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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2019*

13th Annual Employment Law Symposium

Thursday
November 14, 2019
8:00 a.m. – 4:00 p.m.

Farmer & The Seahorse
at The Alexandria

Topics Include:
• Hiring, Orientation, Counseling & Termination
• Harassment & Discrimination
• Wage & Hour Updates
• Employee Policies & Handbooks
• Managing Employees' Off Duty Conduct
• Leaves of Absence
• Retaliation & Whistleblowing
• What's Ahead in 2020

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LEGISLATIVE

Federal

U.S. Department of Labor Announces Final Rule on Federal Overtime Exemptions

The U.S. Department of Labor announced a final rule changing the regulations governing the white-collar overtime exemptions for executive, administrative, and professional employees under the Fair Labor Standards Act.

The new rule, which will take effect on January 1, 2020, will increase the salary threshold for these federal exemptions from the current level of $455 per week ($23,660 per year) to $684 per week ($35,568 per year). It will also allow employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the salary threshold. The Department of Labor considered, but ultimately rejected, a proposal to establish automatic increases to this salary threshold. As a result, the new threshold will remain the same until the Department of Labor takes action to initiate a new increase.

California employers should remember that the increased salary threshold for the federal white-collar exemptions may not impact California workers because the salary threshold under California state law is already higher than the new federal threshold. California law already requires an exempt employee to earn $960 per week ($49,920 per year); that amount will increase in January of each year through 2022.

California

Governor Newsom signed more than 40 bills with employment ramifications. Unless otherwise indicated, these new laws will take effect on January 1, 2020. Below is a summary of some of the laws that will impact employers with operations in California.

Independent Contractors

Governor Gavin Newsom signed into law California Assembly Bill 5, also known as "the gig worker bill." AB 5 will require that most gig economy and platform workers be treated as employees, and entitle them to minimum wage,

overtime, meal and rest breaks, workers' compensation, unemployment insurance, paid family leave, and other benefits.

Prior to 2018, those working as "independent contractors" could set their own schedules, and decide when, where, and how much they wanted to work. For employers, engaging these contractors meant they could quickly expand and contract, and avoid paying payroll taxes, overtime pay, benefits and workers' compensation benefits. AB 5 substantially restricts this practice. The bill begins by adopting as law the ruling established in the 2018 *Dynamex* case, wherein the California Supreme Court held that a worker performing a service for the hiring person or company is presumed to be an employee of that person or company unless the company can show the worker meets all three parts of the "ABC" test:

- The worker is free from control and direction of the hirer in connection with the performance of the work, both under the contract and in fact; and
- The worker performs tasks that are outside the usual course of the hiring party's business; and
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring business. This normally means the worker will have established and promoted his or her own business; is licensed; does advertising; has other clients or potential customers; and the like.

AB 5 significantly expands *Dynamex* in scope and consequences. AB 5 expands the "ABC" test to virtually all California workers, outside of certain specifically enumerated industries and occupations. Importantly, with a few exceptions, AB 5 is drafted to be retroactive to existing relationships and takes effect on January 1, 2020.

However, in addition to various complete exemptions, AB 5 permits certain employers and industries to analyze their contracting practices to be governed by the *Borello* multi-factor "economic realities" test. This will include licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, and workers providing licensed barber or cosmetology services, among other industries. The new law also provides for more lenient rules for those performing work under a contract for professional services, businesses to business relationships, and certain construction subcontracts. (Without the exemption, in many cases these contractors might not qualify under the "ABC" test because the services were integral to the hirer's business, or the provider might not be part of a true, independent business.) Independent contractor relationships for such functions as marketing, HR advising, travel, graphic design, tax preparation, photography, payment processing, and grant writing may also survive, under certain conditions, under the new law.

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Discrimination/Retaliation

AB 9 (Reyes) which amends Government Code sections 12960 and 12965 extends the statute of limitations from one year to three years for complaints alleging employment discrimination under the Fair Employment and Housing Act. "Filing a complaint" refers to filing an intake form with the Department of Fair Employment and Housing. The new law will not apply to previously lapsed claims. The law leaves open the question whether claims that arose in 2019 will be subject to the previous (one year) or the new (three year) statute of limitations.

