PETTITKOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN

EMPLOYMENT LAW UPDATE

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

The 2018 California legislative session has introduced numerous bills that, if signed into law, would impact California employers and employees. These bills include:

AB 1870 would extend the statute of limitations for pursuing sexual harassment claims from one year to three years.

AB 1876 would impose new recordkeeping requirements for sexual harassment complaints.

AB 2366 would require employers to provide time off work for victims of sexual harassment and immediate family members.

AB 2770 would extend immunities from defamation claims related to sexual harassment allegations.

AB 3080 would prohibit mandatory pre-employment arbitration agreements regarding sexual harassment claims.

SB 224 would expand current sexual harassment prohibitions to additional business, service and professional relationships.

SB 820, SB 1300, and AB 3057 would impose new limits on settlement agreements regarding sexual harassment claims, including prohibitions regarding confidentiality provisions.

SB 1300, SB 1343, and AB 3081 would expand the scope of currently-mandated harassment training to additional employers, and for non-supervisory employees.

AB 1938 would prohibit inquiries regarding “familial status.”

AB 1976 and SB 937 would update and materially expand workplace lactation accommodation requirements.

AB 2016 would reform the Private Attorneys General Act to expand the ability to cure Labor Code violations pre-litigation.

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

AB 2069 would amend the Fair Employment and Housing Act to preclude "discrimination" against medicinal marijuana users.

AB 2478 would enable employers to assist employees with student loan repayments.

AB 2482 and AB 2484 would authorize scheduling flexibility through increased access to "compensatory time off," and allow for individual "alternative workweek schedules."

AB 2841 would increase California's paid sick leave availability requirements from three to five days.

AB 3109 would invalidate settlement agreement provisions restricting employment or re-employment.

SB 1038 would amend the Fair Employment and Housing Act to impose individual liability upon employees who engage in post-complaint retaliation.

SB 1284 would require larger employers to submit annual "pay data reports" to state agencies.

ADMINISTRATIVE

Multiple California Agencies Publish Resources Regarding AB 450, Including Model Posting for Employer Usage Preceding Immigration Agency Inspection of Employment Records

Taking effect January 1, 2018, California's Immigrant Worker Protection Act (AB 450) was one of the more significant new employment laws confronting California. AB 450 (1) imposed new limits on the ability of California employers to voluntarily provide worksite access to immigration authorities; (2) imposed new notice and posting requirements on employers; and (3) enacted significant statutory penalties.

The first of the new posting/notice requirements is implicated when immigration agencies provide notice of an intent to inspect I-9 forms or other employment records. Under that circumstance, new Labor Code section 90.2 requires employers that receive a Notice of Inspection of I-9 records or other employment records by an immigration agency to post notice of this impending inspection. This notice must be posted within 72 hours of receiving notice of the inspection in the language the employer normally uses to communicate employment-related information to employees. This notice must also include (1) the name of the immigration agency conducting the inspection; (2) the date the employer received notice; (3) the nature of the inspection, if known; and (4) a copy of the Notice of Inspection of I-9 Employment Eligibility Verification Forms for the inspection to be conducted.

AB 450 directed the Division of Labor Standards Enforcement ("DLSE") to develop and publish on its website a template posting that employers may use to satisfy this pre-inspection notice of a forthcoming inspection by a federal

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.

immigration agency of I-9 forms or other employment records. The DLSE has now published this sample template on its website at:

http://www.dir.ca.gov/DLSE/LC_90.2_EE_Notice.pdf.

Employers are permitted to use this DLSE-provided template or to develop their own version provided it contains all the statutorily-required information.

AB 450 also imposes post-inspection notice obligations on an employer after it receives the results from a records inspection. Specifically, within 72 hours of receiving notice regarding the results of the records inspection, the employer must provide each current "affected employee," and their "authorized representative," a copy of the written immigration agency notice that provides the results of the inspection. This notice must relate to the affected employee only and must be hand-delivered at the workplace if possible, and if not, by mail and email, if the employer knows the employee's email address, and to the employee's authorized representative. This notice must contain the following information: (1) a description of all deficiencies or other items identified in the written immigration inspection results notice related to the affected employee; (2) the time period for correcting any potential deficiencies identified; (3) the date/time of any meetings with the employer to correct the deficiencies; and (4) the employee's right to be represented during this meeting. The DLSE was not tasked with developing a template regarding these post-inspection notices of results, and it is presently unclear whether it will do so.

