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# EMPLOYMENT LAW UPDATE

*Relationship-Driven Results* *June 2020*

## COVID-19

### Federal

On June 5, 2020, President Trump signed into law the Paycheck Protection Program Flexibility Act, which expands the benefits available under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") for businesses struggling to meet their financial obligations during the COVID-19 pandemic. Under the CARES Act, employers were afforded up to eight weeks to use Paycheck Protection Program ("PPP") funds to cover certain enumerated expenses, such as payroll costs. The new law expands the covered period of the loan from eight weeks to 24 weeks or December 31, 2020, whichever occurs first. Employers that had already applied for PPP loans prior to the enactment of the Paycheck Protection Program Flexibility Act may opt to keep the eight-week covered period or use the 24-week period. Additionally, employers may repay PPP loans within five years, instead of two years as originally provided in the CARES Act. Further, employers need only spend at least 60% of PPP funds on payroll costs, and may spend up to 40% on other expenses, such as rent, mortgage interest, and utility costs.

### California

Effective June 18, 2020, the California Department of Public Health issued new guidance for the use of face coverings. Californians must wear face coverings when in the following situations:

- Inside of, or in line to enter, any indoor public space;
- Obtaining services from the healthcare sector in settings including, but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, veterinary clinic, or blood bank;
- Waiting for or riding on public transportation or paratransit or while in a taxi, private car service, or ride-sharing vehicle;
- Engaged in work, whether at the workplace or performing work off-site, when:
    - Interacting in-person with any member of the public;

- Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time;
- Working in any space where food is prepared or packaged for sale or distribution to others;
- Working in or walking through common areas, such as hallways, stairways, elevators, and parking facilities; or
- In any room or enclosed area where other people (except for members of the person's own household or residence) are present when unable to physically distance.

- Driving or operating any public transportation or paratransit vehicle, taxi, or private car service or ride-sharing vehicle when passengers are present. (When no passengers are present, face coverings are strongly recommended, but not required.)

- While outdoors in public spaces when maintaining a physical distance of 6 feet from persons who are not members of the same household or residence is not feasible.

The following individuals are exempt from wearing a face covering as set forth above:

- Persons age two years or under.

- Persons with a medical condition, mental health condition, or disability that prevents wearing a face covering. This includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance.

- Persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication.

- Persons for whom wearing a face covering would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines.

- Persons who are obtaining a service involving the nose or face for which temporary removal of the face covering is necessary to perform the service.

- Persons who are seated at a restaurant or other establishment that offers food or beverage service, while they are eating or drinking, provided that they are able to maintain a distance of at least six feet away from persons who are not members of the same household or residence.

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- Persons who are engaged in outdoor work or recreation such as swimming, walking, hiking, bicycling, or running, when alone or with household members, and when they are able to maintain a distance of at least six feet from others.

- Persons who are incarcerated.

However, individuals exempt from the face covering requirements due to a medical condition who are employed in a job involving regular contact with others should wear a non-restrictive alternative, such as a face shield with a drape on the bottom edge, as long as their condition permits it.

In addition to the foregoing public health guidance, employers should be aware that a significant COVID-19-related bill has been amended and is proceeding through the Legislature. Assembly Bill 3216, introduced by Assembly Members Kalra and Gonzalez, seeks to drastically expand the California Family Rights Act ("CFRA") and paid sick leave benefits in response to the pandemic. Although this bill appeared to die in committee last month, it was amended to scale back some of the more far-reaching expansions of existing law. Prior versions of the bill would have expanded CFRA coverage to all employers, authorized multiple new bases for family and medical leave, and mandated extensive paid sick leave programs. As amended, the bill would require covered employers (those with 50 or more employees) to provide up to 12 weeks of unpaid CFRA leave to care for a family member whose school or place of care has been closed or is unavailable due to a state of emergency, or because an employee is unable to work (or telework) due to a state of emergency involving any of the following: (1) being subject to a federal, state, or local quarantine, isolation, stay-at-home, or shelter-in-place order; (2) being advised to self-quarantine by a health care provider due to exposure to the disease that is the subject of the state of emergency; (3) experiencing symptoms of the disease that is the subject of the state of emergency; or (4) being a member of or caring for a member of a vulnerable population that is at high risk of severe illness from the disease that is the subject of the state of emergency. The bill would also authorize 56 hours (or seven days) of paid sick leave to be used during a public health emergency—this sick leave would be *in addition to* any already required under state and/or local law, though such leave would *run concurrently with* any federal paid sick leave benefits. Finally, the bill would require employers to notify laid off employees about available job positions if the employees previously held or could be qualified for such positions. The Assembly is likely to vote on the bill in the coming weeks.