AB 333 (Eggman) amends section 5550 and adds section 5525 to the Welfare and Institutions Code. The new law grants whistleblower employment protections to patients' rights advocates providing patient services at county mental health centers and creates a private right of action to enforce these protections.

SB 229 (Hertzberg) amends Labor Code section 98.74 and expands appeal and enforcement procedures for employer citations for retaliation and imposes bond requirements and certain deadlines for seeking judicial enforcement in connection with Labor Commissioner judgments.

Harassment Prevention Training

AB 547 (Gonzalez) amends various sections of the Labor Code and mandates that the Department of Industrial Relations establish a training advisory committee to create a list of qualified organizations that janitorial employers can engage to provide sexual harassment prevention training.

SB 530 (Galgiani) instructs the Division of Labor Standards Enforcement to develop industry-specific harassment prevention policy and training standards and delays the mandatory harassment prevention training requirement for the construction industry until January 1, 2021.

Arbitration and Settlement Agreements

AB 51 (Gonzalez) adds Government Code section 12953 and Labor Code section 432.6. This new law bans employers from requiring employees or applicants to waive any right, forum, or procedure under the Fair Employment and Housing Act or Labor Code as a condition of employment. Thus, while the law does not render mandatory arbitration agreements unenforceable, it makes it illegal for an employer to require employees to sign them. The law also prohibits employers from retaliating or threatening employees who refuse to waive such rights. The law applies to agreements entered into, modified, or extended on or after January 1, 2020. Notably, the law does not apply to postdispute settlement or negotiated severance agreements.

AB 749 (Stone) adds new portions of the Code of Civil Procedure and prohibits employment settlement agreements from restricting a settling party from working for the employer or any parent, subsidiary, or affiliate ("no rehire" agreements), unless the employer has made a good faith determination that the person engaged in sexual harassment or assault. This new law applies to agreements entered into on or after January 1, 2020.

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SB 707 (Wieckowski) amends and adds various sections of the Code of Civil Procedure. The new law provides consumers and employees remedies if a drafting party breaches an arbitration agreement by failing to pay costs and fees. By way of example, employees could move the matter to court and receive mandatory monetary sanctions for a drafting party's default. The law also mandates arbitration companies to report demographic data related to the race and gender of arbitrators.

Leaves of Absence

AB 1223 (Arambula) amends various code sections and requires an employer to provide additional, unpaid leave time, of up to 30 days per year (in addition to the 30 days provided under current law), to an employee who is donating an organ.

SB 83 (Committee on Budget and Fiscal Review) amends a multitude of code sections. This law increases California's paid family leave program from six to eight weeks, effective July 1, 2020. The law also creates a task force to develop a proposal for further job protections, including an increased wage replacement rate.

Lactation Accommodation

SB 142 (Wiener) amends Labor Code sections 1030, 1031, and 1033 and adds Labor Code section 1034. This new law obligates employers to provide a private, safe lactation room with a seat, electricity, and a surface upon which lactation equipment can be placed. The lactation location must be in "close proximity" to the employee's work station and may not be a bathroom. In accordance with this law, employers must also provide access to refrigeration or a cooler and running water near the workspace. The law does create undue hardship exemptions for certain employers.

Wage and Hour

AB 673 (Carrillo) amends Labor Code section 210 and authorizes employees seeking wages to bring an action either to recover statutory penalties against the employer or to seek to enforce civil penalties under the Private Attorneys General Act, but not both for the same violation. The new law also makes non-payment of wages under the Barbering and Cosmetology Act a recoverable offense.

SB 688 (Monning) amends Labor Code section 1197.1 and extends the authority of the Labor Commissioner to cite an employer's failure to pay minimum wages under a contract. "Contract wages" is defined as wages based on an agreement in excess of the applicable minimum wage for regular, non-overtime hours.

