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EMPLOYMENT LAW UPDATE

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NEW YEAR REMINDERS

Beginning on January 1, 2023, California's minimum wage increased to $15.50 per hour for all employers, regardless of size. A number of cities and counties have their own minimum wage requirements that exceed the state minimum wage. For example, minimum wage for the City of San Diego increased to $16.30 on January 1, 2023. Employers must pay the highest minimum wage applicable to an employee by comparing state and local minimum wages applicable to that employee. Remote hourly employees should be paid based on the location in which work is being performed.

Starting on January 1, 2023, the minimum salary threshold for exempt or salaried employees must be at least two times the state minimum wage or $64,480 per year. The minimum salary threshold for computer professional employees is now $112,065.20 per year.

The IRS mileage reimbursement rate increased to 65.5 cents per mile.

LEGISLATIVE

California

California Labor Commissioner Provides Pay Transparency Guidance

On December 27, 2022, the California Labor Commissioner's office released Frequently Asked Questions ("FAQs") on the state's new pay scale disclosure requirements under the Equal Pay Act, which became law on January 1, 2023. While the FAQs address a number of compliance issues inherent to the new law, they do not clarify whether the requirements apply only to postings made on or after January 1, 2023, or whether they will apply to all postings that remain active as of January 1, 2023.

Pursuant to Labor Code 432.3, "an employer with 15 or more employees must include the pay scale for a position in any job posting." The FAQs set forth that the Labor Commissioner will count employees using the same process applied to Supplemental Paid Sick Leave. In other words, the Labor Commissioner will implement the definition from Labor Code 1182.12. The disclosure requirements apply if an employer has at least one employee located in California, so long as it employs "directly or indirectly, or through an agent or any other person" 15 or more people. The Labor Commissioner also states that if a position can be filled

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in California, either remotely or in person, then the pay scale must be included in job postings.

The FAQs also confirm that a pay scale is limited to the "salary or hourly wage range the employer reasonably expects to pay for a position." A set hourly rate or set piece rate may be included in place of a pay scale if an employer "intends to pay a set hourly amount or a set piece rate amount, and not a pay range." Bonuses, tips, and other benefits need not be included in the pay scale. Employers may voluntarily provide information on "compensation or tangible benefits provided in addition to a salary or hourly wage." However, the Labor Commissioner comments that "other forms of compensation may be considered for equal pay purposes." In the scenario in which an employee's hourly or salary wages are based on piece rate or commission, the employer must include the piece rate or commission range the employer reasonably expects to pay for the position.

Distinct from other states that have enacted pay scale disclosure requirements, employers cannot link to the salary range in an electronic posting or include a QR code in a paper posting. In California, the pay scale must be included on the posting itself. In addition to the new pay scale disclosure requirements, the law requires that an employer keep records of a job title and wage rate history for each employee for the duration of the employment, plus three years after the cessation of employment. These records must be made available for inspection by the Labor Commissioner, if requested.

Employers should ensure that all job postings listed on or after January 1, 2023 contain the required pay scale information, and should carefully review postings, as employers who fail to comply can be subject to penalties ranging from $100 to $10,000 per violation.

JUDICIAL

Federal

Recent Win for Trucking Company as Break Claims Are Impacted by Preemption Decision

In a recent decision in *Valiente v. Swift Transportation Company of Arizona,* a Ninth Circuit panel affirmed a California district court's grant of summary judgment in favor of Swift Transportation Co. of Arizona, LLC ("Swift Transportation") in a class action pursued by former non-exempt truck drivers alleging violations of California's meal and rest break laws.

