PettitKohn
Pettit Kohn Ingrassia & Lutz

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *July 2016*

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

LEGISLATIVE

CALIFORNIA

San Diego's Earned Sick Leave and Minimum Wage Ordinance

On July 11, 2016, the San Diego City Council voted to adopt the June election results, rendering San Diego's Earned Sick Leave and Minimum Wage Ordinance effective immediately. The ordinance sets the minimum wage for employees working within the city of San Diego at $10.50 per hour. On January 1, 2017, the City's minimum wage will increase again to $11.50 per hour. Beginning in 2019, the local minimum wage will be tied to the Consumer Price Index and adjust as necessary based on the cost of living. Moreover, the ordinance requires employers to provide a more generous sick leave policy than required by state law (five days rather than three days).

The City Council also approved the first reading of an implementing ordinance. The implementing ordinance addresses issues related to accrual and carry-over of sick leave and makes the San Diego ordinance more consistent with state law.

Once the implementing ordinance is approved, employers will be permitted to: either (1) cap accrual of paid sick leave at 80 hours, or (2) pre-load each full-time, part-time and temporary employee with 40 hours of paid sick leave at the beginning of each benefit year (known as the "bank method" pursuant to state law). If the bank method is used, employers will not be required to track employees' sick leave accrual and need not allow any unused sick leave to carry over to the following year.

The implementing ordinance also sets forth that employers who provide employees with at least 40 hours of paid time off, paid vacation or paid personal days which can be used for the same purposes, and under the same conditions, of the ordinance are not required to provide additional leave. The implementing ordinance also provides that employers who provide greater paid time off than is required by the ordinance (such as through a collective bargaining agreement or benefit plan) are deemed in compliance with the law, even if the employer uses an alternative method for calculation, payment, or use of paid sick leave.

The implementing ordinance also strengthens enforcement provisions and sets higher penalties for non-compliance.

If the City Council approves the implementing ordinance at its second reading (currently expected to be July 25, 2016), the implementing ordinance will go to Mayor Kevin Faulconer to either approve or veto. If Mayor Faulconer approves the implementing ordinance, it will take effect 30 calendar days from his approval.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

The City of San Diego will publish the required poster and employee rights notice by September 1, 2016. Employers must provide the notice of the ordinance to all new hires and current employees by October 1, 2016. Failure to provide the required notice can result in a penalty of $500 for each employee, up to a maximum of $2,000.

New PAGA Amendments Increase LWDA Supervision over PAGA Claims and Settlements

On June 15, 2016, the California Legislature approved Governor Brown's budget, which included Senate Bill 836 and amendments to the Private Attorneys General Act ("PAGA"). The amendments became effective on June 27, 2016, and provide for more oversight by the California Labor and Workforce Development Agency ("LWDA") in enforcing PAGA claims.

In his initial proposal of SB 836, Governor Brown stated that "given the scope and frequency of PAGA filings, there is a great opportunity to increase the rate of administrative handling of cases versus the courts." As a result, the LWDA now has sixty days to review PAGA notices instead of thirty days; a PAGA plaintiff cannot commence a civil action until sixty-five days after sending notice to the LWDA, instead of thirty-three days; and the LWDA has sixty-five days to notify the plaintiff and employer of its intent to investigate, instead of thirty-three days.

Additionally, any proposed PAGA settlement must be provided to—and approved by— the LWDA concurrently with the court. For cases filed on or after July 1, 2016, the LWDA may extend its deadline to issue citations to up to 180 days, and the LWDA must be served with a copy of any PAGA complaint.

In a further effort to streamline administration of the claims, SB 836 requires all PAGA notices and cure notices to be submitted to the LWDA online, along with a $75 filing fee.

The impact of the amendments on the rising number of PAGA claims is unclear. However, it is possible that the amendments will result in increased review by the LWDA of initial notices of claims by private parties, as well as increased intervention in proposed settlements.

JUDICIAL

Federal

Ninth Circuit Upholds Summary Judgment in Favor of Employer in ADA Case

In *Mendoza v. Roman Catholic Archbishop,* the Ninth Circuit Court of Appeals ("Ninth Circuit") held that the trial court properly granted summary judgment in favor of an employer on disability discrimination and disparate treatment claims because the employee failed to show that "discriminatory animus was the sole reason for the challenged action" or that the legitimate reason proffered for the employer's action was merely pretext for discrimination.