The California Labor Commissioner and the California Attorney General have also recently published "joint guidance" on AB 450 in the form of Frequently Asked Questions available at:

https://oag.ca.gov/sites/all/files/agweb/pdfs/immigrants/immigration-ab450.pdf.

The California Attorney General and the Department of Justice have also published an "advisory" regarding AB 450 to assist employers comply with the new laws. It is available at:

https://oag.ca.gov/sites/all/files/agweb/pdfs/immigrants/iwpa.pdf

JUDICIAL

California Supreme Court Embraces Employee Friendly Formula for Calculating Overtime Pay

In a unanimous decision, the California Supreme Court issued a ruling that impacts employers who pay employees certain flat rate bonuses. In *Alvarado v. Dart Container Corporation of California*, the court ruled that when calculating overtime in pay periods in which an employee earns a flat rate bonus, employers must divide the total compensation earned in a pay period by only the non-overtime hours worked by an employee. *Alvarado* deviates from the federal manner of calculating overtime, which requires that total compensation be divided by total hours worked (including overtime hours) to compute overtime pay.

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

By way of background, employees who perform work in excess of defined statutory limits are entitled to overtime pay under both federal and California law. Generally, both statutory schemes provide for pay at a rate of 1.5 times the "regular rate" earned by the employee. The regular rate calculation at issue in *Alvarado* involves how to compute the regular rate under California law when an employee is paid a flat sum bonus during a single pay period. The case implicates the federal scheme because the employer used a formula that was in compliance with the federal Fair Labor Standards Act ("FLSA"). Under the FLSA, the regular rate includes all compensation, earnings, or "remuneration" for work performed, with specific payments excluded – examples include reimbursed expenses, reporting-time premiums, vacation or holiday pay, or discretionary bonuses. However, if there are additional payments, the regular rate is calculated by dividing all earnings (excluding those payments previously mentioned) by the total number of hours actually worked. This provides a relatively straightforward computation: all weekly earnings divided by all hours worked equals regular rate. Once calculated, employees are then generally entitled to compensation at 1.5 times all hours worked in excess of 40 hours in a workweek. Oftentimes, employers will calculate overtime by first paying the regular hourly wage for all hours worked, including overtime, and then paying an overtime premium at one-half the regular rate for all overtime hours worked.

In *Alvarado*, the plaintiff-employee ("Employee") worked for Dart Container Corporation of California ("Dart") as a warehouse associate for approximately 16 months. Dart had a written policy providing for an attendance bonus for any employee who was scheduled to work a weekend shift and completed the full shift. The $15 per day bonus was paid regardless of the number of hours an employee worked beyond the normal scheduled length of a shift. In other words, whether the employee worked overtime or not, he or she received the bonus for completing a Saturday or Sunday shift.

Dart calculated overtime pay for attendance bonuses as follows:

> Multiply the number of overtime hours worked in a pay period by the straight hourly rate (straight hourly pay for overtime hours).
>
> Add the total amount owed in a pay period for (a) regular non-overtime work, (b) extra pay such as attendance bonuses, and (c) overtime due from the first step above. That total amount is divided by the total hours worked during the pay period. This amount is the employee's regular rate.
>
> Multiply the number of overtime hours worked in a pay period by the employee's regular rate, which is determined in step two. This amount is then divided in half to obtain the "overtime premium" amount, which is multiplied by the total number of overtime hours worked in the pay period (overtime premium pay).
>
> Add the amount from step one to the amount in step three (total overtime pay). This overtime pay is added to the employee's

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.

> regular hourly pay and the attendance bonus for the total compensation for the pay period.

During his employment, Employee earned attendance bonuses during weeks he worked overtime and at times double time.

In August 2012, Employee filed a lawsuit against Dart alleging that the company's formula for calculating overtime pay as outlined above did not comply with the law, among other claims. Dart argued that its formula was lawful and that federal law should apply to calculating overtime on the bonuses because there was no California law providing a formula for calculating overtime on bonuses. The trial court ruled that Dart was correct because its overtime formula complied with federal law and did not conflict with state law.

Employee argued that his alternative formula was supported by a prior California Court of Appeal case and the Division of Labor Standards Enforcement Manual. The formula Employee advocated was:

> Calculate the overtime compensation attributable only to an employee's hourly wages by multiplying the employee's hourly rate by 1.5 and by the number of overtime hours worked.
>
> Calculate the overtime premium attributable only to the employee's bonus by dividing the bonus amount by the total non-overtime hours worked and multiplying that value by 1.5.
>
> Multiply the bonus overtime premium by total overtime hours worked, and pay that amount in addition to the amount in step one as total overtime compensation.