On December 28, 2018, the Federal Motor Carrier Safety Administration ("FMCSA") elected to preempt California's meal and rest break rules with respect to truck drivers subject to federal regulations after granting a petition made by trucking industry groups to revisit a 2008 decision. In early 2021, in *International Brotherhood of Teamsters, Local 2785 v. Federal Motor Carrier Safety Administration* (9th Cir. 2021) 986 F.3d 841, 846, the Ninth Circuit Court of Appeals affirmed that the agency's decision was a lawful exercise of power and that California's meal and rest break rules were unenforceable as to truckers carrying goods in interstate commerce, upholding the federal preemption decision

by the FMCSA. The Ninth Circuit panel in *Valiente* addressed whether the preemption decision barred plaintiffs from proceeding with the lawsuit, as it was filed before the decision was reached.

The plaintiffs in *Valiente*, Johel Valiente and Ashraf Aiad (collectively, "Plaintiffs"), were former hourly truck drivers for Swift Transportation. On October 16, 2018, before the agency issued the preemption decision, Plaintiffs filed a class action lawsuit against Swift Transportation alleging violations of California's meal and rest break laws, along with derivative state-law claims. After the Ninth Circuit issued its decision in *International Brotherhood*, the district court called for supplemental briefing on whether the preemption decision impacted Plaintiffs' claims. After briefing, the court held that it had no authority to enforce the regulations upon which Plaintiffs' meal and rest break claims rested. Because the entirety of the Plaintiffs' suit depended on the preempted meal and rest break rules, the district court granted summary judgment to Swift Transportation in all respects and dismissed the suit.

The Ninth Circuit panel applied the retroactivity test set forth in *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 263-64, 280 to reach its decision on appeal. In *Landgraf*, the Supreme Court provided a framework for reconciling any tension between two general rules including that a court is to apply the law in effect at the time it renders its decision, and that retroactivity is not favored in the law. On the other hand, changes in law "that merely *removed* a burden on private rights by repealing a penal provision (whether criminal or civil)" were understood to operate retroactively. The court ultimately determined that, because Congress intended for the FMCSA to have the power to halt enforcement of state laws, and because the FMCSA intended for this particular preemption determination to apply to pending lawsuits, the FMCSA's decision prohibited present enforcement of California's meal and rest break rules regardless of when the underlying conduct occurred.

Ninth Circuit Re-Affirms First Amendment Protections for Employee Speech in *Eric Dodge v. Evergreen School District, et al*.

In *Dodge v. Evergreen School District, et al*., a teacher ("Dodge") appealed a district court's grant of a summary judgment, seeking to establish that the school district retaliated against him in violation of his First Amendment right to freedom of expression, and that the school board ratified the denial of the teacher's retaliation, harassment, and bullying complaint filed against the principal ("Garrett") who threatened disciplinary action. The Ninth Circuit Court of Appeals reversed in part and affirmed in part the district court's decision granting summary judgment in favor of defendants.

Dodge was a teacher employed by the Evergreen School District. During teacher-only trainings, Dodge wore a Make America Great Again ("MAGA") hat and was told by Garrett, who had authority over his employment, that if he wore the hat again, he would need to bring his union representative for a conversation to discuss his clothing choice. Other faculty became uncomfortable with the hat and reported to Garrett each time Dodge wore it. Garrett inferred from these reports that the hat caused disruption among faculty. Dodge explained that the reason for wearing the hat was he liked the message behind "MAGA" because it was "kind

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of who [he is], and he owned the hat because he "show[s] support for Donald Trump."

The trial court granted a motion for summary judgment. In doing so, it set out the requisite elements to establish a prima facie First Amendment retaliation claim: a plaintiff must prove that (1) he engaged in protected speech; (2) the defendants took an 'adverse employment action' against him; and (3) his speech was a 'substantial or motivating factor' for the adverse employment action.

The Court of Appeal found that Dodge established a prima facie First Amendment discrimination case, which shifted the burden of proof to the school district to demonstrate the existence of a legitimate administrative interest in suppressing the speech that outweighed the Dodge's First Amendment rights (*Pickering* test). Despite an argument that the hat caused disruption among faculty, the appellate court held that disagreements in political beliefs are par for the course and cannot on their own form a basis for finding disruption of a kind that outweighs First Amendment rights. The court also relied on long-standing precedent establishing that concern over the reaction to controversial or disfavored speech itself does not justify restricting the speech. For those reasons, the panel reversed the district court's grant of summary judgment.