Plaintiff Alice Mendoza ("Mendoza") worked full-time as a bookkeeper for a small parish church for the Roman Catholic Archbishop of Los Angeles ("Defendant"). Mendoza was on medical leave for ten months, during which time the pastor took over the bookkeeping duties himself. During this time, the pastor determined that the job could be done by a part-time bookkeeper. When Mendoza returned from leave, there was no longer

a full-time bookkeeping position. Defendant offered her a part-time job, and Mendoza declined the part-time position.

Mendoza filed a lawsuit against Defendant alleging that it violated the Americans with Disabilities Act of 1990 ("ADA") when it failed to return her to a full-time position following her medical leave. The trial court granted summary judgment in favor of Defendant on Mendoza's disability discrimination and disparate treatment claims, holding that Mendoza failed to raise a triable issue of material fact as to whether Defendant's legitimate, nondiscriminatory reason for not returning Mendoza to full-time work was pretextual. Mendoza appealed, and the Ninth Circuit affirmed.

The Ninth Circuit reasoned that under the ADA, if an employee establishes a prima facie case and the employer provides a nondiscriminatory reason for its adverse action, the employee must raise a triable issue as to pretext. The Ninth Circuit reiterated that a plaintiff who alleges disparate treatment must demonstrate that (1) discriminatory animus was the sole reason for the challenged action; or (2) discrimination was one of two or more reasons for the challenged decision, at least one of which may be legitimate. Here, Mendoza did not demonstrate that Defendant's legitimate reason for the employer's action (the elimination of the full-time bookkeeper position) was pretext for discrimination, and failed to establish that a full-time position was available.

In a rare win for employers, this decision illustrates how an employer can prevail based on its legitimate, nondiscriminatory reason for an adverse employment action, and emphasizes that the employee bears the burden of proof. Nonetheless, employers should exercise caution, and seek legal counsel if necessary, when making business decisions that significantly affect employees on any leave of absence.

Ninth Circuit Rules Cash Paid to Employees in Lieu of Benefits Must Be Included in Pay Rate Calculations for FLSA Compliance

In *Flores v. City of San Gabriel*, the Ninth Circuit Court of Appeals ("Ninth Circuit") weighed in on the question of whether cash payments to employees in lieu of benefits must be included in calculating the employees' overtime rate, or whether the payments should be exempted like the benefits they replace. The Court ruled that such cash payments were distinguishable from payments to third parties for benefits such as a health insurance, and accordingly, the payments were required to be added into the plaintiffs' pay rate for purposes of the Fair Labor Standard Act ("FLSA").

The FLSA provides that employees who work over forty hours in a seven-day week are entitled to overtime pay at the rate of one and one-half times their regular rate of pay. The "regular rate" includes all compensation for employment paid to the employee, subject to a set of specific exclusions. Among these exclusions are sick and vacation pay, reimbursement of business-related expenses, and payments made to a third party for retirement or insurance benefits.

The City of San Gabriel ("the City") maintained a benefits program wherein it provided funds to employees to purchase health, dental and vision insurance. Employees who maintained health insurance outside the City's benefits program (most commonly through a spouse) were entitled to receive a monthly cash payment instead of the health insurance contribution. These cash payments were not factored into the City's calculation of overtime pay rates.

In 2012, a class of employees brought suit in federal court seeking a recovery for unpaid overtime wages on the theory that the cash payments in lieu of benefits should have been reflected in the employees' overtime rate. On a partial summary judgment motion,

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

the trial court ruled that the payments had been improperly excluded, and should have been added to the regular pay rate. However, the trial court further ruled that the applicable statute of limitations was two years, not three, because the City's error had not been "willful." The City and plaintiffs both appealed the decision.

On June 2, 2016, the Ninth Circuit upheld the trial court's ruling as to the improper exclusion, noting that the payments were a form of compensation for the work performed by the employee, regardless of the fact that the payments was not directly tied to the number of hours worked. Moreover, because FLSA exclusions are narrowly construed against the employer, the fact that no applicable exclusion specifically addressed a program like the City's necessitated the inclusion of the payments in the overtime rate.

The Ninth Circuit also held that although the City's noncompliance was ostensibly unintentional, its conduct was nevertheless "willful" as defined by the FLSA because the City was aware of its FLSA obligations and failed to take affirmative steps to ensure that it was in compliance. The Court also ruled that liquidated damages were available to the plaintiffs because the City could not establish that, absent a credible investigation and analysis, it had acted in good faith and with reasonable grounds to believe that its conduct was lawful.