## Local

San Diego County has repeatedly updated its public health orders to refine health and safety requirements in the workplace and permit additional businesses to reopen. Effective June 19, 2020, employers must require employees to be in possession of face coverings and wear them when they are within six feet of another person while in a place of business. Additionally, employers must conduct temperature screenings of employees, and prohibit any employees from entering the workplace if they (1) exhibit symptoms of COVID-19; (2) have a temperature of 100 degrees or more; or (3) have recently been exposed to a person who has tested positive for COVID-19 (either directly or through a breach of PPE in the

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case of healthcare workers or first responders). Employers are encouraged to regularly visit San Diego County's website to access the most up-to-date public health orders: https://www.sandiegocounty.gov/hhsa/programs/phs/.

## JUDICIAL

### Federal

#### U.S. Supreme Court Rules that Title VII Protects LGBTQ Employees

In the landmark ruling of *Bostock v. Clayton County*, the U.S. Supreme Court concluded that Title VII of the Civil Rights Act prohibits discrimination on the basis of sexual orientation and transgender status. Enacted during the Civil Rights era, Title VII forbids employers from discriminating against employees on the basis of race, color, national origin, religion, and sex. For the last several years, LGBTQ advocates have argued that discrimination based upon sexual orientation and transgender status is simply another species of discrimination based upon sex—an employer who fires a man for loving another man takes that action based upon preconceived, discriminatory notions about how members of the sexes should behave. In other words, the employer takes the adverse action *because of* the employee's sex, which is exactly what Title VII forbids.

While some federal appellate courts have agreed with this argument, others have rejected it on the grounds that Title VII does not expressly identify sexual orientation or transgender status in the text of the statute, and that members of Congress in 1964 did not intend the law to protect LGBTQ employees. On June 15, 2020, the Supreme Court confirmed that federal law forbids this kind of discriminatory treatment. Justice Neil Gorsuch, writing for the majority of the Court, wrote: "Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII."

Notably, discrimination on the basis of sexual orientation, gender identity, and gender expression has long been illegal under the California Fair Employment & Housing Act, as well as many other states' anti-discrimination laws. This new ruling brings federal employment law in parallel with California's emphasis on equality for LGBTQ persons in the workplace. Employers with operations outside of California are encouraged to promptly revise any harassment and discrimination prevention policies to include protections for LGBTQ employees.

### California

#### Plaintiffs Cannot Recover Attorneys' Fees for Rest Break Claims

In *Betancourt v. OS Restaurant Services, LLC*, a California Court of Appeal soundly rejected an employee's attempt to recover attorneys' fees in connection with her rest break claim. Plaintiff Raquel Betancourt ("Betancourt") worked as a server at Defendants OS Restaurant Services, LLC and Bloomin' Brands, Inc.'s ("Defendants") Fleming's Steakhouse & Wine Bar for several years. After her employment ended, she sued Defendants for failure to provide rest breaks and for

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retaliation. Betancourt sought to recover attorneys' fees under Labor Code section 218.5, which mandates an award of reasonable attorney fees to the prevailing party "in any action brought for the nonpayment of wages, if any party requests attorney fees at the initiation of the action."

Betancourt eventually settled her claims for approximately $15,000. As part of the settlement, Defendants agreed that Betancourt could file a motion for attorneys' fees incurred on such claims "consistent with applicable law." Betancourt thereafter filed a motion for more than $500,000 in attorneys' fees, arguing that her rest break claim entitled her to attorneys' fees under Labor Code section 218.5. The trial court agreed but reduced the fee award to $280,000. Defendants appealed.

The Court of Appeal concluded that a claim for the failure to provide rest breaks does not constitute "an action brought for the nonpayment of wages" within the meaning of Labor Code section 218.5. Although the remedy for the failure to provide a rest break is an additional hour of pay, which is often referred to as "premium wages," the mere act of defining the remedy in terms of "pay" does not convert a rest break claim into a lawsuit for unpaid wages. Thus, the appellate court determined, there was no basis for awarding Betancourt any attorneys' fees.

*Betancourt* is the most recent in a line of cases restricting an employee's ability to recover attorneys' fees and/or penalties in connection with meal and rest break violations. Other California courts have already held that attorneys' fees are not recoverable for meal and rest break claims (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1255), nor are penalties for waiting time and wage statement violations recoverable where premised solely upon meal and rest break violations (*Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 474; *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261). Though California law routinely imposes new and challenging compliance obligations upon employers, these authorities represent an important win for businesses.

## Seven Figure Punitive Damages Award Affirmed Based on Manager's Misconduct

*Colucci v. T-Mobile USA, Inc.* should serve as a warning to employers to properly train managers and oversee personnel decisions, as the misconduct of such employees may lead to the imposition of punitive damages against the company. In *Colucci*, the Court of Appeal affirmed a $1.5 million punitive damages award against Defendant T-Mobile USA, Inc. ("T-Mobile") in Plaintiff Stephen Colucci's ("Colucci") lawsuit for retaliation. Colucci, a store manager, worked under the supervision of district manager Brian Robson ("Robson"), who oversaw 100 employees and the operation of a dozen stores. Robson's duties involved coaching and developing managers, making final decisions on hiring and firing, and handling a wide range of operations issues.

