PETTITKOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN

EMPLOYMENT LAW UPDATE

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

San Diego | Los Angeles | Phoenix | Tucson
www.pettitkohn.com

COVID-19 UPDATE

The Occupational Safety and Health Standards Board voted to adopt non-emergency COVID-19 regulations that took effect on February 3, 2023. The regulations will remain in effect for two years, with the exception of recordkeeping subsections, which will remain in effect for three years. The non-emergency regulations include a number of requirements previously found in the Emergency Temporary Standards ("ETS").

Key ETS requirements that will remain in effect include:

- Employers must provide face coverings and ensure they are worn by employees when required by California Department of Health ("CDPH").
    - Employers must review CDPH Guidance for the use of face masks to learn when employees must wear face coverings.
    - Employees have the right to wear face coverings and to request respirators when working indoors and during outbreaks.
- Employers must report employee deaths, serious injuries, and serious occupational illnesses to Cal/OSHA, consistent with existing regulations.
- Employers must make COVID-19 testing available at no cost and during paid time to employees following a close contact.
- Employers must exclude COVID-19 cases from the workplace until they are no longer an infection risk, and implement policies to prevent transmission after close contact.
- Employers must review CDPH and Cal/OSHA guidance on ventilation.
- Employers must develop, implement, and maintain effective methods to prevent COVID-19 transmission by improving ventilation.

Important Changes to Regulations

Employers are no longer required to maintain a standalone COVID-19 prevention plan. Instead, employers are required to address COVID-19 as a

Areas of Practice

Appellate

Business Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Trial & Civil Litigation

workplace hazard under section 3203 (Injury and Illness Prevention Program ["IIPP"]). Employers must include procedures to prevent a COVID-19 health hazard in their written IIPP or in a separate document.

Employers must also do the following:

- Provide effective COVID-19 hazard prevention training to employees.
- Make testing available at no cost, including to all employees in the exposed group during an outbreak.
- Notify affected employees of COVID-19 cases in the workplace.
- Investigate and respond to COVID-19 cases and certain employees after close contact.
- Identify COVID-19 health hazards and develop methods to prevent transmission in the workplace.
- Maintain records of COVID-19 cases and immediately report serious illnesses to Cal/OSHA and to the local health department when required.
- Report major outbreaks to Cal/OSHA.

Employers are no longer required to pay employees while they are excluded from work. They are still required, however, to provide employees with COVID-19 related benefits to which employees may be entitled under federal, state, or local laws, employer's leave policies, and/or leave guaranteed by contract.

Important Changes to Definitions

- "Close contact" is defined by the size of the indoor airspace in which the exposure takes place.
    - For 400,000 or fewer cubic feet, "close contact" is sharing the same indoor airspace with a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the infectious period.
    - For greater than 400,000 cubic feet, "close contact" is being within six feet of a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period.
- "Exposed group" includes employer-provided transportation and employees residing within employer-provided housing covered by the COVID-19 prevention standards.

Further information and additional resources can be found on the Department of Industrial Relations and Cal/OSHA websites.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

JUDICIAL

Federal

Ninth Circuit Affirms Burden Shifting Requirements for Employee Discrimination Claims

In *Opara v. Yellen*, a revenue officer ("Opara") appealed a district court's grant of summary judgment, seeking to establish that the Internal Revenue Service ("IRS") terminated her employment pretextually based on age and national origin, in violation of the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. The Ninth Circuit Court of Appeals ("Court") affirmed the lower court's decision granting summary.

Opara was born in 1954 and Nigerian in national origin. Opara's employment with the IRS was terminated for assessed Unauthorized Access of Taxpayer Data ("UNAX") offenses. Opara accessed the tax records of taxpayers with whom she had been acquainted from her congregation and who worked as contractors at her home. Opara was placed under investigation prior to termination, and temporarily suspended from use of the IDRS system during investigation. Because she could not complete her ordinary work tasks without the IDRS system, the IRS director assigned her with administrative tasks to perform in the interim, including cleaning government cars. Opala claimed she was terminated based on age and national origin, and argued the IRS discriminated against her by proposing her termination and by "humiliating" her with "menial tasks" as well as by discharging her without offering her the opportunity to retire after 27 years with "no history of discipline."