This decision highlights multiple issues for employers. First, it is imperative for employers to ensure that all payments made to non-exempt employees are either reflected in their overtime rates or specifically identified as a valid exclusion under the FLSA. Second, the case is a reminder that an employer's error may constitute a "willful" violation under the law—thereby subjecting the employer to increased fines and penalties— absent a good faith effort by the employer to determine whether a practice is legal. Finally, the case highlights the need for employers to carefully review their wage and hour policies to ensure legal compliance, and where necessary, work with counsel to fully evaluate any potential liabilities.

Ninth Circuit Confirms Requirements for Class Certification

In *Vaquero v. Ashley Furniture Industries,* the Ninth Circuit Court of Appeals ("Ninth Circuit") affirmed an order granting class certification where the plaintiff sufficiently demonstrated the existence of "commonality" among putative class member claims.

Stoneledge Furniture, LLC ("Stoneledge") operates approximately fifteen retail furniture stores throughout California, and employs approximately 600 sales associates. Plaintiff Ricardo Bermudez Vaquero ("Vaquero") was employed for approximately two years. After his employment ended, Vaquero filed a class action on behalf of current and former sales associates of Stoneledge, alleging that, while class members were paid exclusively via commission, they were regularly required to engage in tasks (including cleaning, attending meetings, and carrying furniture) for which they were not compensated.

Vaquero's complaint alleged four sub-classes: (1) all California sales associates employed from August 24, 2008, to the present who were paid less than minimum wage for non-sales time worked; (2) sales associates who were not provided itemized wage statements; (3) former sales associates who were not paid all wages due at separation; and (4) sales associates who were subject to unlawful business practices.

Vaquero filed a motion for class certification, which was granted by the trial court on all but the third sub-class. Stoneledge appealed certification of the three sub-classes. For purposes of the appeal, all three were treated as one sub-class under the definition of the first sub-class.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

In order for a class to be certified in federal court, the moving party must establish the four key elements of a class (numerosity, commonality, typicality, and adequacy), and that both 1) questions of law or fact common to class members predominate over individual claims; and 2) a class action is the superior means of fairly and efficiently adjudicating the controversy.

On appeal, Stoneledge argued a lack of commonality, and that individual claims predominated over class claims. Commonality requires that class members' claims "depend upon a common contention," and that the "common contention . . . must be of such a nature that it is capable of class-wide resolution." The Ninth Circuit held that since only one type of injury was alleged – a failure to compensate employees for performing tasks not "directly involved in selling"– the commonality requirement was satisfied. Similarly, the Court held that because the decision to pay employees in a potentially improper manner was common throughout the entire sub-class, common questions of law or fact predominated. Given its analysis, the Ninth Circuit affirmed the trial court's ruling.

Vaquero serves as a good reminder that, in most cases, it is relatively easy for class action plaintiffs to satisfy the "commonality" requirement of class certification, particularly in cases where the employer has an illegal policy that it applies to the entire class. Accordingly, employers should review their wage and hour policies and procedures to ensure compliance with state and federal law.

<u>California</u>

Receipt of an Employee Handbook Can Be Sufficient Evidence of an Agreement to Arbitrate

In *Harris v. TAP Worldwide, LLC*, a California Court of Appeal analyzed whether an agreement to arbitrate exists when the employee does not sign an arbitration agreement, and whether such agreement is rendered illusory by the employer's right to unilaterally modify the terms of the agreement. The trial court resolved these questions in the negative; the Court of Appeal disagreed. In *Harris*, Plaintiff Dwayne Harris ("Harris") sued his former employer, TAP Worldwide, LLC ("TAP") and two managers for racial harassment and discrimination, violation of the California Family Rights Act, violation of the Labor Code, and wrongful termination. TAP moved to compel the dispute to arbitration, relying on its Employee Handbook and the arbitration agreement attached thereto as appendix A.

Included as a section of the employee handbook was a brief description of TAP's arbitration policy. The policy articulated the following key provisions: (1) confirmation of receipt and agreement to the attached arbitration agreement was a prerequisite to hiring and continued employment; (2) if an applicant failed to execute the attached arbitration agreement and began employment, the employee would be deemed to have consented to the agreement to arbitrate by virtue of receipt of the employee handbook; and (3) TAP reserved the right to modify any policies contained in the employee handbook at any time, with or without notice.

