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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *February 2019*

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LEGISLATIVE

California

With the new legislative session under way, there are a number of proposed bills that, if signed into law, will impact California employers and employees. These bills include:

AB 5 (Gonzalez): The California Supreme Court established (in the case of *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903) a presumption that a worker who performs services for a hirer is an employee and set forth the ABC test to establish whether a worker is an independent contractor. This bill would state the intent of the Legislature is to codify the *Dynamex* decision.

AB 9 (Reyes): AB 9 would extend the period of time in which a complainant could file his/her administrative charge of discrimination with the California Department of Fair Employment and Housing from one year to three years. The bill has been referred to the Committee on Labor and Employment.

AB 71 (Melendez): AB 71 addresses employee/independent contractor issues. The bill would require a determination of whether a person is an employee or an independent contractor to be based on a specific multifactor test, (known as *Borello*) and would reject the ABC test in *Dynamex*. The bill has been referred to the Committee on Labor and Employment.

AB 51 (Gonzales): This bill would prohibit mandatory arbitration agreements for violations of the California Fair Employment & Housing Act as a condition of employment. The bill has been referred to the Committee on Labor and Employment as well as the Judiciary Committee.

JUDICIAL

California

Employer's On-Call Scheduling Practice Triggered Reporting Time Pay

In *Ward v. Tilly's,* a California appellate court held, for the first time, that a retail employer's on-call scheduling scheme triggered the reporting time pay requirements of California Industrial Welfare Commission Wage Order 7. In *Ward*, employees were assigned on-call shifts, but were not told until they called in two hours before their shifts started whether they should actually arrive at work. If

they were told to report to work, they were paid for the shift; if not, they did not receive any compensation for having been "on call."

Plaintiff Skylar Ward (the "Employee"), a former employee of clothing retailer Tilly's, alleged Tilly's practice violated the reporting time pay provisions which are present in most of the wage orders. Wage Order 7 (governing the mercantile industry) requires employers to pay employees "reporting time pay" for each workday "an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work."

The Employee argued that when on-call employees contact Tilly's two hours before on-call shifts, they are "report[ing] for work" within the meaning of Wage Order 7, and thus are owed reporting time pay. The trial court dismissed the lawsuit finding the phrase "report for work" meant that an employee must physically appear at the workplace. The appellate court disagreed.

The court of appeal found the wage order to be "ambiguous" and "susceptible to more than one reasonable interpretation." The appellate court considered a variety of extrinsic circumstances to interpret the regulation including "the evils to be remedied, the legislative history, public policy … [and] the consequences that will flow from a particular interpretation." The "report for work" language was adopted by the Industrial Welfare Commission ("IWC") in the 1940s. The court agreed with Tilly's that, at the time, this likely meant physically showing up for work. However, interpreting the regulation in light of new technology, the court found that had the IWC anticipated cell phones and telephonic call-in requirements, it would have intended the reporting time pay requirement to apply. The court also considered the original purpose of the reporting time pay requirement, which was to compensate employees for transportation costs and loss of time involved in getting to work. It was meant to encourage employers to provide proper notice and scheduling. The court found Tilly's on-call practices shared similarities with the abusive practices the IWC sought to combat when it first enacted the reporting time pay requirement. Both requiring employees to come to work at the start of a shift without a guarantee of work, and unpaid on-call shifts benefit employers by creating a pool of contingent workers the employer can utilize if the store's business warrants it, or tell them they are not needed without any financial consequence to the business.

The court found the unpaid on-call shifts impose tremendous costs on employees because they cannot commit to other jobs, schedule classes or anything else during those shifts; they may make contingent child care arrangements which they then need to pay for even if they are told not to come to work, and they could not otherwise make plans during the times they may be called into work. The court also noted that the employees' activities were constrained at call in time as they had to be sure to be in a place where they could make a phone call.

As such, the court found that employees need not necessarily physically appear at the workplace to "report for work." Moreover, requiring reporting time pay for on-call shifts is consistent with the IWC's goals in adopting Wage Order 7, as it would require employers to absorb costs associated with overscheduling and

thereby encourage employers to more accurately predict their labor needs and schedule accordingly.

The court declined to decide whether its interpretation of the wage order applies prospectively or retroactively. The court also declined to speculate on how much advance notice employers must provide to avoid a reporting time penalty, but acknowledged that four-hour, eight-hour or 24-hour call in shifts would likely not be as beneficial or "economically desirable" to employers because of the inability to predict staffing needs, for example, eight hours before the start of a shift. Following *Ward*, entities doing business in California will want to review their on-call scheduling and payment practices.

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