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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *August 2018*

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Pettit Kohn Ingrassia Lutz & Dolin is proud to announce that shareholder Tom Ingrassia has been included in the 2019 *Best Lawyers in America* listing for his work in Employment Law – Management as well as Employment and Labor Litigation.

Among his other accolades, Tom has been named as a San Diego Super Lawyer every year since 2008, San Diego Super Lawyer Top 50 in 2016 and 2017, and has achieved Martindale-Hubbell's AV-Preeminent rating.

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LEGISLATIVE

California

Governor Signs Bill Codifying Privilege for Communications Involving Sexual Harassment Claims and Investigations

Governor Brown has signed into law Assembly Bill 2770 (Irwin), which expands categories of communications that are privileged and protected for purposes of a defamation action. AB 2770 will be codified in Civil Code section 47. Under previous law, communications concerning an employee's job performance or qualifications of a job applicant that were made without malice by a current or former employer to a prospective employer were privileged. The new law establishes protections from defamation actions for communications of complaints of sexual harassment by an employee, without malice, to an employer based on credible evidence. Communications between the employer and interested persons regarding a complaint of sexual harassment are also protected by privilege for purposes of a defamation action. The bill also authorizes an employer to disclose, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.

Notably, this bill does not change existing law. Rather, it codifies court interpretations of the existing defamation privilege statutes as applied to workplace communications about sexual harassment. The new law makes these protections explicit.

This is a rare example of legislation that helps employees and employers alike. In the response to the "#MeToo" movement, employers have seen increased complaints of sexual harassment in the workplace. This law enables employers to escape liability for honest disclosures made without malice regarding whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment. This law is also intended to protect present and potential victims of sexual harassment by allowing an employer to warn a prospective employer about a person who poses a risk, and by ensuring that a victim who makes a good faith sexual harassment complaint to an employer or supervisor will not be sued by the alleged sexual harasser for defamation.

Governor Signs Bill Clarifying Salary History Inquiry Rules

Effective January 1, 2018, California law prohibits, among other things, an employer from relying on the salary history of an "applicant" in determining whether to offer an applicant employment or deciding what salary to offer that applicant. It also requires an employer, upon "reasonable request," to provide the "pay scale" for a position. Unfortunately, the terms "applicant," "reasonable request," and "pay scale" were not defined in the previous version of the law.

Governor Brown has signed into law Assembly Bill 2282 (Eggman), which not only defines the above-referenced terms, but also includes additional clarification for employers:

- "Pay Scale" means a salary or hourly wage range.
- "Reasonable Request" means a request made after an applicant has completed an initial interview with the employer.
- "Applicant" or "Applicant for Employment" means an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position.

In addition, AB 2282 adds the following language to the law: "Nothing in this section shall prohibit an employer from asking an applicant about his or her salary expectation for the position being applied for."

Finally, AB 2282 adds the following: "Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors listed in this subdivision." In other words, employers may make a compensation decision based on an employee's current salary as long as any wage differential resulting from that compensation decision is justified by one or more of the specified factors (*e.g.*, seniority or merit). AB 2282 amends sections 432.3 and 1197.5 of the Labor Code.

Although the new law does add clarity to the state's salary history inquiry rules, employers must still be careful not to elicit improper compensation information during the hiring process. Employers may also want to conduct a wage audit to ensure that those employees doing substantially similar work are compensated appropriately.

JUDICIAL

Federal

Taco Bell Prevails: Discounted Meal Policy Does Not Violate Employer's Meal Period Obligations

In *Rodriguez v. Taco Bell Corp.*, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirmed summary judgment in favor of Taco Bell in a putative class action concerning employee meal breaks.

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.

Bernardina Rodriguez ("Plaintiff") worked for Taco Bell in Suisun City, California. Her duties included preparing and cooking food and cleaning. Plaintiff brought suit against Taco Bell for failing to provide uninterrupted, duty free meal periods, failing to provide rest periods, failing to calculate regular hourly and overtime wages, failing to provide accurate written wage statements, and failing to timely pay all final wages. With respect to meal periods, Plaintiff argued that Taco Bell failed to provide employees with an uninterrupted, duty-free, 30-minute meal period because it required them to remain on-site if they wanted to take advantage of the company's employee discount for Taco Bell food. Taco Bell's policy stated that employees could receive discounted meals and complimentary drinks, provided that they (1) eat their discounted meal in the restaurant[1]; (2) place their order at the front counter; and (3) sign the receipt and place the receipt in the cash register drawer. The crux of Plaintiff's argument was that because Taco Bell required the discounted meal to be eaten in the restaurant, the employee was under sufficient employer control to render the time compensable. The trial court disagreed.

In affirming the trial court's grant of summary judgment in favor of Taco Bell, the Ninth Circuit held that the discounted meal policy was legal. Notably, Taco Bell did not *require* the employee to purchase a discounted meal. The purchase of the meal was entirely voluntary. Likewise, Plaintiff did not introduce evidence suggesting that Taco Bell pressured its employees to purchase the discounted meals. Rather, employees were free to leave the premises or spend their break time in any way that they chose. Finally, employees were free to purchase meals at full price and eat them wherever they wished.

The ruling serves as a reminder that an employer's meal break policies must not result in the employer having control over employees during those breaks. Employers are advised to audit their meal break policies to confirm that they are legally compliant.

California

Where English and Spanish Arbitration Agreements Contain Contradictory Terms, Don't Expect a Court to Compel the Dispute to Arbitration

One California employer recently learned the hard way that key discrepancies between the English and Spanish versions of an arbitration agreement can defeat an attempt to enforce an otherwise valid agreement.

