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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *March 2019*

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LEGISLATIVE

Federal

DOL's New Overtime Rule Sets FLSA Exemption Threshold

The U.S. Department of Labor ("DOL") recently issued its long-awaited replacement of the Obama administration's overtime rule, raising the minimum salary threshold required for workers to qualify for the Fair Labor Standards Act's white collar exemptions to $35,308 per year.

The new proposal would update the FLSA's overtime exemptions for executive, administrative, and professional workers and replace a currently enjoined rule that was finalized in 2016. The DOL proposed updating the salary levels every four years but doing so only after notice-and-comment periods that precede those increases.

For highly-compensated employees, the DOL raised the salary threshold from $100,000, as it was in the 2004 rule, to $147,414.

The DOL estimated that the rule would take effect in January 2020.

California has its own wage and hour law that has its own salary basis test for its white collar exemptions: 40 hours x twice the state's minimum wage. Currently, the minimum wage is $11 per hour (25 employees or less) and $12 per hour (26 employees or more); therefore the minimum salary threshold is $880 per week (40 hours x 2 x $11), or $45,760 per year (for employers with 25 employees or less) or $960 per week (40 x 2 x $12), or $49,920 per year (for employers with 26 employees or more) – well above the federal overtime rule's salary threshold. The California minimum wage will rise over time until it reaches $15 per hour by 2022, and then it will continue to rise based on a statutory-required formula. The new federal overtime rule's salary threshold may also rise every four years. This means that employers will have to pay careful attention to how the thresholds change over time to ensure they are classifying their employees properly.

California employers must remember that – regardless of the salary threshold – the state requires employees to be "primarily engaged" in exempt duties to qualify as exempt. This is different than the federal standard, even under the revised law, which did not revise its duties tests (although some had thought the DOL would revise it to make it more similar to California's test). This means that

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more than 50% of an employee's time must be spent engaging in the activities that earn the exemption (e.g., depending on the exemption, performing such activities as supervising others, exercising independent discretion and judgment, managing a subsection of the company, or performing tasks that utilize the skills learned in their advance degree). Thus, even if a California employer pays someone enough under the federal and state standard, the salary may still not qualify them as exempt under California law.

California employers must be aware that California does not have the highly compensated employee exemption, and therefore an employee meeting the new rule's requirements may not be exempt under California law. The new federal rule permits employers to satisfy up to 10% of the salary threshold with nondiscretionary bonuses, incentive payments, and commission. However, the California rules do not allow for this.

In summary, California employers, like employers operating in other states with their own wage and hour laws, must not forget to account for state specific requirements when making compliance decisions related to the new federal overtime rule.

Forced Arbitration Injustice Repeal Act

The new congress has introduced the "Forced Arbitration Injustice Repeal Act." Under this act, S.610/H.R.1423 (Blumenthal/Johnson), companies would be barred from enforcing mandatory arbitration agreements in employment, consumer, civil rights, and antitrust disputes. Agreements to arbitrate would have to result after a dispute arises. The bills would also block agreements that prevent individuals, workers, and businesses from joining or filing class actions. These bills were introduced to Congress on February 28, 2019 and referred respectively to the Committee on the Judiciary and House Committee on the Judiciary.

JUDICIAL

California

California Supreme Court Emphasizes Employers' Wage Statement Duties

The California Supreme Court struck a decisive victory in favor of payroll companies, issuing a unanimous opinion that an employee is not a third-party beneficiary of the contract between her employer and its payroll service provider. The Court held that an employee-plaintiff has no standing to sue her employer's payroll company for an alleged failure to pay wages under California's wage and hour laws.

In *Goonewardene v. ADP LLC*, et al. the plaintiff/employee ("Plaintiff") sued her former employer, travel agency Altour International Inc., for discrimination, missed overtime and breaks, wrongful termination, and other claims. Plaintiff added ADP LLC, the outside vendor who processed payroll for Altour, as a defendant, claiming ADP committed unfair business practices for not giving her accurate checks – errors which amounted to $6,144 in damages. The case came before the California Supreme Court after the court of appeal allowed

Plaintiff to proceed with her claims against ADP for third-party breach of contract, negligence, and negligent misrepresentation. However, the California Supreme Court overturned the lower court's ruling.