In determining whether Dodge engaged in protected speech, the court looked to whether he spoke on a matter of public concern, and whether he spoke as a private citizen or public employee. Speech is of public concern when it relates to a matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest. Whether Dodge spoke as a private citizen or public employee depends on the "scope and content of [his] job responsibilities." A person speaks in a personal capacity if he had no official duty to make the statements, or the speech was not the product of performing the tasks he was paid to perform.

As Dodge's hat was an expression of support for former president Donald Trump's campaign slogan, the content of this speech is quintessentially a matter of public concern. The court held that he spoke in a personal capacity because he was not required to wear the hat to perform his job, and did not wear it to school with students, which distinguishes this case from others involving speech in schools. Thus, his speech was protected under the First Amendment.

The court then evaluated whether the school district took any adverse employment action against him, individually, for his political speech. The court held that Dodge alleged sufficient facts to support a claim of retaliation for purposes of summary judgment but failed to prove any adverse action had actually been taken against him by the school district's Chief Human Resources Officer. Instead, Dodge was simply advised of his right to have a representative at any future conversation about the hat. However, the court held that a statement that 'warns' a person to stop doing something carries the implication of some consequences of a failure to heed that warning. The court ultimately held that, at a minimum, there was a genuine issue of fact regarding whether Dodge reasonably interpreted the statement as a threat against his employment.

The last required element of Dodge's prima facie case was that his

protected speech motivated the adverse employment action. As above, the court found a triable dispute existed as to whether Dodge's MAGA hat motivated Garrett's actions. The court applied the *Pickering* balancing test to determine whether Garrett had a legitimate administrative interest in preventing Dodge's speech that outweighed Dodge's First Amendment right. As there was no evidence of actual or tangible disruption to school operations, and that disagreements over political messages are to be expected, they cannot form the basis for establishing disruption of a kind that outweighs the speaker's First Amendment rights. As such, the grant of summary judgment was overturned.

California

Camp v. Home Depot, USA, Inc. Strikes Blow Against Utilization of Rounding Policies

In *Camp v. Home Depot, USA, Inc.*, the California Court of Appeal for the Sixth Appellate District held that, where employers are capable of recording time to the minute but instead choose to utilize a rounding policy, the imposition of summary judgment in favor of the employer is not appropriate.

In March 2019, Camp filed a class action lawsuit against Home Depot alleging that rounding policies resulted in unpaid minimum wages and overtime. At the heart of the inquiry was Home Depot's utilization of a timekeeping system that captured all time clocked in by non-exempt employees to the minute, but then rounded each employee's total shift time to the nearest quarter hour. Home Depot filed a motion for summary judgment which was initially granted, but thereafter appealed.

Citing to *See's Candy Shop v. Superior Court* (2012) 210 Cal. App. 4th 889 and its progeny, Home Depot moved for summary judgment on the grounds that its policy for rounding time was neutral on its face, neutrally applied, and otherwise lawful. The *See's Candy* court ruled that a rounding policy is lawful if it is (1) neutral on its face and (2) "is used in such a manner that will not result, over a period of time, in failure to compensate the employees properly for all the time they actually worked." In a subsequent case, the appellate court held that a rounding policy "is fair and neutral and does not systematically undercompensate employees where it results in a *net surplus of compensated hours and a net economic benefit to employees viewed as a whole*." (*AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1028. ("*AHMC*").) The trial court granted summary judgment based on these decisions, particularly as evidence presented by Home Depot demonstrated that employees benefitted from rounding and were, in fact, slightly *overpaid* wages.

