarily tipped employees. Two district courts ruled that a recent Ninth Circuit decision, *Cumbie v. Woody Woo, Inc.* (9th Cir. 2010) 596 F.3d 577, validated this tip arrangement, and further determined that a DOL regulation that prohibited such an arrangement was invalid. The Ninth Circuit reversed the district courts, holding that the DOL was not foreclosed from promulgating the regulation at issue and that the regulation was entitled to *Chevron* deference.[1]

In *Cumbie*, the Ninth Circuit analyzed a tip pooling practice in which tipped employees earned at least the minimum wage in cash, but were also required to contribute their tips to a tip pool that included employees who were not regularly or customarily tipped. The Court of Appeals determined that section 203(m) applied only to employers who did take a tip credit, because the section 203(m) created a "statutory inference" relating to that practice. On the other hand, section 203(m) is silent as to the validity of tip pooling where an employer meets its minimum wage obligation without taking a tip credit; there is no "statutory inference" to be drawn in that situation. Accordingly, in the absence of a "statutory inference" to the contrary, the court upheld the tip pooling practice.

However, shortly after *Cumbie* was decided, the DOL promulgated a formal rule (the "2011 rule") extending the tip pool restrictions of section 203(m) to all employers, not just those who take a tip credit. Pursuant to the 2011 rule:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section [20]3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section [20]3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

(29 C.F.R. § 531.52.) The employers in *Oregon Restaurant* argued that *Cumbie's* holding foreclosed the DOL's ability to promulgate the 2011 rule and that the 2011 rule was invalid under *Chevron*.

The Ninth Circuit disagreed. First, the appellate court explained that Congress has not directly spoken on whether the DOL may regulate the tip pooling practices of employers who do not take a tip credit. In *Cumbie*, the court noted that, where a statute is silent as to a particular practice, and no relevant provision expressly or implicitly prohibits the practice, there is no violation. "[N]othing in the text [of the FLSA] purports to restrict" a tip pooling practice where a tip credit is not taken; the FLSA is thus silent as to this

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[1] In *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* (1984) 467 U.S. 837, the U.S. Supreme Court set forth the analytical framework for determining whether an agency's interpretation of a statute is valid—if a regulation or other agency interpretation survives this framework, it is valid and therefore entitled to so-called "*Chevron* deference." The *Chevron* analysis requires the court to address two questions: (1) has Congress directly spoken to the precise question at issue; and (2) if the statute is silent or ambiguous as to Congress' intent, is the agency's action based on a permissible construction of the statute?

practice. Accordingly, the Ninth Circuit found that the first step in the *Chevron* analysis was satisfied.

Second, the Court of Appeal determined that the DOL's interpretation of section 203(m) was reasonable. The agency promulgated the rule after a notice-and-comment period, after receiving many comments that section 203(m) was "confusing" or "misleading" as to the ownership of tips. Thus, it was appropriate for the DOL to clarify the statute. Moreover, the legislative history of the FLSA supported the DOL's statutory construction that "tips are the property of the employee," as the Committee reports indicated that tipped employees should have greater protection and that customers have the right to determine who is the recipient of the tip. Therefore, the Ninth Circuit concluded that the DOL's interpretation reflected a permissible construction of the statute. Accordingly, the regulation was valid.

The *Oregon Restaurant* decision brings federal law closer in line with California law, which provides that tips are the sole property of the employee(s) to whom they are given or for whom they are left. (Cal. Labor Code, § 351.) Although the Labor Code prohibits the use of any tip credits, voluntary tip pooling and involuntary tip pooling, where the practice is reasonable (e.g., includes employees who are in the "chain-of-service") are permissible under state law. Employers subject to the FLSA should review their tip pooling policies to ensure that they are in compliance with this decision.

California

Court of Appeal Rules Arbitration Agreement Unconscionable Where Rules Are Not Provided and Terms Unfairly Favor Employer

In *Carbajal v. CWPSC, Inc.*, a California Court of Appeal denied an employer's motion to compel arbitration on the grounds that the arbitration provision in its employment agreement was both procedurally and substantively unconscionable.

Plaintiff Martha Carbajal ("Carbajal") accepted a job in sales and management with CWPSC. Inc. ("CW Painting") in November 2011. Upon being hired, Carbajal was required to enter into a mandatory arbitration agreement ("the Agreement"). The Agreement provided that any claims by Carbajal against CW Painting would be arbitrated under the rules of the American Arbitration Association ("AAA"), and that Carbajal waived her right to bring any claims as a class action. Moreover, under the terms of the Agreement, Carbajal was required to waive her statutory right to recover attorney fees for Labor Code violations.

Further, although most of the terms of the arbitration were bilateral, CW Painting included a carve-out from the arbitration requirement for its own claims seeking injunctive relief against Carbajal. Despite these terms, Carbajal signed the Agreement to secure her employment.

Following her resignation in August 2012, Carbajal filed a class action lawsuit against CW Painting in California Superior Court, alleging a series of Labor Code violations. CW Painting filed a motion to compel arbitration. The trial court denied the motion on the grounds that the Agreement was procedurally and substantively unconscionable. CW Painting appealed, arguing that the trial court had incorrectly analyzed the Agreement.