Shortly after Robson assumed his district manager position, he decided to transfer Colucci from his store to a kiosk located inside a shopping mall. When Robson notified Colucci of his plans, Colucci informed him that he suffered from an anxiety disorder that would prevent him from performing his job in the crowded

mall location. Though Robson was skeptical (stating "this is the most ridiculous thing I've ever heard"), he did not transfer Colucci to the kiosk. A few months later, Colucci learned an associate was spreading rumors about him, and asked Robson to investigate. Robson agreed but permitted the investigation to languish. During the same timeframe, another coworker told Robson that Colucci operated a "side business" of selling used cars and had improperly used T-Mobile's equipment (a fax machine) for his side work. Robson immediately commenced an investigation.

When Robson arrived at the store to interview Colucci about his side business, Colucci was unable to meet with him because he was experiencing severe back pain. Colucci complained to Robson about his distress that Robson had not completed the investigation into his gossip complaint and asserting his belief that Robson was treating him unfairly due to his accommodation request and medical condition. Colucci requested to take a medical leave of absence. Robson stated it was Colucci's right to take medical leave and approved his taking the rest of the day off. Two hours later, Robson recommended to human resources that Colucci be fired because his side business posed a conflict of interest.

The jury found in favor of Colucci on his retaliation claim and awarded more than $1 million in compensatory damages and $4 million in punitive damages. The appellate court confirmed that an award of punitive damages was appropriate, though deemed the amount awarded to be excessive, and reduced it to $1.5 million.

Punitive damages may be assessed against an employer if an owner, officer, or managing agent engages in oppression, fraud, or malice. An employee is a "managing agent" where the employee has substantial discretionary authority over significant aspects of the business. The court concluded that Robson was a managing agent because he was a district manager, supervised 100 employees and numerous stores, had authority to hire and fire, and could decide where to transfer employees, whether to institute disciplinary measures, and whether and how to investigate an employee's reported concerns.

The court rejected T-Mobile's argument that Robson could not be a managing agent because he was not a corporate policy maker. According to the court, corporate leaders are not the only individuals who play a role in setting corporate policy—employees who possess substantial discretion to override company policy also "set" policy. In this case, Robson was empowered to override the company's progressive discipline policy and jump straight to termination, could communicate with employees out on leave despite a prohibition against doing so, and suffered no consequences for engaging in such activities.

The court also concluded that Robson acted with "malice" because he allowed Colucci to leave the store believing he was on medical leave but then fired him immediately, betraying willful and conscious retaliation.

In light of the *Colucci* opinion, employers are cautioned to carefully train managers to abide by EEO and anti-retaliation policies and to ensure that critical personnel decisions are cleared with human resources, so that rogue employees do not bind the company to massive jury awards based on their misconduct.

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## Employer's Bid for Arbitration Denied for Failure to Timely Assert the Right to Arbitrate

Fleming Distribution Company ("Fleming") made a critical mistake in defending against Alfonus Younan's ("Younan") claim for unpaid commissions—the company failed to compel arbitration until after Younan had won his case before the Labor Commissioner. *Fleming Distribution Company v. Younan* commenced when Younan filed a complaint with the Labor Commissioner to recover earned commissions. At the start of the case, Fleming notified the Labor Commissioner that Younan had signed an arbitration agreement. However, Fleming proceeded through the entire administrative process without seeking to compel arbitration, instead appearing at the Labor Commissioner's hearing (the administrative "trial" of Younan's claim), examined witnesses, introduced evidence, and awaited a ruling. Only after the Labor Commissioner ruled against the company did Fleming file a motion to compel arbitration.

The trial court denied Fleming's motion, reasoning that the company had waived its right to compel arbitration. The appellate court agreed, noting that the factors relevant to a determination of waiver include: whether the moving party acted inconsistently with the right to arbitrate; whether the litigation machinery was substantially invoked and the parties were well into the preparation of a lawsuit before the moving party expressed its intent to arbitrate; whether the moving party delayed a long period before seeking to arbitrate; and whether the non-moving party suffered prejudice because of the delay. The Court of Appeal explained that Fleming was well aware of its right to arbitrate, as the company had notified the Labor Commissioner at the outset of the existence of an arbitration agreement, but failed to act on that intention until after it had run through the entire administrative process and lost.

Though Fleming may not have learned its lesson in time, other employers can: If an employee has signed an arbitration agreement, the employer must promptly notify the employee (and counsel) of such agreement and commence arbitration proceedings, either by stipulating to arbitrate or moving the court to compel arbitration.



*This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Jennifer Suberlak, Blake Woodhall, Carol Shieh, Shelby Harris, Brittney Slack, or Rio Schwarting at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, Mihret Getabicha, or Sevada Hakopian at (310) 649-5772.*