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California Supreme Court Rejects Claim for Unpaid Wages Under PAGA

Kalethia Lawson ("the Employee") sued her former employer ZB, N.A. and Zions Bancorporation (the "Employer") alleging failure to pay overtime and minimum wages, failure to provide meal and rest periods, failure to timely pay wages, failure to provide accurate wage statements, and failure to reimburse business expenses. The Employee's complaint contained a single cause of action under California's Private Attorneys General Act ("PAGA") for alleged Labor Code violations – claims that arguably would not be subject to arbitration under California law. Importantly, the Employee's complaint sought "civil penalties . . . including unpaid wages and premium wages per California Labor Code section 558." Labor Code section 558(a) provides for penalties of $50.00 and $100.00 "for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages." The Employer moved to compel arbitration of the Employee's section 558 claim for unpaid wages and to stay the civil action. The trial court granted the motion, but it also compelled to arbitration "as a representative action" the unpaid wages of all allegedly aggrieved employees.

The Employer filed an appeal and a writ for mandate from the trial court's order. The court of appeal issued a writ, stating the Employee's claim for unpaid wages under section 558 could not be arbitrated. The appellate court opined that the "wages" recoverable under section 558 fell within the scope of a civil penalty, and therefore a PAGA claim under section 558 could not be arbitrated.

Thereafter, the Employer petitioned the California Supreme Court to determine whether an employer may compel arbitration of a PAGA claim seeking unpaid wages under section 558. Prior to addressing that question, the Court decided to address a "more fundamental question": whether employees can file a PAGA-only civil complaint that includes a request for unpaid wages under section 558?

The California Supreme Court's analysis began with an examination of the history of section 558 and PAGA. Section 558 was enacted as part of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. As originally written, this statute enabled the California Labor Commissioner to collect civil penalties and unpaid wages from employers. PAGA allows employees to recover civil penalties on behalf of themselves and other employees that previously were recoverable only by the Labor Commissioner, including the civil penalties contemplated in section 558. The issue was whether the employee-specific "underpaid wages" amount in section 558 "is the kind of 'civil penalty' the PAGA and *Iskanian* contemplated the employee pursuing on the state's behalf – and whose recovery *Iskanian* thus immunized from predispute waivers in arbitration agreements." In other words, may an employee bring a PAGA action to collect both civil penalties and unpaid wages under section 558? The Employer's argument was that unpaid wages should be viewed either as a "nontraditional

penalty" that can be compelled to arbitration or as compensatory damages. The Employee admitted that section 558 did not contain a private right of action but argued she could seek unpaid wages as a "civil penalty" through PAGA.

The Court partly agreed with each side. It confirmed that section 558 does not create a private right of action but agreed with the Employer that unpaid wages are compensatory damages that can be pursued only by the Labor Commissioner. The Court compared section 558 to Labor Code Section 1197.1, which allows the Labor Commissioner to issue a citation that includes a fixed component and underpaid wages component. Further, the Court noted, to classify an employee's unpaid wages as penalties available under PAGA would require 75 percent of the employee's wages be paid to the California Labor and Workforce Development Agency. That result would be inconsistent with section 558(a)(3), which provides that all recovered wages will be paid to the affected employee.

Interestingly, the Court noted that the "vast majority" of civil penalties in California's Labor Code are "fixed, arbitration amount[s]," like the $50.00 and $100.00 penalties in section 558 and the $100.00 and $200.00 penalties under PAGA. The "underpaid wages" language is more like the restitution of wages in section 1197.1 than those civil penalties, it held.

Because the unpaid wages provided for by section 558 are not penalties and because section 558 does not contain a private right of action, the Employee could not recover her wages or any aggrieved employees' wages under section 558 and PAGA. On these grounds, the Court affirmed the order denying the Employer's motion to compel arbitration, and remanded the case to the trial court to determine whether to strike the Employee's unpaid wage claim under section 558, or to grant her leave to amend, ending the recent split in authority on whether a PAGA claim, with a claim for unpaid wages under section 558, could be compelled to arbitration.

This case should put an end to the tactic of using PAGA-only cases to recover unpaid wages to avoid arbitration and class actions. Employees will be required to seek unpaid wages through an individual claim, class action, or by filing an administrative charge with the Division of Labor Standards Enforcement. Employers who want to resolve these types of claims in arbitration should ensure their arbitration agreements are fully enforceable and expressly cover individual, class, and administrative claims.

No *Tameny* Cause of Action Without the Prior Existence of an Employment Relationship

In *Williams v. Sacramento River Cats Baseball Club, LLC*, a California Court of Appeal reaffirmed that a plaintiff cannot assert a common law failure to hire claim against an employer in the absence of a preexisting employment relationship.