The Court found that Opara established a prima facie discrimination case, which shifted the burden of proof to the IRS to show whether it had a legitimate, nondiscriminatory reason for terminating Opara's employment. The IRS argued that the IRS manager's guide instructed that the decision to terminate Opara was an appropriate penalty for the assessed UNAX violations, and the Court found this reason sufficient. The burden then shifted back to Opara to establish that the IRS' articulated reason was pretextual. However, the Court held that her direct record evidence of age-related discriminatory animus consisted of her own allegations (i.e., that her previous territory manager said "if anyone is too old to do this job, then she should quit") and was therefore insufficient to raise a genuine issue as to pretext. Because Opara had not raised a genuine issue as to whether her termination was due in whole or in part to age discrimination, the Court affirmed the lower court's grant of summary judgment.

In regard to the national origin discrimination claim, the Court held that it need not decide whether Opara could establish a prima facie national origin discrimination claim because, assuming *arguendo* that she could, her claim failed at the pretext stage. The Court further held that the IRS satisfied its burden of articulating a legitimate, non-discriminatory reason for the challenged action for the same reasons as discussed above. As such, the Court held that Opara failed to establish that the IRS' proffered reasons for termination were a pretext for discrimination based on national origin, and that Opara's conclusory

Areas of Practice

Appellate

Business Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Trial & Civil Litigation

allegations (i.e., male colleagues were "punished less severely" for similar mistakes) were insufficient to create a genuine issue as to whether the reasoning was false or whether the termination was due in whole or in part to her national origin.

California

California Court of Appeal Rejects Attempt to Force Pre-Employment Claims of Race-Based Harassment and Discrimination

In *Vaughn v. Tesla, Inc.*, the California Court of Appeal for the First Appellate District held that when arbitration agreements do not directly reference periods of time before the employment started, retroactive imposition of those agreements to pre-employment periods is not appropriate.

In November 2017, Plaintiff Marcus Vaughn ("Vaughn") filed a complaint against Tesla, Inc. ("Tesla") alleging that he suffered a racially hostile work environment. The court of appeal affirmed the trial court's ruling that arbitration could not be compelled because Vaughn did not sign the offer of direct employment which contained the arbitration agreement. In November 2020, Tesla moved to deny class certification because Vaughn was not bound to arbitrate and therefore could not adequately represent the interests of workers who had agreed to arbitration. Following the trial court's direction, Vaughn filed an amended complaint with proposed subclasses and additional named plaintiffs. The plaintiffs were part of a subclass of workers who were employed for portions of time by staffing agencies and later became direct employees of Tesla. These employees sought relief against Tesla based on a "joint" employer theory for the periods before they become direct employees of Tesla and were employed by staffing agencies.

In August 2021, Tesla moved to compel arbitration of Vaughn's claims because the allegations of the additional named plaintiffs failed to distinguish between the time employed by staffing companies and direct employment by Tesla and that arbitration was mandated for all the claims because they were related to the plaintiffs' employment with Tesla. Plaintiffs argued they were not obligated to arbitrate claims regarding conduct before the "first day of employment" indicated in their offer letter from Tesla, August 2, 2017. The trial court granted Tesla's petition to compel arbitration in part and denied in part by concluding that the arbitration clauses require plaintiffs to arbitrate disputes that arise on or after August 2, 2017, and that any claims before that date are not within the scope of the agreements and also denied the motion to compel arbitration regarding plaintiffs' claim for a public injunction. Tesla then appealed this decision.

The *Vaughn* decision increases the risk of litigation in circumstances where an arbitration agreement does not explicitly indicate pre-employment claims are covered and the signed offer defines "employment" narrowly. Employers should be aware that courts carefully read arbitration provisions to determine what both parties agreed to and will only compel arbitration when mutual consent is clear. Further, because public injunctions are considered substantive rights, preempting rules that prohibit waiver of the right to seek

public injunctions will fail unlike procedural structures which are more easily waived.

No Payment of "Overtime on Overtime"

An employer is not required to pay "overtime on overtime" when calculating regular rate of pay. When an incentive compensation program provides for the simultaneous payment of overtime compensation due on a monthly bonus by way of a percentage increase to an employee's regular and overtime wages, it comports with both federal and California law.

In *Lemm v. Ecolab*, Stephen Lemm ("Plaintiff") was a non-exempt route sales manager for Ecolab Inc. ("Defendant"). He earned a nondiscretionary monthly bonus, which varied month to month and was paid every four to six weeks pursuant to a schedule set out in the incentive compensation plan. Under the plan's terms, the monthly bonus depended on Plaintiff meeting or exceeding the two goals. The first goal was to achieve at least 80% of his territory sales budget. If he met this goal, his gross wages for the month were increased by at least 22.5%. The greater his sales, the greater the percentage multiplier. The second goal was to complete a report on at least 90% of his regular customer calls. If he met this goal, his gross wages for the month were increased by an additional 5%. This percentage did not change, even if he completed reports on more than the 90% goal. Under Defendant's calculation, gross wages for the purpose of calculating the bonus included straight time, overtime, and double time wages.

Plaintiff brought a Private Attorneys General Act ("PAGA") claim alleging that he did not receive the proper overtime rate as part of the nondiscretionary monthly bonus. The parties did not dispute that overtime compensation was due on the monthly bonus; they differed on the correct method to use to calculate the overtime due on the bonus. The parties filed cross-summary adjudication motions to resolve how overtime rates are treated in the calculation of nondiscretionary monthly bonuses.

The trial court granted Defendant's motion and denied Plaintiff's, finding that a requirement for an employer to pay overtime on a percentage bonus that already included overtime pay would make an employer pay "overtime on overtime." The Second District Court of Appeal affirmed.

Payment of overtime compensation in California is governed by both federal and state law, but state law controls when it is more protective of employees than federal law. In California, Labor Code section 510 and Industrial Welfare Commission ("IWC") Wage Order No. 5 require an employer to pay an overtime premium of 1.5 times the regular rate of pay for work in excess of eight hours in a day, 40 hours in a week, or for the first eight hours worked on the seventh consecutive day of work, as well as twice the regular rate of pay (double time) for any work in excess of 12 hours in one day.

Section 49.2.4 of the Division of Labor Standards Enforcement ("DLSE") Manual explains how to compute regular rate of pay and overtime on a bonus. When a bonus is based on a percentage of production or some formula

other than a flat amount and can be computed and paid with the wages for the pay period to which the bonus is applicable, overtime on the bonus must be paid at the same time as the other earnings for the week, or by the payday for the next regular payroll period. When a bonus is earned during straight time as well as overtime hours, the overtime premium on the bonus is half-time on the regular bonus rate. The regular bonus rate is found by dividing the bonus by the total hours worked (including overtime hours) during the period to which the bonus applies. An employee is entitled to an additional half of the regular bonus rate for each time and one-half hour worked.

The Fair Labor Standards Act of 1938 ("FLSA") requires an employer to pay overtime compensation at 1.5 times an employee's regular rate of pay when an employee works over 40 hours in one week. There are eight statutory exceptions to the regular rate definition, including discretionary bonuses. According to CFR 778.210, percentage-based bonus schemes, in which an employer's payment of a bonus is based on the percentage of total earnings, including both regular and overtime earnings, satisfies the overtime provisions of the FLSA and no recalculation is required.

The terms of Defendant's incentive compensation plan expressly provide for the simultaneous payment of overtime compensation due on the monthly bonus by way of a percentage increase to Plaintiff's regular *and* overtime earnings. These simultaneous payments satisfy the overtime provisions of the FLSA and the Ninth Circuit and district court agree that this type of calculation used for overtime due on the monthly bonus is proper under federal and California authorities. The appellate court found that Plaintiff's calculation of overtime using DLSE 49.2.4, instead of CFR 778.210, would have led to the payment of "overtime on overtime" because it failed to take into account the fact that the bonus that he received already included overtime on the bonus. Labor Code section 510 and Wage Order No. 5 only require an employer to pay an overtime premium of 1.5 times the regular rate of pay, not a greater amount. The court concluded that Defendant was not required to use the exact formulation in DLSE 49.2.4 to calculate a percentage-based bonus; Plaintiff would have been paid the same amount whether Defendant used the DLSE 49.2.4 formula or the CFR 778.210 formula, as long as the calculation did not include "overtime on overtime."

As a separate matter, Plaintiff served an amended PAGA notice to the Labor and Workforce Development Agency ("LWDA") to allege additional claims for reporting time and split shift wage violations. Defendant filed a motion for judgment on the pleadings on these two claims, and the trial court ruled in its favor, as the complaint did not include these allegations. Plaintiff then filed a second PAGA action against Defendant, alleging the same claims for reporting time and split shift wage violations asserted in his amended PAGA notice.

Defendant moved to compel arbitration in this second case, relying on the U.S. Supreme Court's decision in *Viking River Cruises v. Moriana*. The trial court in this second case granted Defendant's motion to compel arbitration of Plaintiff's individual claims and to dismiss his representative claims. The appellate court found that, because Plaintiff's claims had been sent to arbitration

in the other case, the issue was moot in this case, as there was no relief it could grant. By filing the second case and being compelled to arbitration, Plaintiff rendered moot his appeal of the motion for judgment on the pleadings.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

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, Rio Schwarting, Christine Dixon, Jessica O'Malley, Nicole Allen, Haley Murphy, Noah Diamant, or Celeste Leung at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Rachel Albert, or Enoch Cheung at (310) 649-5772.