On appeal, the Court of Appeal ruled that the Agreement was both procedurally and substantively unconscionable, and therefore unenforceable. The Court of Appeal based its ruling as to procedural unconscionability in part on the fact that the agreement was a mandatory condition of employment not open to negotiation, and on the grounds that

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CW Painting neither disclosed the specific AAA rules to be utilized in arbitration nor advised where the applicable rules could be found. The Court of Appeal found the arbitration agreement to be substantively unconscionable because it allowed CW Painting to bring the actions it was likely to assert (e.g., claims for injunctive relief) in civil court, while requiring Carbajal to arbitrate the claims she was likely to bring (*e.g.*, actions for Labor Code violations). Moreover, Carbajal's mandatory waiver of her right to recover attorneys' fees and the elimination of certain statutory obligations for CW Painting were viewed as unconscionable terms favoring the employer, affirming that the Agreement as unenforceable.

For California employers utilizing arbitration agreements, this decision reiterates the need to set forth the terms of the agreement clearly, and to ensure that those terms are sufficiently equitable to be held enforceable. Moreover, provisions that are ostensibly fair may be found to be unconscionable if they operate in a manner that functionally benefits only the employer. Employers are advised to have their arbitration agreements reviewed by skilled employment counsel to maximize the likelihood that they will be enforced.

Court of Appeal Applies *Harris* Substantial Motivating Factor Test to Disability Discrimination Claim

In *Wallace v. City of Stanislaus*, a California Court of Appeal held that the "substantial motivating factor" test articulated in *Harris v. City of Santa Monica* should be used to prove discriminatory animus. Plaintiff Dennis Wallace ("Wallace") started working as a deputy sheriff for Defendant County of Stanislaus (the "County") in 1997. In 2007, Wallace injured his left knee and filed a workers' compensation claim for that injury. He later reinjured his knee during a river sweep, and started wearing a knee brace at work. In September 2008, he underwent knee surgery and went on a paid leave of absence. When Wallace returned to work, he received a light duty assignment in the property and evidence room. The County offered him a long-term modified duty assignment as a bailiff at his pre-injury rate of pay that complied with his restrictions, which were considered permanent until he had an agreed medical exam. Following his agreed medical exam, the doctor issued a report listing additional work restrictions. A disability coordinator for the County determined that there was no modified or alternative work available that complied with Wallace's new work restrictions. Following a meeting to discuss the department, the County placed Wallace on an unpaid leave of absence in January 2011.

Wallace filed a lawsuit against the County for disability discrimination in May 2011. Wallace continued to maintain that he could perform the essential functions of a deputy sheriff. In July 2012, the County offered to send Wallace to a fitness-for-duty exam. Following that exam, a doctor issued a report and Wallace returned to full duty as a patrol officer five days later. At trial, the jury found that Wallace was treated by the County as if he had a disability, Wallace was able to perform the essential duties of a deputy sheriff, and the County failed to prove that Wallace was a danger to himself or others in performing the essential duties of a deputy sheriff. The next question posed to the jury was whether or not the County regarded or treated Wallace as having a disability in order to discriminate. The jury answered this question about the County's animus or intent to discriminate in the negative. The court declared a mistrial as to other claims on which the jury was deadlocked, and motions for summary adjudication followed. A second jury trial was held for the remaining claims, and the jury found in favor of the County. Wallace appealed.

The court cautioned courts and practitioners not to automatically apply the burden principles of *McDonnell Douglas* to disability discrimination cases because, unlike other forms of discrimination, disability discrimination often has direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition. The court also emphasized that California law does not require an employee with an actual

or perceived disability to prove that the employer's adverse employment action was motivated by animosity or ill-will against the employee. An employer can be liable for disability discrimination when a decision is made based on erroneous or mistaken beliefs about the employee's physical condition, even if the mistake was reasonable and made in good faith. The County argued that Wallace was unable to perform his job safely, and that was a legitimate business reason to place him on unpaid leave. The court found that the County's "legitimate business reasons" were actually erroneous in light of the County's mistaken belief that Wallace was unable to perform his job safely.

Based on *Harris*,[2] the appellate court found that an employer has treated an employee differently because of a disability when the disability is a substantial motivating reason for the employer's decision to subject the employee to an adverse employment action. Thus, the appellate court held that the jury should have been instructed on the "substantial motivating factor" test in connection with the County's requisite intent to discriminate.

The court's opinion mentions several things that the County did not do when it determined that Wallace could not perform the essential duties of any position in the department, and this provides some guidance as to actions employers should take when making this decision. The court pointed out that the decision-makers did not ask Wallace's supervisors if he was able to perform the job. Additionally, the County held a meeting to explain its decision that there was no position that would comply with Wallace's work restrictions notwithstanding Wallace's statement that he could perform the functions of a detective or school resource officer.

This case serves as a good reminder that employers must engage in a good faith interactive process with disabled employees and consider all reasonable requests for accommodation. It is also a good idea for employers to document their efforts to engage in the interactive process, and to consult with experienced employment counsel in the event they have questions about their ongoing legal obligations.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Ryan Nell, Lauren Bates, Jennifer Suberlak or Shannon Finley at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.

[2] Between the first and second jury trial, the California Supreme Court held in *Harris* that a jury should be instructed to determine whether discrimination was "a substantial motivating factor/reason" for the employer's adverse action against the employee.