The difference between Dart's formula and Employee's is that where Dart divided total compensation by total hours worked, the DLSE divided by only "regular hours," i.e., excluding overtime hours.

The Court determined that the formula put forth by Alvarado was "marginally more favorable to employees."

Despite finding that the DLSE Manual was void, the Court noted that the interpretation of state law contained within the DLSE Manual may be correct. While the DLSE Manual was not entitled to any special deference, the Court determined that it may consider the agency's interpretation and the reasons for the DLSE's implementation if its own independent judgment reached the same conclusion. The Court reasoned it may go so far as to "adopt the DLSE's interpretation as our own if we are persuaded that it is correct" – which is exactly what the Court ultimately did in this case. The Court's guiding principles were two-fold: 1) discouraging the imposition of overtime work through premium overtime pay, and 2) interpreting state law liberally in favor of employee protection. With these principles in mind, the Court reasoned that because the flat sum bonus at issue was payable even if the employee worked no overtime during the relevant pay period, it should be treated as being earned by only the non-

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

overtime hours in the pay period. Accordingly, only non-overtime hours should be considered when calculating the bonus' per-hour value.

Importantly, the Court determined that its holding would not only be given prospective application, but would apply retroactively.

California employers should promptly review policies and pay practices because the decision will apply retroactively, potentially subjecting companies to penalties and liability based on past practices. However, the Court expressly limited its decision to flat-sum bonuses earned in a single pay period, as opposed to other kinds of non-hourly compensation, such as production bonuses, piece work, and commissions, in which a "different analysis may be warranted."

Gig Economy Decision

In *Lawson v. Grubhub, Inc.*, the United States District Court for the Northern District of California ruled that a restaurant delivery driver for Grubhub, Inc. was an independent contractor, not an employee. The district court found in favor of Grubhub on the driver's claims of misclassification as an independent contractor and of minimum wage, overtime and expense reimbursement violations that would only be viable if he were found to be an employee.

Applying the current applicable California Supreme Court multi-factor test in S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal.3d 341, the Grubhub court found the facts weighed in favor of the driver being an independent contractor on the most critical factor – the right to control the manner and means of the driver's work. In other words, the court determined that there was minimal control by Grubhub. Specficially, Grubhub did not control the following:

What the driver wore (no uniforms or car signage);

Training or script;

Supervision (the driver in fact never met any Grubhub employee);

Schedule (the driver made his own schedule, no minimum hours were required, and the driver could accept or reject any order for delivery);

Grubhub controlled the driver's rate of pay and the geographical boundaries of delivery zones, but on balance these two factors did not transform the driver into an employee.

The court also addressed the secondary Borello factors and found they weighed in favor of an independent contractor relationship. These eight lesser factors were applied as follows:

Distinct occupation – the driver was not in a different occupation (which weighed in favor of employment);

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.

Work performed under supervision – the driver worked unsupervised (which tilted toward an independent contractor relationship);

Skill required – no special skills were needed (which favored an independent contractor relationship);

Tools and equipment – the driver provided his own car and phone (which weighed in favor of an independent contractor relationship);

Length of performance – the driver worked four months, for a few hours on the days he chose to work, and could end the relationship at any time (which weighed in favor of an independent contractor relationship);

Method of payment – Grubhub paid the driver an hourly rate (which weighed in favor of employment);

Whether work was part of company's regular business - the driver's food delivery work was a part of Grubhub's regular food delivery business (which weighed in favor of employment); and

The parties' intent – the court found this was a neutral factor as the existence of a written independent contractor agreement was not controlling on the issue of intent.

This ruling will likely have implications for other gig economy companies. The court noted its decision was the product of the legislature not addressing the recent gig economy with its low wage workforce performing low skill but highly flexible episodic jobs in defining employment. As such, the present test under applicable case law (the *Borello* test) resulted in a finding that the gig economy company simply did not exert enough control over its driver to deem him an employee.

This is Pettit Kohn Ingrassia Lutz & Dolin 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, Jennifer Suberlak, Shannon Finley, Cameron Flynn, Cameron Davila, or Erik Johnson at (858) 755-8500; or Grant Waterkotte, Jennifer Weidinger, Andrew Chung, or Tristan Mullis at (310) 649-5772.