Wilfert Williams ("Plaintiff") sued defendant Sacramento River Cats Baseball Club, LLC ("Defendant") alleging a common law tort action for failure to hire in violation of public policy, discrimination under the Unruh and Ralph Civil Rights Acts, and violation of the Business and Professions Code. Defendant demurred to the complaint, arguing, in relevant part, that California law does not

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recognize a cause of action for failure to hire in violation of public policy. The trial court sustained Defendant's demurrer and dismissed the complaint after Plaintiff stipulated the dismissal be entered without leave to amend. Plaintiff appealed.

Plaintiff argued that the trial court erred in dismissing his complaint because the reasoning of *Tameny*, recognizing a tort action for wrongful termination in violation of public policy, extended to his failure to hire claim. The Court of Appeal disagreed. In the published portion of the opinion, the Court held that while failing to hire a prospective employee based on race violates public policy (and could give rise to a discrimination claim under the Fair Employment and Housing Act), an applicant is precluded from bringing a failure to hire claim in a common law tort action without the prior existence of an employment relationship. This is because the tort recognized by the California Supreme Court in *Tameny* is premised on the existence of an employment relationship, and in the absence of such a relationship, an employer does not owe a duty to the prospective employee.

California Appellate Court Clarifies Penalties, Interest, and Attorneys' Fees Available When an Employer Owes Employees Meal Premiums for Violations of 226.7

In *Naranjo v. Spectrum Security Services, Inc.,* a California appellate court held that unpaid premium wages for meal break violations do not entitle employees to additional remedies pursuant to sections 203 and 226 if their pay statements during the course of violations include the wages earned for on-duty meal breaks, but not the unpaid premium wages. Plaintiff Gustavo Naranjo ("Naranjo") worked as an officer for Spectrum Security Systems, Inc. ("Spectrum"). Spectrum contracts with federal agencies including federal prisons Immigration and Customs Enforcement. Spectrum officers take temporary custody of prisoners and detainees when they travel for medical treatment or other appointments. Officers also guard witnesses awaiting court appearances. Officers provide continuous supervision of these individuals until they return to custody.

Spectrum officers had on-duty meal breaks because they could not leave prisoners or detainees unsupervised. Naranjo worked for Spectrum less than a year when his employment was terminated after he left his post for a meal break. The next month, in June 2007, Naranjo sued Spectrum in a putative class action alleging that Spectrum failed to provide officers with meal and rest breaks pursuant to Labor Code section 226.7 and the Industrial Wage Commission (IWC) Wage Order No. 4-2001, and additional derivative claims.

Spectrum had a written policy regarding on-duty meal periods, but it violated the wage order because it did not include notice that an agreement to have on-duty meal periods could be revoked in writing. Despite not having a valid on-duty meal period agreement, Spectrum did not pay meal premiums.

The trial court concluded that Spectrum was liable for meal premiums because it did not utilize a compliant agreement. The trial court found that this failure was knowing and intentional and imposed penalties for inaccurate itemized wage statements under section 226. However, the trial court also concluded that the failure to include meal premiums in final paychecks of separated employees was not willful and created no liability for additional penalties under Labor Code

section 203. The trial court also awarded prejudgment and post-judgment interest at a rate of 10%. Class counsel was awarded attorneys' fees under section 226(e).

The appellate court disagreed, holding that (1) at-will, on-call, hourly, nonexempt employees who are paid for on-duty meal periods are also entitled to premium wages if the employer does not have a written agreement with an on-duty meal period revocation clause; (2) employees entitled to premium wages pursuant to section 226.7 may not, for that reason alone, pursue derivative remedies pursuant to sections 203 (waiting time penalties) and 226 (itemized wage statement penalties); (3) prejudgment interest for the failure to pay meal premiums is 7% (instead of 10%); (4) the order denying class certification of the rest break class was reversed; and (5) without the imposition of section 226 penalties, attorneys' fees could not be awarded.