In *Juarez v. Wash Depot Holdings, Inc.*, employee Carlos Juarez ("Juarez") filed a wage and hour lawsuit against his employer, Wash Depot. The lawsuit sought relief under the Private Attorneys General Act ("PAGA"). In an attempt to reduce the scope of its potential liability, Wash Depot moved to enforce the Dispute Resolution Agreement ("DRA") contained within its employee handbook, as that agreement contained a waiver of the employee's right to pursue PAGA claims. However, the English version of the DRA stated that, if a court found the PAGA waiver to be unenforceable, the court must sever the provision and enforce

[1] The requirement that the meal be eaten on the premises was to ensure that the benefit was utilized only by employees and that the food did not leave the premises to be given to friends and family.

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the rest of the arbitration agreement. On the other hand, the Spanish version specifically stated, if the PAGA waiver were to be found unenforceable, the court was forbidden from severing the provision from the DRA.

Even though Juarez had signed acknowledgments that he had received both the Spanish and English versions of the handbook, the trial court denied Wash Depot's motion to compel arbitration, given the contradictory language of the PAGA waivers. A California Court of Appeal agreed that the DRA could not properly be enforced.

Pursuant to the California Supreme Court's seminal decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, waivers of PAGA claims are unenforceable as contrary to public policy. On appeal, the parties did not dispute that the PAGA waiver was unenforceable. Rather, the central issue was whether the court should sever the offending provision and enforce the rest of the DRA. Typically, when deciding whether to enforce a contract, a court follows the express terms of the agreement. In this case, the express terms of the two versions of the DRA contradicted each other: one version mandated severance of the PAGA waiver while the other prohibited it. In accordance with state contract law, the court construed this ambiguity in a manner disfavoring Wash Depot because, as drafter of the agreement, the company had the ability to write the contract in clearer and consistent terms. Thus, the court followed the stricter language of the Spanish version of the DRA, which prohibited severance of the PAGA waiver. Since the arbitration agreement contained an unlawful PAGA waiver that could not be removed, the court declined to enforce the DRA and denied the motion to compel arbitration.

Employers should certainly maintain arbitration agreements, employee handbooks, and other employment contracts and policies in languages other than English, if employees have difficulty understanding English. However, companies should also take care that any such translations are accurate and that the terms of the policies are the same regardless of language. When one group of employees is subject to more onerous standards than others—for instance, English speakers may pursue certain legal remedies that Spanish speakers cannot—an employer risks not only the non-enforcement of any agreements setting forth the differing standards but also potential claims of discrimination based on race or national origin. We therefore encourage employers to retain legal counsel to review employment contracts and policies and to obtain certified translations where necessary.

Sticks and Stones May Break Your Bones, but Words Will Result in a $500,000 Jury Verdict

Caldera v. Department of Corrections and Rehabilitation provides a simple lesson for employers: do not let employees (especially supervisors) make fun of another employee's disability (or anything else for that matter).

Augustine Caldera ("Caldera"), who stutters when he speaks, is a correctional officer employed by the California Department of Corrections and Rehabilitation ("CDCR"). Caldera's coworkers, including a supervisor, James Grove ("Grove"), made fun of Caldera's stutter at least a dozen times over a two-year period. Grove mocked Caldera's stutter in the presence of other employees

and, on one occasion, over the prison's radio system. A psychologist who worked with Caldera and Grove testified that there was "a culture of joking" about Caldera's stutter that was mean-spirited, harmful, and caused Caldera to experience psychological disorders.

Caldera complained about Grove's conduct. Two days later, the prison reassigned Grove to the same hall as Caldera despite Caldera's request that the prison assign Grove to a different location. Caldera then filed a lawsuit against CDC, alleging causes of action for disability harassment, failure to prevent harassment, and retaliation.

At trial, the jury found that Caldera was subjected to unwanted harassing conduct, that the harassment was severe and pervasive, and that a reasonable person in Caldera's position would have considered the work environment to be hostile or abusive. The jury awarded Caldera $500,000. CDCR moved for a new trial. The trial court granted a new trial on the grounds that the damages award was excessive. Caldera appealed the new trial order.

The California Court of Appeal reversed the trial court's order for a new trial. It found sufficient evidence for the jury to have concluded that Caldera experienced severe or pervasive harassment. The *Caldera* court took a particularly dim view of the "culture of joking" that pervaded Caldera's workplace: "It seems striking to us that the harassment was so pervasive within the institution that Grove apparently felt he could openly mimic Caldera's stutter in front of his peers (a group of prison supervisors) without any sense of shame or fear of reprisal." The *Caldera* court also noted that the CDCR failed to prevent Grove's harassment because Grove continued to mimic Caldera's stutter irrespective of any steps CDCR may have taken to stop the conduct.

Caldera illustrates how workplace "joking" or "teasing" can easily give rise to a costly harassment lawsuit. Employers should not tolerate either bullying or harassment, and *Caldera* highlights the financial ramifications of failing to meaningfully address an employee's report of such conduct. Employers should take every complaint of unwanted conduct by coworkers seriously, and implement remedial measures that will prevent any such behavior in the future.

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12th Annual Employment Law Symposium

Thursday, November 15, 2018
8:00 a.m. – 4:00 p.m.
Breakfast, Lunch, and Networking Happy Hour
Farmer & The Seahorse at The Alexandria

Register Here!

This program is pending approval for HR Certification Institute and SHRM credits.

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, Erik Johnson, or Carol Shieh at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Jennifer Weidinger, Andrew Chung, or Rachel Albert at (310) 649-5772.