EMPLOYMENT LAW UPDATE

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LEGISLATIVE UPDATE

■ AB 168 – Prior Salary History

This new law adds Section 432.3 to the Labor Code and prohibits both public and private employers from seeking or inquiring into an applicant's salary history (including compensation and benefits) either directly or indirectly. In addition, the law prohibits employers from relying on salary history information as a factor in whether to offer employment and/or what salary to offer. Under this law, employers are also required (upon reasonable request) to provide an applicant with a pay scale for the position sought.

There are a handful of exceptions to this new restriction. The law does not prohibit an applicant from voluntarily (ie, without prompting or provocation by the employer) disclosing prior salary information, nor does it prohibit the employer from using voluntarily disclosed information in determining what salary to offer. In addition, this new law does not apply to salary history information that is disclosable to the public pursuant to other federal or state law.

Employers are advised to review applications and hiring practices in order to ensure that prior salary inquiries are removed. Because the law applies to any "agent" of the employer, it is critical that individuals who interview and interact with applicants are aware of this restriction. As a practical matter, employers may want to consider replacing those questions with an inquiry as to the salary the applicant would like to receive. In addition, employers need to prepare salary range breakdowns for positions in advance so that they will be available for distribution if requested. As drafted, the law only requires that the pay scale information be provided to applicants, and not to current employees, who request such data. Finally, employers are reminded that under the recently enacted Equal Pay Act, even if prior salary can be considered, it cannot alone justify a disparity in compensation among different genders, races, or ethnicities.

■ AB 1008 - Fair Chance Act (ie, "Ban the Box")

California has joined the Ban the Box bandwagon. AB 1008 prohibits employers from making pre-offer inquiries into conviction history and outlines a specific procedure that must be followed in cases where the employer determines not to hire an applicant due to a prior conviction.

With regard to pre-employment inquiries, the Fair Employment and Housing Act will now prohibit employers with 5 or more employees from asking about or considering an applicant's criminal history before a conditional offer of employment has been made. More specifically, employers are precluded from the following activities: 1) including any questions about conviction history on the job application; 2) inquiring about conviction history (including verbal questions during an interview) or considering the conviction history of the applicant prior to a conditional offer of employment; 3) considering, distributing, or disseminating information related to arrests that did not result in conviction, diversion programs, convictions that have been sealed, dismissed, expunged, or statutorily eradicated (including juvenile convictions and adjudications).

Once a conditional offer of employment has been made, employers may inquire into the applicant's conviction history. However, if the employer intends to base a decision not to hire on the conviction history (even if just in part), the employer must complete an individualized assessment analyzing the relationship between the conviction and the specific job duties of the position. The conviction history must bear directly and adversely on the specific job sought in order for the employer to use the conviction as a justification for the decision not to hire. Generally speaking, the individualized assessment should consider the nature and gravity of the conduct, the length of time that has passed since the conviction, and the nature of the position sought.

Following the individualized assessment, if the employer determines that the applicant should not be hired, the employer must provide written notice to the applicant of that preliminary decision. The notice must include a copy of the conviction report (if any) and specific language informing the applicant that the decision will not become final for 5 days, during which time the applicant can contact the employer to contest the accuracy of the report or provide other explanation. If the applicant indicates that they are contesting the report, they must be given an additional 5 days to obtain supporting evidence. The employer is obligated to consider all supporting evidence submitted by the applicant prior to reaching a final hiring decision.

If the employer ultimately concludes that the applicant will be denied employment, the employer must then provide written notice to the employee of that final decision. The notice must specify that a final decision has been made that the applicant is not eligible for hire due to the conviction history (with or without further explanation), explain any appeal procedures that the employer may have in place for having the application reconsidered, and notify the applicant of his or her right to file a complaint with the DFEH.

Finally, this new law clarifies that certain positions are exempt from these restrictions including: 1) positions for which a state or local agency is otherwise required to perform a criminal background check; 2) positions with a criminal justice agency as defined in Section 13101 of the Penal Code; 3) positions as a Farm Labor Contractor as defined in Section 1685 of the Labor Code; and 4) any other position where an employer is required by federal, state, or local law to perform a criminal background check.