The appellate court reversed the trial court's ruling, however, disagreeing with *See's Candy, AHMC*, and other similar decisions permitting time rounding. In support of this opinion, the court relied on two recent California Supreme Court cases: *Troester v. Starbucks* (2018) 5 Cal. 5th 829 ("*Troester"*) and *Donohue v. AMN Services, LLC* (2021) 11 Cal. 5th 829 ("*Donohue"*), ruling that employees must be paid for all time worked. Working under the assumption that clocked time is time worked, the court determined that this is an issue subject to further litigation, such that imposition of summary judgment was improper.

The appellate court also rejected Home Depot's contention that calculation of wages and display of hours on wage statements is easier under application of a rounding policy, as there is no provision under California law that privileges arithmetic simplicity over paying employees for all time worked.

The appellate court did not address the validity of the rounding standard articulated in the *See's Candy* in limited circumstances where the employer can capture and has captured all minutes an employee has worked, inviting the California Supreme Court to resolve this issue. Similarly, the appellate court also provided little guidance regarding "technological advances" that now exist to assist employers in tracking non-exempt employees' time more precisely, instead leaving that inquiry to the California Supreme Court.

The *Camp* decision increases the risk of litigation and potential liability for California employers that utilize rounding systems for payment of wages, especially where the employers' timekeeping system is capable of tracking clocked time to the minute. While rounding is not illegal per se, paying by the minute will certainly reduce the likelihood of potential litigation and adverse ruling, and should be strongly considered by all employers capable of doing so.

California Court of Appeal Holds Highly Fact-Specific Nature of Essential Job Duties Raises Triable Issue of Fact for Disability Claim in *Price v. Victor Valley Union High School Dist.*

La Vonya Price ("Price") worked at the Victor Valley Unified School District (the "District") as a substitute special education aide between summer 2006 and fall 2007. During this span of employment, Price never told the District about a disability and/or resultant medical restrictions caused by a stroke that occurred in 2003.

In February 2018, Price applied for another substitute position at the District, at which time she indicated that she had no disability that required accommodation. In July or August 2018, Price applied for a full-time permanent position with the District. While she received an offer for the position, that offer was contingent upon passing a physical exam, which Price failed.

Price sued the District, alleging various disability-related claims under the Fair Employment and Housing Act. The District argued that Price could not meet the physical demands of the position because running after students was an essential function when working with special education students. The trial court granted the District's motion for summary judgment, but the Court of Appeal reversed in part.

The appellate court rejected the District's argument that Price was not qualified to perform the job because she failed the physical examination. In doing so, the court held that there was a genuine dispute of material fact as to whether running was an essential function of the position, particularly as Price had worked in the same position in a part-time capacity before being offered a full-time position. Further, Price established that she could have been placed with special needs students that would not require any physical assistance or supervision. Lastly, the court determined that repeated comment by the District's Director of

Classified Personnel stating Price was "a liability" created a triable issue of material fact as to whether its reason for rescinding the job offer was pretextual. Accordingly, the court reversed and directed the trial court to enter an order denying the District's motion for summary adjudication of Price's disability discrimination claim.

In its ruling, however, the court cautioned that the District was under no obligation to engage in the interactive process with Price because her disability, limitations, and reasonable accommodations were not open and obvious. Accordingly, she had the initial burden to initiate the interactive process and request a reasonable accommodation. Because Price never initiated the process or made a request, her failure to accommodate claim failed.

First Appellate District Clarifies Application of Outside Salesperson in *Espinoza v. Warehouse Demo Services, Inc.*

In *Espinoza v. Warehouse Demo Services, Inc.*, California's First Appellate District reversed a trial court's grant of summary judgment against Appellant Georgina Espinoza ("Espinoza"), holding that the pertinent inquiry as to whether an employee works away from the employer's place of business is the extent to which the employer maintains control or supervision over the employee's hours and working conditions.

Espinoza worked as a product demonstrator for Respondent Warehouse Demo Services, Inc. ("Warehouse"), an in-house product demonstration company for Costco Wholesale ("Costco"). Warehouse did not lease any portion of Costco but maintains an office space within each store in which it provides demonstrations.

Warehouse's policy was that demonstrators were not permitted to leave their demonstration areas unattended at any time during their six-hour shifts. Espinoza could therefore only leave her demonstration area to take a break when an assigned "breaker" came to relieve her. Warehouse argued that Espinoza fell under the outside salesperson exemption because she was engaged in selling away from respondent's place of business, as respondent did not own or lease space at Costco. Espinoza, on the other hand, argued that Warehouse exerted extensive control and supervision over its office and demonstration areas within Costco to such an extent that she did not work "outside" of respondent's place of business.

The trial court granted Warehouse's motion for summary judgment because Espinoza did not work at a site owned or controlled by Warehouse, and therefore, the court agreed, worked away from Warehouse's place of business.

On appeal, the appellate court reversed. Warehouse relied on the Division of Labor Standards Enforcement's ("DLSE") 1998 letter and *Moore v. International Cosmetics and Perfumes, Inc.* (C.D. Cal. 2016) 2016 WL 3556610, to argue the outside salesperson exemption does not apply because an employer's "place of business" means property that is "owned or controlled by [the] employer;" and Warehouse does not own or lease Costco.

Contrary to Warehouse's position, however, the underlying facts in *Moore*

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provide a perfect example of when an employer controls its employees' hours and working conditions on property it does not own or lease. First, although Warehouse is technically headquartered elsewhere, the only place it actually conducts its primary business is at Costco locations. Moreover, Espinoza was required to clock in and out at every shift, was responsible for maintaining her designated area, and could not leave her designated area during her shift unless another employee came to relieve her for a break. Unlike traveling salespersons or route sales representatives in *Ramirez v. Yosemite Water Co* (1999) 20 Cal.4th 785, demonstrators did not enjoy the freedom to choose the exact location of work.

While employees in *Moore* were instructed to work at different retail locations with varying hours and did not receive any direct or in-person supervision from their employer, Espinoza reported to a single Costco location over an extended period of time, had set six-hour shifts, and was supervised by an on-site event manager plus two shift supervisors. Warehouse also had an office located inside Costco where Espinoza clocked in and out and retrieved supplies and equipment.

The appellate court also disagreed with *Moore*'s legal interpretation of the DLSE's 1998 letter. The court concluded that the law does not require that an employer own or control a property for it to be considered its "place of business" for purposes of the exemption. Instead, the DLSE concluded that an employer's place of business was not limited to its principal place of business or headquarters and that these employees did not fall within the exemption.

Ultimately, the *Espinoza* decision concluded that the outside salesperson exemption would not apply where an employee's hours and schedule were carefully monitored and controlled by the employer, even if the work was technically performed at a location separate from the employer's own headquarters. In light of this decision, employers should be wary of the potentially broad interpretation of the concept of "place of business" for purposes of alleging exemption and should refrain from arguing exemption where such a position is not logically justifiable.

Ninth Circuit Establishes Timely Pay for Employees in *Parsons v. Estenson Logistics, LLC*

In *Parsons v. Estenson Logistics, LLC*, the Ninth Circuit evaluated when wages ought to be paid to employees who are paid weekly when the close of a payroll period lands on a Saturday.

Parsons was formerly employed by Estenson, which pays its employees weekly, on the second Monday after the end of each pay period - nine calendar days after the end of the pay period. If that Monday falls on a holiday, payment is issued on the following Tuesday – ten calendar days after the end of the pay period. Parsons claimed that this practice was violative of Labor Code section 204(d), which requires that employees who are paid weekly be paid "not more than seven calendar days following the close of the payroll period."

Parsons argued that, in order to be deemed timely, wages are owed on

Saturday when a pay period closes on Saturday. Estenson, on the other hand, argued that wages are deemed timely if paid by the following Monday. The court agreed with Estenson, holding that, consistent with Civil Procedure section 12(a) (which provides that weekends are deemed holidays), wages for pay periods ending on a Saturday may be timely paid the following Monday or, should that Monday fall on a holiday, on the next day following the holiday.

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