The key holding long debated among federal district courts is that employees entitled to meal premiums are not entitled to waiting time penalties or penalties for the failure to provide accurate wage statements. The court determined that penalties under sections 203 and 226 are for unpaid "wages," and that meal premiums are not wages. The appellate court reasoned that wages are defined as "labor performed by employees" and labor is "labor, work, or service… if the labor to be paid for is performed personally by the person demanding payment." Section 203 penalizes an employer that willfully fails to pay any wages to a separated employee. Similarly, section 226.7's premium wage is a statutory remedy for an employer's conduct, and not an amount "earned" for "labor, work, or service" performed personally by an employee.

This case is instructive for employers for several reasons. It clarifies that meal premiums are not wages for purposes of claims under sections 203 and 226. It confirms that employers must have compliant written agreements for any employees who work on-duty meal periods. There has been a trend of increasing litigation surrounding meal and rest breaks including both class and representative actions. Employers should examine their break policies and practices to ensure best practices are in use to mitigate potential exposure. Lastly, the underlying lawsuit was filed in 2007 and has been pending for 12 years, which demonstrates how long some employers could be involved in a lawsuit, especially if the case is a class action or an appeal is involved.

Wages Owed to Personal Attendant

In *Liday v. Sim et al.*, a California Court of Appeal reversed a trial court's decision, finding that it erred in its determination of wages owed to a personal attendant for work performed prior to 2014, when personal attendants were considered exempt employees. The trial court had ruled that the worker's fixed salary covered regular, non-overtime work, which yields a higher hourly rate than the prevailing minimum wage. The appellate court found instead that the prevailing minimum wage should have been used as the worker's hourly rate in calculating damages.

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Plaintiff Lea Liday ("Employee"), a live-in personal attendant, sued her former employers, Peter Sim and Loraine Diego ("Employers"), alleging that she was due overtime pay, minimum wages, waiting time penalties, and civil penalties under the Private Attorneys General Act ("PAGA"). Employee was hired as a caretaker for Employers' special needs children and was paid a monthly salary of $3,000.00. Throughout the employment relationship, Employers did not specify an hourly rate, or the number of hours Employee was expected to work.

The trial court determined the claims period to be April 2010 to April 2014. From April 2010 until December 2013, personal attendants were properly classified as being exempt from overtime requirements and protections. The legislature passed the Domestic Workers Bill of Rights ("DWBR"), which provided personal attendants with overtime protections starting January 1, 2014. Specifically, DWBR capped personal attendants' regular hours at 45 hours a week, or nine hours a day. After a bench trial, the court found in Employee's favor on all causes of action except her PAGA claim. In accordance with Employee's proposal to treat the monthly salary as compensation for regular hours only, or 45 hours a week under DWBR, the court awarded her $403,256.33 for unpaid wages.

Employers appealed, arguing that since DWBR was not in effect from the start of the claims period until December 2013, Employee's monthly salary during that time should not be presumed to cover the 45-hour regular workweek prescribed by DWBR. Rather, Employee should only be entitled to minimum wages for each hour of work that she was working as an exempt employee.

The appellate court found that under the terms of Wage Order 15, Employers were only required to pay Employee the minimum wage of $8.00 per hour up until the enactment of DWBR in 2014. The formula used by the trial court, which presumes that Employee's salary covered her regular, non-overtime hours, relies on Labor Code section 515 ("section 515"), which applies to nonexempt employees. Since Employee was exempt up until 2014 and did not have a defined regular hour limit, section 515 does not apply, and prevailing minimum wage must be presumed as her hourly rate. Based on the foregoing, the appellate court reversed and remanded the trial court's determination of Employee's damages, as she should have been entitled to $74,080.17 under the prevailing minimum wage.

Recent Case Highlights Importance of Properly Classifying Employees

Although a positive outcome for employers, *Modaraei v. Action Property Management, Inc.* is a timely reminder about the importance of properly classifying employees.

Action Property Management ("APM") provides property management services for common interest developments. Plaintiff Ron Modaraei ("Plaintiff") purported to represent a class of managers assigned by APM to a common interest development. He alleged that APM misclassified its managers as exempt employees. Plaintiff moved the trial court for an order certifying the case as a class action. The trial court denied the motion for class certification and Plaintiff appealed.

The Court of Appeal affirmed, holding that variations in the working conditions among putative class members, who worked at hundreds of different properties, would command individual inquiries, making class treatment of the claims unmanageable.

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