The Court ruled that Plaintiff could not maintain a breach of contract claim against ADP under the third-party beneficiary doctrine. The Court found that the "relevant motivating purpose" of an employer contracting with a payroll company "is to provide a benefit to the employer . . ." Further, the Court opined that allowing employees to sue payroll providers would impose considerable litigation defense costs upon the payroll company, which was likely to then pass those costs to the employer. Such a result, the Court held, would be inconsistent with the contract and the contracting parties' reasonable expectations.

The California Supreme Court also held that Plaintiff's claims for negligence and negligent misrepresentation were meritless. After analyzing a multitude of policy considerations, the Court found that it is neither necessary nor appropriate to impose a tort duty of care upon a payroll service provider regarding the obligations owed to an employee under California's wage and hour laws. Because an employee already has an adequate remedy against the employer alone, the Court held that allowing payroll companies to be brought into wage and hour cases by an employer's employees would likely mean "an unnecessary and potentially burdensome complication to California's increasing volume of wage and hour litigation."

The Court also found the payroll company has no "special relationship" with its client's employees that would warrant recognition of a duty of care under California's third-party beneficiary doctrine, and that imposing tort liability upon the payroll provider was an unnecessary deterrent against negligent conduct, as the payroll company is already obligated to act with due care in performing its duties under its contract with the employer.

As the Court noted, however, payroll service providers do still face possible liability, by way of a breach of contract claim, if it improperly processes the information provided by the employer which results in an underpayment of wages to an employee or an improper wage statement.

As the *Goonewardene* case makes clear, the employer retains the ultimate responsibility for ensuring that its employees are provided adequate documentation and records regarding their compensation, and employers can face significant liability for the failure to do so. Following the holding in *Goonewardene* that an employee's employer bears full responsibility for any liability arising from wage statement errors, employers should review their payroll processes and ensure they are compliant with all federal, state, and local laws.

PAGA Penalties Must be Distributed on a Pro Rata Basis

In *Moorer v. Noble L.A. Events*, a California appellate court confirmed that 25 percent of the penalties to be allocated under the Private Attorneys General Act of 2004 ("PAGA") must be distributed to all aggrieved employees in a pro rata share.

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Plaintiff David Moorer ("Moorer") was formerly employed by Defendant Noble L.A. Events, Inc. ("Noble") as a full-time security guard. Moorer filed a complaint against Noble as an individual and on behalf of all aggrieved employees alleging individual wage and hour and representative PAGA claims for violations of the Labor Code and Industrial Welfare Commission Wage Order No. 4. After Noble failed to respond to discovery that Moorer had served, Noble's counsel filed an ex parte application to be relieved as counsel, which the court granted. The trial court deemed Noble to be in default when it failed to retain new counsel.

The court clerk entered a default against Noble, and Moorer submitted a request for entry of default judgment including PAGA penalties, Moorer's individual claims, costs, and attorney's fees. Moorer's proposed judgment initially sought to give 100 percent of the PAGA penalties to himself and did not allocate any penalties to the Labor and Workforce Development Agency ("LWDA"). The trial court denied the request explaining that 75 percent of the PAGA penalties must be allocated to the LWDA, with the remaining 25 percent distributed to each of the 23 aggrieved employees.

Although the PAGA penalties in the proposed judgment were calculated based on wage violations for 23 aggrieved employees, Moorer asserted that the remaining 25 percent of the PAGA penalties was not required to be distributed to the other aggrieved employees. He claimed that as the sole named plaintiff in the lawsuit, he was entitled to the entire 25 percent portion.

After eight attempts to obtain default judgement against Noble, the trial court dismissed Moorer's case. It cited to clear and unambiguous language from the California Supreme Court that "a portion of the penalty goes not only to the citizen bringing the suit but all employees affected by the Labor Code violation." *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 382. The trial court added that allowing Moorer to recover $148,912.50 in PAGA penalties when his individual claim only amounted to $9,513.59, would run afoul of the purposes of the PAGA. Moorer appealed.

The Court of Appeal affirmed the trial court's order dismissing Moorer's case. It held that PAGA civil penalties must be distributed to all aggrieved employees. The Court of Appeal correspondingly rejected Moorer's argument that he was unable to distribute 25 percent of the penalties to the other aggrieved employees because Noble had not provided him with a contact list for the other employees. It noted that Moorer could have complied with the trial court's order, then obtained discovery from Noble as a judgment creditor.

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.