What does this mean for California employers? Employers must update applications and train hiring supervisors to avoid questions related to criminal history during interviews. Employers should also use caution if public internet searches are conducted on candidates since this may reveal information that is not appropriate for consideration during the hiring process. In addition, employers should revise the post-offer hiring process so that it includes procedures for conducting an individualized assessment, providing preliminary notice, evaluating additional applicant evidence, and providing final notice as needed.

■ SB 63 - New Parent Leave Act

Historically, the obligation to provide "baby bonding" leave has only fallen on employers with 50 or more employees (as per both the FMLA and CFRA where baby bonding leave rights are found). This

new law creates a right to "baby bonding" leave that mirrors the FMLA/CFRA rights, but which applies to employers with 20 – 49 employees. Importantly, employees who are already covered by the FMLA/CFRA will not be covered by this law.

SB 63 adds Section 12945.6 to the California Government Code which requires that employers with 20 – 49 employees provide up to 12 weeks of unpaid child bonding leave. In order to be eligible for this leave, employees must work at a location with at least 20 employees within a 75-mile radius, have been employed for at least 12 months, and have worked at least 1,250 hours during the 12-months prior to the leave request.

Parental leave can be used to bond with a new child anytime within the first year of the child's birth, adoption, or foster care placement. Employees are permitted to use any available paid leave (vacation, PTO, sick leave) during this time and must be returned to the same position when the leave ends.

In addition, employers must maintain and pay for the employee's health benefits on the same terms and conditions that existed prior to the leave request. However, the law does permit the employer to recover the employer's portion of the insurance premium from the employee in the event that the employee does not return from the leave of absence for reasons other than the employee's own serious health condition or "other circumstances beyond the control of the employee."

As with baby bonding leave under FMLA/CFRA, where both parents work for the same employer, a combined total of 12 weeks of parental leave is required for both employees and the employer retains discretion with regard to whether both employees can be out at the same time.

Employers are specifically prohibited from interfering with, restraining, or denying an eligible employee the right to take parental leave and from retaliating or discriminating from an employee who takes leave.

SB 63 also requires the DFEH to create a 2-year parental leave mediation program allowing employers to demand mediation within 60 days of receiving a right-to-sue notice. Demanding mediation will prevent the employee from pursuing civil relief until the mediation is complete, until the employee affirmatively elects not to participate in mediation, or the DFEH notifies the parties of its belief that mediation would be fruitless. The mediation program provision will expire January 1, 2020.

Employers should review their employee headcount to assess whether this new law will apply to them. Covered employers will need to generate and publish a compliant parental leave policy and will need to train supervisors and management on how the policy should be administered.

■ **AB 450 - Immigrant Worker Protection Act (ie, "Sanctuary State" Law)**

AB 450, the so-called "sanctuary state" legislation, prohibits employers from allowing immigration enforcement agents to access non-public areas of the workplace without a judicial warrant. It also bars employer from voluntarily allowing an immigration enforcement agent to access, review, or obtain employee records without a subpoena or a court order, except for I-9 forms for which a Notice of Inspection has been provided or other instances when federal law requires the employer to provide

access to records. Employers who violate these restrictions will face significant penalties (ranging from $2,000-$5000 for the first violation and $5000 - $10,000 for subsequent violations).

Unless otherwise required by federal law, AB 450 requires employers to provide current employees with notice of an immigration agency's records inspection by posting notice of an inspection within 72 hours of the immigration agency providing written notice to the employer. The notice must specify the name of the agency conducting the inspection, the nature of the inspection (if known), and a copy of the official "Notice of Inspection" provided by the immigration agency.

Employers must also provide affected employees with a copy of a notice of inspection of I-9 forms upon reasonable request. Within 72 hours of receiving written notice of the results of an I-9 inspection, the employer must provide a copy of the notice to the employee and their collective bargaining representatives. The notice must include the results of the inspection and the obligations of the employer and employee(s) arising from those findings.

AB 450 does not prohibit compliance with the federal E-verify system, but it explicitly forbids employers from re-verifying employment eligibility of a current employee at a time or in a manner that is not required by 8 USC Section 1324a(b). