Folger Levin LLP

NEW LEGAL DEVELOPMENTS
FOR CALIFORNIA EMPLOYERS
2019

Onward to 2019!

There were some seismic shifts in employment laws in the past year. In what could fundamentally change the nature of many businesses in California, the California Supreme Court rewrote the standard for who is an independent contractor – greatly expanding the number of workers who will be considered "employees" under California law. The full impact of that decision is still uncertain, as many employers, particularly those in the technology sector, work out the consequences of the new test on their bottom line. The longer-term consequences of the #MeToo movement also are being felt legislatively, with major changes in the laws concerning sexual harassment – including imposing new training requirements and restricting non-disclosure agreements. Among the other new developments:

- Stricter wage-and-hour standards for "de minimis" time spent at work by employees;
- Changes to the calculation of the regular rate of pay for "flat sum" bonuses, impacting how employees who receive these bonuses are paid overtime, meal and rest period premiums, and sick pay under California law;
- Employers must reassess non-solicitation agreements post-termination after their legality was drawn into question.

Please remember that the following update provides general information and is not intended to provide legal advice as to any specific factual situation. If you have questions about the application of these laws to a particular situation, please contact one of the attorneys in our Labor Group, who would be happy to assist you.

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CALIFORNIA SUPREME COURT ADOPTS NEW TEST FOR INDEPENDENT CONTRACTORS: *DYNAMEX OPERATIONS WEST, INC.*

On April 30, 2018, the California Supreme Court issued an opinion regarding independent contractors with profound implications for California employers. The Court's decision in *Dynamex Operations West Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) rewrote the test for determining whether a worker is an "employee" or an "independent contractor" for purposes of California wage-and-hour claims under the Industrial Welfare Commission Wage Orders.

The case involved drivers for a delivery company who had worked as employees before being reclassified by the company as "independent contractors." The drivers then filed a class action lawsuit claiming that they were improperly classified, and the California Supreme Court addressed the question of what test to apply for claims alleging violations of California's Industrial Welfare Commission Wage Orders. The Court's ruling changes the longstanding "control test" standard applied by the Labor Commissioner and courts for many years and instead institutes a brand-new test with huge impacts for California employers.

The new test (called the "ABC" test) states that an individual will be presumed to be an employee (rather than an independent contractor) under the law, unless the hiring business can satisfy each element of a three-factor "ABC" test:

A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; and

B. That the worker performs work that is outside the usual course of the hiring entity's business; and

C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

To meet prong (A), the hiring company may not either exercise control or retain the right to exercise control over the worker. This prong is the most like the existing "control" test.

For prong (B), the worker may not be performing work that is a usual part of the hiring entity's business. For this case, because Dynamex's entire business was that of a delivery service, whether the drivers who made deliveries for defendant Dynamex were performing the same work being carried on by the business was "clearly" amenable to resolution on a class basis – with the Court tacitly concluding that they were. Similarly, the Court cited a case holding that entertainers hired by a resort for its guests were performing work within the resort's usual course of business, because the resort advertised and regularly provided that entertainment. Thus, those entertainers needed to be classified as employees. In contrast, a retail store bringing in a plumber to fix a leak in the store will be able to satisfy prong (B) of the test.

Finally, as to prong (C), the hiring entity will be required to show that the worker actually is engaged in an independently established business, with evidence (such as marketing materials) that the independent business is in fact operating, not merely an agreement that says the worker may provide services to others.

Litigation Impact

In practice, the decision will greatly expand the number of workers who must be treated as "employees" for purposes of essentially all California wage-and-hour regulations, including minimum wages, overtime, and meal-and-rest breaks. It may also make it easier for plaintiffs to bring class actions by reducing the number of factual issues for courts to consider.

Because *Dynamex* is ostensibly limited only to claims pursuant to the Wage Orders, its impact is somewhat narrowed. The California Court of Appeals recently provided some clarity on these limits. In *Garcia v. Border Transportation Group LLP*, 28 Cal. App. 5th 558 (2018), the court reversed in part and affirmed in part a pre-*Dynamex* lower court ruling dismissing an action with mixed Wage Order and non-Wage Order claims. The trial court, applying the control test in effect before *Dynamex*, had found that the plaintiff -- a driver for a taxi-cab company -- was an independent contractor. The appeals court reversed in part, finding that under the *Dynamex* "ABC" test, the driver was an employee for the purposes of the Wage Order claims, such as for unpaid wages. For the non-Wage Order claims, it deferred to the trial court's analysis applying the existing control test.

Notably, the *Garcia* court took for granted a retroactive application of *Dynamex* on the Wage Order claims after the defendants failed to argue the point, noting that in general "judicial decisions are given retroactive effect." At least one trial court also has explicitly reached this conclusion. In *Oriana Johnson et al. v. VCG-IS LLC et al.*, No. 30-2015-00802813 (Cal. Sup. Ct. July 25, 2018), a case involving the classification of exotic dancers as independent contractors, the court ruled that *Dynamex* did indeed have retroactive application. Thus, even though this test emerged only this year, it appears likely that courts will apply *Dynamex* retroactively, expanding the scope of potential liability.

Takeaways

Looking backwards, employers can take some comfort knowing that in lawsuits concerning independent contractor classification, the new "ABC" test will be applied only to claims arising from the Wage Orders. However, with retroactive reach, classification decisions made before this test was in effect can now be challenged.

Going forward, this sweeping new decision will have major implications on the classification of workers under California law. And as a practical matter, although the test only applies to Wage Order claims, employers cannot classify workers as employees for some purposes and independent contractors for others. Despite the seemingly limited nature of the test, employers need to apply it for all purposes in determining whether to classify a worker as an employee or independent contractor.

California businesses should carefully review their classification of independent contractors to ensure that they are complying with this new decision.

DE MINIMIS RULE REJECTED: *TROESTER V. STARBUCKS CORP.*

Under federal law's longstanding *de minimis* rule, employers may be excused from paying employees for trivial amounts of time that would be difficult for an employer to record. The California Supreme Court's decision in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), however, rejected the application of the *de minimis* rule to an employee's regularly reoccurring activities, finding that California statutes and wage orders do not incorporate the federal rule or an equivalent state rule.

In *Troester*, the employer argued that the *de minimis* rule should defeat a supervisor's claim that he was owed compensation for 4 to 10 minutes of work he performed each day closing the store after clocking out. This work included initiating a store closing procedure on a computer separate from the one on which he clocked out, activating the store's alarm, exiting, and locking the door.

"*De Minimis*" time may now be compensable under California law.

The Court held that the California Labor Code and wage orders do not incorporate the federal *de minimis* rule and do not incorporate a comparable rule under state law applicable to the regularly occurring work at issue, and thus the time was compensable and should have been paid by Starbucks. At the same time, the Court limited its holding to regular and reoccurring small amounts of time, declining to decide whether there may be any set of facts involving minute or irregular work periods that would be unreasonable to record and therefore non-compensable.

In arriving at its conclusion, the Court rejected longstanding California Department of Labor Standards Enforcement (DLSE) guidance that had adopted the federal rule, reminding employers that the DLSE's Enforcement Manual is not binding on courts, even if it may sometimes be persuasive.

What should employers do?

Employers should ensure that employees record all time worked. The Court noted that employers, aided by technological advances, can devise ways to ensure that even small or irregular amounts of work are recorded. This can include restructuring work, for example, by having employees clock out only after completing all work tasks. Where work cannot easily be tracked, adopting means to estimate work time can be an acceptable option.

OVERTIME ON FLAT-SUM BONUSES: *ALVARADO*

Under both federal and state law, employers must pay non-exempt employees overtime (as well as state sick leave and meal and rest break premiums) based on an employee's "regular rate" of pay. In addition to an employee's base rate of pay, the regular rate incorporates additional forms of compensation, such as non-discretionary bonuses. However, as illustrated by the California Supreme Court's decision in *Alvarado v. Dart Container Corp.*, 4 Cal. 5th 542 (2018), the regular rate under state law is not always calculated in the same manner as under federal law.

The employer in *Alvarado* paid employees who worked on the weekend an attendance bonus of $15 for each weekend day an employee worked. Although the employer did include this non-discretionary bonus in each employee's regular rate for calculating overtime, the question addressed by the Court was, for purposes of calculating the regular rate, whether the bonus was attributable to all hours worked, or only to non-overtime hours worked. Attributing the bonus only to non-overtime hours worked would result in higher overtime payments to non-exempt employees each workweek.

The employer had calculated overtime on the bonus pursuant to the federal rule of dividing the bonus by all hours worked in the pay period to determine the hourly value of the bonus, and then multiplying that hourly value by 0.5 to calculate overtime, consistent with federal law and an existing California Court of Appeals decision adopting that formula. The plaintiff argued that the hourly value of the bonus should be based only on non-overtime hours worked by the employee (resulting in a higher base for the overtime), and that the bonus hourly rate should be multiplied by 1.5 rather than 0.5 to calculate overtime because the employer owes both base compensation and the overtime premium on the flat-sum bonus. While the difference per employee each pay period using the plaintiff's method was not substantial, the cumulative amount for all employees plus penalties was significant.

The California Supreme Court agreed with the plaintiff, determining that the flat-sum bonus compensated an employee only for non-overtime hours worked. Therefore, the Court held that the regular rate for overtime on a flat-sum bonus must be determined by first dividing the bonus amount by the non-overtime hours the employee worked during the workweek and then multiplying the result by 1.5 (for time-and-a-half overtime).

What should employers do?

Employers should review compensation they provide California non-exempt employees beyond the employee's base wages to determine whether and how the extra compensation should be calculated for purposes of the regular rate. If an employer provides a flat-sum non-discretionary bonus and an employee works overtime in that week, to calculate the "regular rate", the flat-sum bonus must be divided by an employee's non-overtime hours worked in the applicable period to determine the hourly value of the bonus, and then multiplied by 1.5 for time-and-a-half overtime (or by 2 for double time). However, employers should keep in mind that other forms of additional compensation (such as variable production bonuses) may still be factored into the regular rate based on all hours worked and then multiplied by 0.5 to determine the overtime premium.

This is a complicated area of the law, and also makes impacted employers vulnerable to wage-and-hour claims, so overtime calculation methods should be reviewed carefully.

NEW TEST FOR UNPAID INTERNS AND STUDENTS

The U.S. Department of Labor (DOL) has dropped its prior 6-factor test for unpaid intern status, and instead adopted the "primary beneficiary test" used by several federal courts of appeals to determine whether an intern or student is an employee for purposes of federal wage-and-hour law. This new DOL test differs from the test used by the California DLSE, and California employers must comply with both the federal and California standards.

Under the primary beneficiary test, the economic reality of the employer-intern relationship is examined to determine which—the employer or the intern—is the primary beneficiary of the relationship, using the following factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

This test is factually intensive, and no factor is determinative.

What should employers do?

While the primary beneficiary test incorporates a number of the factors that were in the DOL's prior 6-factor test, the 6-factor test (used in California) was stricter, and required that all 6 factors be present to classify an individual as an unpaid intern. As it stands, the tests used by the DOL and DLSE are now different. Unless and until the DLSE adopts the primary beneficiary test, California employers should examine both tests, and classify interns as employees if that would be the result under either one of the tests.

CALIFORNIA MINIMUM WAGE INCREASE

Effective January 1, 2019, the statewide minimum wage will increase to $11.00/hour for employers with 25 or fewer employees, and to $12.00/hour for employers with 26 or more employees.

Because the minimum salary for most exempt employees in California is two times the minimum wage, the increase in the minimum wage also will increase the minimum annual salary for most exempt employees to $45,760 for employers with 25 or fewer employees, and to $49,920 for employers with 26 or more employees.

Note that many local jurisdictions have adopted their own minimum wage ordinances which require employers to pay a higher minimum wage to non-exempt employees. The local minimum wage requirements do not affect the minimum salary requirement for exempt employees.

DLSE ISSUES NEW INTERPRETATION OF SPLIT-SHIFT PREMIUM REQUIREMENT

California wage orders require non-exempt employees to be paid a split-shift premium when their shift includes an unpaid break between work periods which is longer than a *bona fide* meal period, is not a rest or meal period, and is for the benefit of the employer. The split-shift premium due is equal to one hour of pay at the minimum wage; however, any amount that an employee earns over the minimum wage during the workday is credited towards the split-shift premium.

On its website, the DLSE now expresses the opinion that the split-shift premium should be calculated using the higher of the state or local minimum wage. While this opinion does not have the effect of a formally adopted regulation and may exceed the DLSE's authority, it does indicate how the DLSE may rule in administrative hearings.

What should employers do?

It is not clear whether the DLSE's new approach will be adopted by courts, but employers may wish to consider the DLSE guidance and use the higher of the state and local minimum wage for purposes of calculating split-shift premiums.

TIME COMMUTING IN EMPLOYER VEHICLE NOT COMPENSABLE: *HERNANDEZ*

Under California wage orders, employers must pay employees for all hours worked. The wage orders define "hours worked" as time when the employee is subject to the control of the employer or time the employee is "suffered or permitted" to work.

Under both state and federal law, time spent commuting to and from work is generally not considered hours worked. Plaintiffs in *Hernandez v. Pacific Bell Telephone Co.*, 29 Cal. App. 5th 131 (2018), however, alleged that their optional use of company vehicles to commute between their initial and final worksites and their homes made their commute time compensable hours worked. The plaintiffs attempted to further bolster their claims with the facts that they were required to transport company materials and equipment in the company vehicle and were restricted in what they could do with the vehicle during the commute.

The appeals court found that the use of company vehicles did not make commuting time compensable, in part because employees had the option to drive their own cars to the employer's worksite to pick up the company vehicles. The plaintiffs cited various cases where courts had found that time spent driving when delivering equipment was compensable time. However, the court distinguished between the incidental transport of equipment necessary to perform an employee's job, which requires comparably little effort as compared to the job itself, and the transport of equipment as a job. The court held that the employees' commute time was not compensable simply because they transported equipment to perform their job once they arrived at a worksite.

PAGA SUBJECT TO BROAD INTERPRETATIONS

Several decisions from the Court of Appeals in California emerged this year with even broader interpretations of California's Private Attorneys General Act (PAGA), in line with

past rulings supporting an expansive application of the controversial act.

PAGA authorizes employees to file claims for wage-and-hour violations with the state Labor and Workforce Development Agency (LWDA). If the LWDA declines to pursue the action, the employee may file a civil suit, purportedly on behalf of the state, to obtain penalties for wage-and-hour violations on a representative basis (that is, for other "aggrieved employees" in addition to the employee filing the claim). The state then receives 75% of any recovered penalties, with "aggrieved employees" receiving the remaining 25%. In recent years, PAGA claims have increased in importance (and number) due to the California Supreme Court's holding that the right to bring PAGA claims on a representative rather than individual basis may not be waived under an arbitration agreement (unlike claims brought as class actions under other laws).

Aggrieved Employees (Not So Aggrieved)

In *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745 (2018), the Court of Appeal held that an employee who is affected by just one Labor Code violation may bring claims under PAGA on behalf of other employees to recover penalties for unrelated Labor Code violations. That is, an employee who experiences a unique (potentially minor) violation of the Labor Code may bring claims alleging violations of code provisions that affect other employees.

This decision highlights the breadth of the risk employers face with just one potentially disgruntled employee. Suddenly, someone who may have only received their paycheck a few days late can raise far-reaching claims concerning unrelated departments and pay structures.

Wage Statement Violations Do Not Require Actual Injury

In *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal. App. 5th 667 (2018) the Court of Appeal held that, unlike direct actions under the Labor Code to recover statutory penalties for failure to provide accurate wage statements, PAGA representative claims for civil penalties do not require proof of injury or a knowing and intentional violation. *Raines* is notable because, for PAGA actions, it lowers the bar to bring these highly technical wage-statement claims.

While many employers have been hoping for a legislative fix, potential exposure under PAGA remains high, with no guarantees of a favorable result for technical violations of California law that do not result in damage to employees.

HIRING

CALIFORNIA PROHIBITION ON SALARY INQUIRIES

Since January 2018, California employers have been prohibited from inquiring about or considering a job applicant's prior salary history in determining whether to hire the applicant or how much to pay the applicant. That law now has been amended to clarify that:

- Employers may ask about an applicant's salary expectations for the position being applied for;
- Only external applicants (not current employees) are entitled to a pay scale upon request, only after completing an initial interview, and the pay scale provided only needs to include salary or hourly wage ranges.

Compensation decisions for current employees (such as for raises and bonuses) will be permissible if justified by factors such as a seniority or merit system.

NEW LIMITS ON CONSIDERING DISMISSED CONVICTIONS

With certain exceptions, Labor Code Section 432.7 generally prohibits employers from seeking information about, or considering in making employment decisions, an applicant's convictions that have been dismissed or sealed. Under an amendment to Section 432.7 effective January 1, 2019, employers are not prohibited from seeking information about a particular conviction—from an applicant or other source—when:

1. The employer is required by law to obtain information regarding the particular conviction of the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
2. The applicant would be required to possess or use a firearm in the course of his or her employment.
3. An individual with that particular conviction is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
4. The employer is prohibited by law from hiring an applicant who has that particular conviction, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

What should employers do?

Under the amendments, employers generally are only permitted to solicit information about and consider convictions that have been dismissed or sealed when the law requires them to seek such information about or consider those particular convictions. Employers required to conduct criminal background checks or restrict employment based on criminal history should consult with legal counsel to ensure that their background check process complies with these amended exceptions.

EMPLOYEE NON-SOLICITATION AGREEMENTS: *AMN HEALTHCARE, INC.*

For over 30 years, employers have relied on *Loral Corp. v. Moyes*, 174 Cal. App. 4th 268 (1985) as legal support permitting agreements that limit former employees' ability to solicit other employees away from their former employer. However, a recent California appeals court ruling calls into question whether employers may continue to enter into such agreements.

In *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, 28 Cal. App. 5th 923 (2018), AMN Healthcare had its travel nurse recruiters sign a Confidentiality and Nondisclosure Agreement that included a provision prohibiting the recruiters from soliciting employees to leave AMN for one year to 18 months after the recruiter's employment with AMN ended. The travel nurse recruiters recruited travel nurses for employment with AMN and placed them in 13-week assignments. Several travel nurse recruiters left AMN and joined competitor Aya Healthcare Services ("Aya") and then recruited travel nurses working for AMN to leave and work for Aya.

AMN sued Aya and the recruiters who had joined Aya, alleging a breach of the non-solicitation agreement and other related claims. The appeals court analyzed the legality of the agreement under California Business and Professions Code Section 16600, which provides, with limited exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The court held that the non-solicitation agreement would restrain the recruiters in their profession as recruiters by limiting the number of travel nurses with whom they could work at Aya and by potentially reducing their compensation.

The court then turned to AMN's argument that *Loral Corp. v. Moyes* permitted such agreements. The court in *Loral* had permitted enforcement of an agreement that prohibited an executive officer from "raiding" the employees of his former employer. The *AMN* court, however, distinguished *Loral* from the facts before it, noting that unlike the executive officer in *Loral*, the employees here were actually in the business of recruiting and placing employees; therefore, the non-solicitation agreement would restrain them from engaging in that business in violation of Section 16600.

At the same time, the *AMN* court also found that the California Supreme Court's interpretation of Section 16600 in *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) was likely in conflict with the appeals court's conclusion in *Loral* that reasonable restraints on an employee's lawful business, profession, or trade were permissible. In *Edwards*, the court rejected the reasonableness standard as well as an exception for narrow or limited restraints that had been created by the federal Ninth Circuit Court of Appeals. As a result, the appeals court ruling on AMN's claim expressed doubt that *Loral* is still good law.

Legality of non-solicitation agreements in question.

What should employers do?

Although *Loral* has not been explicitly overruled, California employers should consider the significant risks of a legal challenge to non-solicitation agreements generally, and should consult with legal counsel about whether to continue to use them at all, given the legal risks. Additionally, employers definitely should not include non-solicitation clauses in agreements with employees whose job it is to recruit employees.

NEW NOTICE REQUIRED FOR BACKGROUND CHECKS

Employers that obtain consumer reports, such as background or credit checks, on applicants or employees generally are required to provide a copy of the federal "Summary of Your Rights Under the Fair Credit Reporting Act" to the applicant or employee (and in California, also a California notice as well). In September, the federal Consumer Financial Protection Bureau released an updated version of this disclosure notice as a result of changes in the law requiring notice that a consumer can request a security freeze of their consumer credit report. Use of the updated federal Summary of Your Rights was required as of September 21, 2018. It can be found here.

Employers that use third-party companies to provide their consumer reports should confirm that those companies are using the new notice.

DISCRIMINATION, HARASSMENT & RETALIATION

MOST EMPLOYERS NOW REQUIRED TO PROVIDE SEXUAL HARASSMENT TRAINING TO ALL EMPLOYEES

California law has required for more than a decade that employers with 50 or more employees provide sexual harassment prevention training to all supervisory employees every two years. Senate Bill 1343 expands this requirement to provide that by January 1, 2020, all California employers with five or more employees must provide two hours of classroom or "other effective interactive training" regarding sexual harassment to all supervisory employees and one hour of training to all non-supervisory employees. The training must be provided within six months of an employee's hire and every two years thereafter. For seasonal and temporary employees, the training must be provided within thirty calendar days after their hire date or within 100 hours worked, whichever occurs first.

The new law also requires the Department of Fair Employment and Housing (DFEH) to develop online sexual harassment prevention training courses that will meet the requirements of the new training law, and to post those trainings on their website. Additionally, the bill requires the DFEH to make its existing posters and fact sheets available in alternate languages on its website.

NEW LAWS LIMIT CONFIDENTIALITY IN HARASSMENT SETTLEMENT AGREEMENTS

As part of a movement to make allegations of harassment public, several new California laws prohibit confidentiality provisions in agreements entered into starting on January 1, 2019.

First, Code of Civil Procedure Section 1001 prohibits settlement agreements that require claimants not to disclose facts relating to claims brought in court or before an administrative agency for sexual assault, sexual harassment, employment discrimination based on sex, or retaliation for reporting or opposing sexual harassment or discrimination. Section 1001 applies only to settlements of lawsuits and administrative claims, and not pre-litigation settlements. The new law also does not prohibit agreements to keep the amount of a settlement confidential. Employers should note, however, that while California law still allows parties to agree to keep the amount of a settlement confidential, the federal tax law passed in December 2017 provides that parties may not deduct the cost of the settlement of a sexual harassment claim if the settlement agreement requires the claimant to keep the amount of the settlement confidential.

Second, Civil Code Section 1670.11 prohibits any provision in a contract or settlement agreement that would limit a party's right to testify concerning alleged criminal conduct or sexual harassment by the other party.

> Look out for new restrictions on confidentiality clauses in settlement agreements when resolving harassment claims.

Finally, the legislature added a new provision to the Fair Employment and Housing Act (FEHA) making it a violation of public policy for an employer to require employees, as a condition of receiving a raise or bonus or continuing employment to waive claims under FEHA (including discrimination, harassment and retaliation claims) or to sign a non-disparagement agreement or any document that appears "to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment." However**,** this provision does not apply to "negotiated settlement agreements" that settle FEHA claims filed by the employee in court, with the DFEH or an alternative dispute resolution forum, or claims made through the employer's internal complaint process.

Employers considering settling claims of sexual assault, harassment, discrimination or retaliation should consult with legal counsel to ensure the settlement agreement complies with these new laws.

PROTECTION FOR DISCLOSING HARASSMENT COMPLAINTS IN JOB REFERENCE

Consistent with the new laws that protect victims' rights to disclose information about sexual harassment, an amendment to Civil Code 47 provides a "qualified privilege" defense to a defamation action to an employer who, in response to a request for a job reference from a prospective employer, discloses information about a complaint of sexual harassment against a current or former employee that was based on "credible evidence." An employer also has a qualified privilege defense if it discloses whether it would decline to rehire a former employee based on the employer's determination that the former employee engaged in sexual harassment.

Employers should remember that this new law provides only a "qualified privilege," meaning that the privilege will be lost if the individual bringing a defamation claim can show that the employer disclosed the information with malice or that the the complaint of harassment was not based on credible evidence.

HIGHER HURDLE FOR SUMMARY JUDGMENT ON HARASSMENT CLAIMS

An amendment to California's FEHA will make it harder for employers to defeat claims of workplace harassment. Government Code Section 12923 establishes new, lower, standards for plaintiffs to withstand summary judgment on claims for unlawful workplace harassment. Under the terms of the new law, harassment cases are "rarely appropriate for disposition on summary judgment." Among the changes in the legal standard are:

- A claimant does not need to prove that her "tangible productivity" actually declined as a result of workplace harassment; she need only prove that a reasonable person would find that harassment made it more difficult for her to do her job;
- A single incident of harassing conduct is sufficient to require a jury to decide whether a claimant was subjected to a hostile work environment if the harassing conduct unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.
- Even "stray remarks" made by someone not involved in allegedly discriminatory decisions may be sufficient to establish unlawful discrimination.

INCREASED LIABILITY FOR HARASSMENT CLAIMS

In addition to changing the legal standards for establishing claims of harassment, the California legislature also increased the potential liability for employers. Under amendments to the FEHA:

- Employers may now be potentially liable for the acts of all types of harassment (not just sexual harassment) by nonemployees (vendors, contractors, guests) if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. Previously employers could be liable only for sexual harassment by nonemployees.
- Employers who defeat harassment lawsuits will have an even harder time recovering their attorneys' fees. Under the new law, a court is prohibited from awarding attorneys' fees to a prevailing defendant employer "unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so."

And it's not just employers who face greater liability for harassment-related claims—individual employees who engage in harassment may now be liable not just for harassment but

also for retaliation. Under prior law, only the employer could be liable for retaliation.

HARASSMENT BASED ON PROFESSIONAL RELATIONSHIPS

In addition to prohibiting sexual harassment by employers, California law has prohibited sexual harassment in professional relationships where one person holds himself or herself out as being able to help someone establish a business or professional relationship directly or with a third party. The law, California Civil Code Section 51.9, expressly prohibited harassment by physicians, attorneys, landlords and teachers. Reacting to publicity about the prevalence of harassment by individuals in powerful positions in government and the entertainment industry, the legislature has amended Section 51.9 to prohibit sexual harassment in a wider range of professional relationships, including harassment by lobbyists, elected officials, directors, producers, and investors.

LACTATION ACCOMMODATION

California adds additional lactation accommodation requirements effective January 1, 2019. Prior law required that employers make reasonable efforts to provide a location other than a toilet stall for lactation accommodation, but under the new law, that location must be something other than a bathroom. The new state law also requires that the location for lactation accommodation generally should be a permanent location, but may be a temporary location if:

1. The employer is unable to provide a permanent location due to operational, financial, or space limitations;
2. The temporary location is private and free from intrusion while being used for lactation purposes; and
3. The temporary location is not used for other purposes while being used for lactation.

One general exception exists for these new requirements: If an employer can prove that it is an undue hardship to comply with these requirements, the employer may provide a location, including a bathroom, other than a toilet stall for lactation purposes. An agricultural exception also exists: An agricultural employer may comply by allowing an employee to use the air-conditioned cab of a tractor or truck.

ARBITRATION

SUPREME COURT ISSUES RULING ALLOWING CLASS WAIVERS IN ARBITRATION AGREEMENTS BETWEEN EMPLOYEES AND EMPLOYERS

In a long-awaited decision issued in May of this year, the U.S. Supreme Court resolved a circuit split involving the enforceability of class-action waivers contained in employment arbitration agreements. The widely predicted decision is considered a victory for employers, as it upholds the validity of class waivers in the context of employment relationships. At the same time, because the California Supreme Court has held that arbitration agreements cannot apply to claims for wage-and-hour violations brought under California's Private Attorney General Act (known as PAGA), the impact is somewhat less broad for California employers at this time.

This decision arises out of a series of cases in which employee attorneys fought the enforceability of arbitration agreements by arguing that class-action waivers in arbitration agreements violated the federal National Labor Relations Act (NLRA) by interfering with an employee's right to engage in protected concerted activity under Section 7 of the NLRA. That issue was cued up for the Supreme Court in a trio of consolidated cases: *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *National Labor Relations Board v. Murphy Oil USA*, 138 S. Ct. 1612 (2018).

The Supreme Court's ruling was straightforward: the Federal Arbitration Act (FAA) requires courts to enforce agreements to arbitrate, including the terms that the parties agree upon, like class waivers. As to the NLRA, the Court found that the section addressing "concerted activities" spoke to the right to organize unions and bargain collectively – and that section did not displace the FAA. Thus, the Court found that the NLRA and FAA can be harmonized by allowing the enforcement of class waivers in arbitration agreements.

What should employers know?

This recent decision is one in a long line of cases in which federal courts have upheld the terms of arbitration agreements in employment agreements. However, California employers are impacted somewhat less than employers elsewhere because of PAGA. While in most of the rest of the country, the *Epic Systems* decision means all wage-and-hour claims can be sent to arbitration on an individual basis (so long as there is a valid and binding arbitration agreement containing a class waiver), claims brought under PAGA – which generally are wage-and-hour claims – may not be forced to arbitration. For now, even post-*Epic Systems*, although California employers may enforce binding arbitration agreements as to class actions, they also should be mindful that PAGA cases cannot be individually arbitrated, and wage-and-hour PAGA "representative" actions are still alive and well.

UNCONSCIONABILITY DEFENSE AFTER *EPIC SYSTEMS*

Even post-*Epic Systems*, California courts continue to strike down arbitration agreements under the state-law unconscionability framework. Late this year, in *Ramos v. Superior Court*, 28 Cal. App. 5th 1042 (2018) a Court of Appeal found that the plaintiff could pursue her claims in Superior Court despite an arbitration agreement that she signed upon joining her law-firm employer. The court struck down the arbitration agreement, citing the so-called *Armendariz* factors.

In its decision, the Court of Appeal explicitly held that *Epic Systems* did not affect the requirement to comply with *Armendariz*, noting that the FAA does not preempt the invalidation of arbitration agreements by "generally applicable contract defenses, such as fraud, duress, or unconscionability."

In *Armendariz*, the California Supreme Court held that mandatory employment arbitration contracts which require employees to arbitrate employment claims are unenforceable unless they meet certain requirements, such as the employer paying for the full cost of arbitration. In *Ramos*, the court found that the arbitration agreement did not meet the *Armendariz* requirements, by, among other things, requiring the California employee's claims to be brought in Chicago, limiting the remedies an arbitrator could award, requiring that the arbitration be confidential, and requiring the employee to pay half the costs of the arbitration.

This case is a notable reminder that, even with significant favorable law concerning arbitration from the U.S. Supreme Court, California employers must still comply with state law requirements for arbitration agreements. Such agreements should be drafted extremely carefully, with the advice of counsel.

What should employers do?

Employers who have concluded that mandatory arbitration agreements are appropriate for their business should have the agreements reviewed regularly as the laws concerning arbitration agreements continue to evolve. Employers considering whether to implement an arbitration program will find interesting a recent article by Folger Levin attorneys: Risk & Compliance: Pros and Cons of Mandatory Arbitration Provisions.

IMMIGRATION

2018 CALIFORNIA IMMIGRATION LAW PARTIALLY ENJOINED

Effective January 1, 2018, the California Immigrant Worker Protection Act (AB 450) imposed various prohibitions and requirements on employers regarding worksite inspections by federal immigration enforcement agents. However, some provisions of the new law now have been put on hold after litigation initiated by the Trump administration.

Among other restrictions, the law prohibited employers from providing "voluntary consent" to the entry of immigration enforcement agents to "any nonpublic areas of a place of labor." Likewise, employers were prohibited from "provid[ing] voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records." Under AB 450, employers were required to confirm the existence of a valid, judicial warrant before assisting federal immigration authorities. Violators of the law could be fined up to $10,000 for repeated offenses.

Even before the suit by the federal government, interpretation of AB 450 caused confusion. In February, the Labor Commissioner and Attorney General's office issued guidance on the interpretation and enforcement of the controversial new law, guidance which is now under review.

The federal government then filed suit early this year to prevent the implementation of AB 450. The federal district court, in ruling on a preliminary injunction, sided in part with the Trump Administration. The federal court enjoined California from enforcing nearly all provisions of AB 450 as to private employers, except for the provisions in the law requiring employers to provide employees notice of inspections.

Practically speaking, this means that the most controversial parts of the law - imposing penalties for voluntary cooperation with immigration authorities and employee "reverification" - are on hold for the foreseeable future. While employers must still notify employees in advance of a federal inspection of I-9's or other employment records, they need not be concerned about correctly determining whether immigration authorities have provided the appropriate type of warrant if attempting to search their premises or access records. That said, private employers may still elect not to voluntarily cooperate with immigration officials, and may opt to request to see a judicial warrant before providing this type of access to immigration officials.

The preliminary injunction ruling is up on appeal, and a final ruling on the merits in this case is not anticipated for some time.

USCIS RESTARTS IMMIGRATION "NO-MATCH" PROGRAM

Suspended since 2012, this year the Social Security Administration (SSA) announced that it will be restarting in Spring 2019 its practice of issuing so-called "No-Match" notification letters. Formally called "Employer Correction Requests," the notices inform employers when there is a mismatch between information on an employee's W-4 and the SSA's records. If employers receive such a notice, they should investigate and contact legal counsel. The mismatch could arise for innocuous reasons, such as a clerical error, so it is important that no corrective action be taken against an employee without further inquiry.

NLRB

HANDBOOK RULES

Good news for employers regarding Handbook and workplace rules: On June 6, 2018, the NLRB's General Counsel issued a 20-page Memorandum (GC 18-04) regarding enforcement of Handbook Rules, greatly relaxing the restrictive rules that existed pre-2017 and reinforcing the NLRB decision from *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017).

In prior years, the Board had found many facially neutral policies to potentially interfere with "protected concerted activity" under the National Labor Relations Act (NLRA), in ways that often seemed unreasonable to employers. However, the General Counsel's Memorandum on Handbook Rules now looks at whether a facially neutral rule, when reasonably interpreted, would interfere with rights under the Act. If so, the NLRB will strike a balance between (i) the nature and extent of the potential impact on employee rights; and (ii) legitimate justifications supporting maintenance of the rule. The Board no longer will find rules unlawful merely because they could be interpreted as potentially interfering with potentially protected activities.

The Board established three categories of rules: (1) *Category 1* rules, which are lawful because they do not restrict rights under the Act, or because the justifications for the rules outweigh their tendency to restrict those rights; (2) *Category 2* rules, which warrant individualized consideration as to whether they prohibit or interfere with employee rights, and if so, whether the impact is outweighed by other, legitimate considerations; and (3) *Category 3* rules, which are unlawful because they would restrict rights protected in a way that outweighs any justifications associated with them. The Board's categories help clarify what rules are permissible or not under the NLRA.

> Neutral policies prohibiting insubordination and other misconduct are now presumptively permissible.

The General Counsel's Memorandum also helps explain how many common rules will be categorized as a matter of enforcement policy, and gives many helpful illustrations. For example, permissible Category 1 policies include rules prohibiting insubordination, lack of cooperation, and disruptive behavior; misuse of confidential, proprietary, and customer information or documents; defamation or misrepresentation; misuse of the employer's logos or other intellectual property; speaking on behalf of the employer without authorization to do so; and disloyalty or nepotism. The Memorandum also provides as illustrations of generally unlawful rules falling within Category 3, such as confidentiality rules that restrict discussing wages, benefits, or working conditions.

As a result of *Boeing* and the General Counsel's Memorandum, many workplace policies previously ruled invalid will not be unlawful under the Board's new legal standards. Although this is good news for employers, employers should nevertheless remember that the Board has not addressed all workplace policies, and even lawful rules may not be applied in a way that interferes with employees' protected rights.

JOINT EMPLOYER RULE

Following extensive NLRB litigation and publicity over the *McDonald's* franchise case and joint employer questions, in September 2018, the NLRB published a Notice of Proposed Rulemaking regarding its joint-employer standard under the NLRA. Under the proposed rule, an employer may be found to be a joint-employer of another employer's employees only if the employer both possesses and exercises substantial, direct, and immediate control over the essential terms and conditions of employment of the other employer's employees, and has done so in a way that is not limited and routine. If the Rule is adopted, indirect influence and contractual reservations of authority will no longer be sufficient to establish a joint-employer relationship.

As the NLRB explained, the proposed rule reflects the Board majority's initial view that the NLRA's intent is best supported by a joint-employer doctrine that "does not draw third parties, who have not played an active role in deciding wages, benefits, or other essential terms and conditions of employment, into a collective-bargaining relationship for another employer's employees." This would most significantly impact franchisor and franchisee relationships.

NEW LAWS AFFECTING HOTELS

HUMAN TRAFFICKING: EMPLOYER TRAINING OBLIGATIONS

A new law regarding human trafficking awareness amends the Fair Employment & Housing Act and requires hotel and motel employers to provide at least 20 minutes of training on human trafficking awareness by January 1, 2020 to employees who are likely to come into contact with victims of human trafficking. These include front desk, housekeeping, bell desk, and other employees who regularly interact with customers. The new law requires covered employers to provide such training to covered employees within 6 months of hire and once every two years thereafter.

A separate Assembly Bill also has similar training requirements for employers who operate an intercity passenger rail, light rail, or bus station. Those employers must provide at least 20 minutes of training on human trafficking awareness by January 1, 2021 to employees who are likely to come into contact with human trafficking victims.

HOTEL INDUSTRY: MIPPS UNDER CAL-OSHA HOUSEKEEPING REGULATIONS

The Cal-OSHA "Hotel Housekeeping Musculoskeletal Injury Prevention" regulation took effect July 1, 2018. The regulation is intended to address a workplace hazard confronted by housekeepers called "musculoskeletal injuries," defined as "acute injury or cumulative trauma of a muscle, tendon, ligament, bursa, peripheral nerve, joint, bone, spinal disc or blood vessel."

Under the new rules, California hotels are required to establish and maintain a Musculoskeletal Injury Prevention Program (MIPP). Required elements include:

- Being Readily Accessible: The MIPP must be "readily accessible" to employees to review during their work shift. An electronic copy is sufficient if there are "no barriers to employee access."
- Worksite Evaluations: By October 1, 2018, affected employers must have completed an initial worksite evaluation to identify and address potential injury risks to housekeepers. This worksite evaluation as well as subsequent evaluations (at least annually) "shall include an effective means of involving housekeepers and their union representative in designing and conducting the worksite evaluation."
- Specific Risks Identified: The worksite evaluation must identify and address potential risks to housekeepers, including: (1) slips, trips, and falls; (2) prolonged or awkward static postures; (3) extreme reaches and repetitive reaches above shoulder height; (4) lifting or forceful whole body or hand exertions; (5) torso bending, twisting, kneeling, and squatting; (6) pushing and pulling; (7) falling and striking objects; (8) pressure points where a part of the body presses against an object or surface; (9) excessive work-rate; and (10) inadequate recovery time between housekeeping tasks.
- Injury Investigations/Corrective Measures: The MIPP's procedures for investigating musculoskeletal injuries must allow for input from the housekeepers and their union representative as to whether any measures, procedures, or tools would have prevented the injury, and whether required tools or control measures were being used appropriately.
- Training: Training is required: (1) when the MIPP is first established; (2) to new hires; (3) to all housekeepers given new job assignments; (4) when new equipment or practices are introduced; and (5) at least annually thereafter.
- Recordkeeping: Records of worksite evaluations and other records required by the MIPP must be made available to a Cal/OSHA inspector within 72 hours of a request. (There is no 72-hour deadline under the IIPP regulation.)

California hotel and other lodging establishments industry employers should have rolled out their Musculoskeletal Injury Prevention Programs by October 1, 2018.

SAN FRANCISCO

BAN-THE-BOX LAW AMENDED TO ALIGN WITH STATE LAW

As of January 1, 2018, California employers with five or more employees have been barred from asking for criminal history information on employment applications and from inquiring about or considering criminal history at any time before a conditional offer of employment is made (unless required to do so by state or federal law). San Francisco, which already had its own "Fair Chance Ordinance" (also known as the "Ban-the-Box" Ordinance) with similar restrictions, has now amended the SF Fair Chance Ordinance to make it consistent (in most respects) with California law.

San Francisco's Fair Chance Ordinance (FCO) now applies, like California law, to employers with five or more employees (rather than the previous minimum of twenty employees). The amendments also now require that as under state law, employers may not ask about criminal history until after a conditional job offer.

In addition, the Office of Labor Standards Enforcement (OLSE), the San Francisco agency that enforces the FCO, may now issue increased penalties for violations: $500 for the first violation; $1,000 for the second violation; and $2,000 for any subsequent violations. Individuals also have the right to file a civil lawsuit against an employer concerning a violation, so long as the aggrieved individual first files a complaint with the OLSE and exhausts administrative remedies.

The FCO also added a new category of information that employers may never consider: "A Conviction that arises out of conduct that has been decriminalized since the date of the Conviction," which includes certain marijuana offenses. This amendment means that if the background check reveals a marijuana conviction (which in any event may not be considered if it is more than two years old under California law), San Francisco employers will have to evaluate whether the conduct was decriminalized after "the date of the Conviction," which the law defines as the date of sentencing.

What should SF employers do?

All San Francisco and California employers should review their background check process.

- *First,* California employers must not conduct a background check until a conditional offer of employment is made.
- *Second*, employers using background check providers should ensure that these providers are complying with the federal Fair Credit Reporting Act and the California Investigative Consumer Reporting Act. These laws require employers to provide individuals with notices of their rights when advising employees of possible adverse actions based on a background check report.

- *Third*, California employers should carefully review the forms and processes of background check companies, as many companies may have notices that are not in compliance with local, state, and federal laws. For example, there is a very new federal FCRA Notice of Employee Rights that went into effect this year which must be provided to applicants. Employers also need to make sure that the company is not providing arrest or criminal history information beyond 7 years on which an employer legally may not rely.

- *Finally*, if a background check reveals a potentially disqualifying criminal conviction, employers should consult with legal counsel to ensure compliance with local, state, and federal laws in doing an individualized assessment in determining whether or not to hire that applicant, and then follow strict procedural requirements.

Please note that employers who are required to conduct criminal background checks by state or federal law may not be required to comply with the provisions of the FCO.

MINIMUM WAGE INCREASE

Effective July 1, 2018, the San Francisco minimum wage increased to $15.00 per hour for work performed in San Francisco. On July 1, 2019 and each year thereafter, the minimum wage rate will be adjusted based on the annual increase in the Consumer Price Index.

Companies that have contracts with the City and County of San Francisco are subject to a higher minimum wage under SF's Minimum Compensation Ordinance (MCO). As of November 11, 2018, private employers who are city contractors must pay their employees who perform any work funded (in whole or in part) under the contract with the City, or on a project funded under the contract, a minimum wage of $17.00 per hour; non-profit organization may pay no less than the San Francisco minimum wage of $15.00 per hour.

NEW RATES FOR HEALTH CARE SECURITY ORDINANCE

As of January 1, 2019, under SF's Health Care Security Ordinance, the SF health care expenditure rate will be $2.93 per hour for large businesses (100+ employees total) and $1.95 per hour for medium-sized businesses (20-99 employees total) and non-profits with 50-99 employees.

The minimum rate for the exemption for managers, supervisors, and confidential employees will be an annual salary of $100,796 or $48.46/hour.

NEW RULES INTERPRET THE SAN FRANCISCO PAID SICK LEAVE ORDINANCE

The San Francisco Office of Labor Standards Enforcement (OLSE) published new Rules Interpreting the Paid Sick Leave Ordinance on June 7, 2018. The San Francisco Paid Sick Leave Ordinance (PSLO) requires employers to provide paid sick leave to all employees (including temporary and part-time employees) who perform work in San Francisco. These new rules predominately mirror the OLSE's prior 2007 Rules, but clarify a few areas for employers.

- Notification Requirements: Under the prior 2007 rules, policies that required employees to give "reasonable notification" for foreseeable absences, and policies that required notification "as soon as practicable" for unforeseeable absences were "in principle reasonable and thus presumptively lawful." Under the new Rules, these policies are now "presumptively reasonable." Accordingly, if the OLSE contests an employer's notification requirements, these rules appear to shift the burden to the OLSE (or an employee) to show that the policy or practice is unreasonable.

- Regular Rate of Pay: Just as California paid sick time is calculated at "the regular rate of pay" for non-exempt employees, sick time under the San Francisco Ordinance is also paid at the regular rate of pay, which the new rules now confirm is calculated according to state law as used in California Labor Code Section 510, and the DLSE Enforcement Manual, Section 49, "as it may be amended from time to time." The rules further clarify that if an individual is exempt from California and federal employment laws, the employee must be paid his or her salary without any deduction for sick time taken, with the time taken applied against the employee's leave balance.

- Enforcement: The original Rules did not detail how OLSE would investigate and resolve disputes. In general, the OLSE has the authority to conduct investigations, monitor compliance, and obtain restitution and penalties for PSLO violations, which means that an OLSE representative may review employer records, speak with employees, and conduct audits. The rules now address how the OLSE will calculate how much an employer owes for a non-compliant sick leave policy, inadequate records, or for not allowing the OLSE access to records. The OLSE also set short timelines for the employer to respond to an OLSE Notice of Preliminary Determination (NOPD). The OLSE issues a NOPD upon making a preliminary determination that an employer has violated the PSLO. Under the rules, after receiving a NOPD, an employer only has 15 calendar days to: (1) resolve the issue and comply with the law (including paying back pay, interest, and penalties), or (2) contest the NOPD and request a NOPD Review Meeting with the OLSE. In addition, employers have only seven days to resolve or contest a retaliation charge (alleging that the employer retaliated against an employee for using paid sick leave). Employers should take note that if the OLSE concludes that an employer has violated the PSLO, an employer may need to pay its employees sick leave payments and penalties, and make penalty payments to the OLSE.

Although the rules do not represent major changes to the PSLO, San Francisco employers should take this opportunity to review their paid sick leave policy to ensure the policy complies with the PSLO.

SALARY HISTORY ORDINANCE

The San Francisco Consideration of Salary History Ordinance, also known as the Parity in Pay Ordinance, took effect on July 1, 2018. Just as required by California law (which took effect on January 1, 2018), the San Francisco Ordinance prohibits employers from (1) asking applicants about their current or past salary or (2) disclosing a current or former employee's salary history without that employee's authorization unless the salary history is publicly available.

Critically, San Francisco employers must display on a 8.5" x 14" paper the "Employer Consideration of Salary History Poster" at each workplace or job site.