Appendix A set forth additional details regarding the agreement to arbitrate, including TAP's right to modify the agreement. Appendix A granted TAP the right to modify or terminate the agreement as to future disputes or claims to the extent necessary or desired in order to comply with any future developments or changes in the law, so long as TAP provided 30 days' written notice prior to the effective date of any modification or termination of the policy.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

In opposing TAP's motion to compel arbitration, Harris denied that an agreement to arbitrate existed because he never signed an "arbitration agreement;" he merely signed an acknowledgement that he received the employee handbook and the attached appendix. Harris further argued that the modification provision in the employee handbook rendered the arbitration agreement illusory and unenforceable. The trial court agreed, and denied the motion to compel arbitration. The Court of Appeal reversed, concluding that an agreement to arbitrate existed and that agreement was not illusory.

The Court of Appeal found that the acknowledgement form that Harris signed specifically acknowledged his receipt of the employee handbook *and the attached arbitration agreement*—thus, Harris' attention was specifically called to the arbitration agreement. Second, Harris' actions demonstrated the existence of an implied agreement to arbitrate. The Court of Appeal further determined that the parties' agreement to arbitrate was not illusory.

The *Harris* decision marks a continued departure by California Courts of Appeal from some of the more overtly anti-arbitration cases, which impose a greater burden on employers in proving the existence of an agreement to arbitrate.

Court of Appeal Reverses Summary Judgment on FEHA and CFRA Claims

In *Moore v. The Regents of the University of California*, a California appellate court reminds us that summary judgment will not be affirmed in a lawsuit rooted in the California Fair Employment and Housing Act ("FEHA") and California Family Rights Act ("CFRA") unless a contrary view of the facts would be completely unreasonable.

In 2008, Plaintiff Deborah Moore ("Moore") began working for University of California, San Diego in the marketing and communications department ("Department") as a temporary worker. She was quickly promoted to a permanent position: creative director. By February 2010, Moore became the director of marketing, overseeing half of the Department. Soon after, Moore and one other director began sharing duties as the interim executive director following the unexpected resignation of the executive director. In June of 2010, the Department hired Kimberly Kennedy as the new executive director. Kennedy immediately initiated a plan to restructure the Department.

Months later, in September 2010, Moore was diagnosed with idiopathic cardiomyopathy, a heart disease that required Moore to wear a LifeVest and eventually receive a pacemaker.

When Moore told Kennedy about her diagnosis, Moore assured her that she would only need to wear the LifeVest for two to three weeks, and that she was able to do her job without any accommodations—Moore made clear that her condition did not affect her work. In response, Kennedy told Moore: "the first thing we need to do is lighten your load to get rid of some of the stress." Kennedy, unbeknownst to Moore, also asked the human resources department what to do about an employee with "adverse" health conditions and asked how to "handle [Moore] as a liability to the department."

After the diagnosis and initial disclosure, Kennedy lessened Moore's workload, eliminating many of Moore's duties by sending them to freelancers or reassigning the work to others in the Department. Kennedy continued to assign only unimportant work to Moore and further decrease her workload. By mid-November 2010, Kennedy formally demoted Moore.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

In December 2010, Moore initially requested "a few days off" in early 2011 to have a pacemaker implanted. Moore ultimately scheduled the surgery for April 2011, relaying the date of surgery to the Department in January. In February 2011, Kennedy eliminated Moore's position and terminated her employment, citing "lack of work" and "budget reasons." Kennedy never considered Moore for a freelance position, nor did she ever ask if Moore would accept a pay reduction. However, during the period of November 2010 to May 2011, the Department increased its overall headcount by eight employees.

In January 2013, Moore filed a complaint alleging causes of action for disability discrimination, failure to accommodate, failure to engage in the interactive process, retaliation under the FEHA, interference with CFRA, and retaliation in violation of CFRA. Approximately a year later, The Regents of the University of California ("Regents") moved for summary judgment; the trial court ruled in favor of the Regents on the above-named causes of action, entering judgment in its favor. Moore appealed.

The Court of Appeal remanded with respect to all cause of action, with the exception of retaliation under the FEHA.[1] As to the discrimination, the Court reasoned that although Moore set forth a prima facie case, and the Regents offered a legitimate, nondiscriminatory basis for Moore's termination, there was still a question as to whether the Regents' basis for termination was pretextual. The Court held that the timing of Moore's termination, the Regents' failure to follow its own policies and procedures with regard to seniority when eliminating positions (which were not followed), and Kennedy's statements to human resources about Moore's condition, all served as evidence of pretext sufficient to defeat a motion for summary judgment.

In regard to both the failure to accommodate and failure to engage in the interactive process claims, the trial court concluded Moore could not prevail on either claim because she had no disability to accommodate. The Court disagreed, holding that Moore did not need to have an actual disability, but only had to be regarded as having one by the Regents.

With respect to the CFRA claims, the trial court found that retaliation could not exist where Moore did not specifically use, or intend to use, CFRA leave because there was no direct, causal connection between CFRA leave and the termination of her employment. However, the Court of Appeal noted that the question is not whether Moore specifically requested CFRA leave, but whether Moore exercised her right to take leave (generally) and whether the purpose of that leave was for a qualifying CFRA purpose. Because Moore's leave requests were adequate to trigger the CFRA and there were outstanding questions of pretext concerning Moore's termination (as discussed above), the Court determined summary judgment was not appropriate.

Tackling the issue of interference with the CFRA, the Court held that the Regents' actions to terminate Moore before she could take her requested leave directly interfered with her right to take CFRA leave. Since there was a question as to whether Moore's mention of leave for surgery provided adequate notice of CFRA-leave for the Regents, summary judgment was again inappropriate. Importantly, the Court noted that summary adjudication cannot occur where the employer fails to show that it provided notice to its employees about their rights to request CFRA leave.

[1] The Court applied a pre-2015 standard that did not consider the request for an accommodation as protected activity for the purposes of retaliation under the FEHA. Legislation has since confirmed that the request for an accommodation is protected activity for the purposes of retaliation.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Moore serves as an important reminder to California employers on a handful of issues. First, employers should review their layoff/termination policies and adhere to the requirements they have self-imposed. Second, employers may not rely on an absence of an actual disability when that employer treats an employee as if he or she has a disability. Third, employers should explicitly determine if an employee intends to use CFRA leave if he or she presents the employer with a CFRA-qualifying reason for taking leave. If the CFRA is implicated, the employer must follow all notification obligations, as a failure to do so may create liability and preclude summary adjudication. Finally, *Moore* reminds all California employers of the steep hurdles associated with disposing of a case via summary judgment.

Court of Appeal Reverses Attorneys' Fee Award to Manager Defendant

In *Ramos v. Garcia*, the California Court of Appeal reversed a decision awarding attorneys' fees to a manager/co-employee of the plaintiff. Plaintiff Rogelio Ramos ("Ramos") sued his employer and an individual manager for various wage and hour violations. At trial, Ramos was successful with respect to some of his claims, and was able to recover damages against his employer. However, his claims against his manager failed because the manager was deemed to not be Ramos' employer. After post-trial motions, the trial court awarded attorneys' fees to the manager as a prevailing employee defendant. Ramos appealed.

The appellate court weighed the applicability of two attorneys' fee provisions in the Labor Code – sections 218.5 and 1194 – and determined that neither permitted an attorneys' fee award to the manager. Labor Code section 1194 provides attorneys' fees for an aggrieved employee who successfully makes a claim for unpaid overtime or minimum wages. The appellate court concluded that the manager did not constitute an "aggrieved employee" under section 1194 since he was not the plaintiff in the case.

For similar reasons, the appellate court held that the manager could not recover attorneys' fees under Labor Code section 218.5, which permits an award of attorneys' fees to either employees or employers who prevail on an action for nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions. The statute further provides that when the prevailing party is "not an employee," the prevailing party may only recover attorneys' fees if the employee brought the action in bad faith.

The appellate court interpreted the words "in bad faith" to encompass cases where an employer prevails against a plaintiff employee. Because the manager was not an employer, the court held that Ramos' claim for penalties did not apply to the manager. The manager, therefore, was not a prevailing party under section 218.5.

Finally, the appellate court opined that there was no showing of "bad faith" by Ramos since he was able to recover some damages against his employer. The court found that section 218.5 was not intended to authorize an attorneys' fee award against an employee who unsuccessfully sues a co-employee. The trial court's award of attorneys' fees to the manager was thus reversed.

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, Shannon Finley, or Cameron Flynn at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.

San Diego | Los Angeles | Phoenix

www.pettitkohn.com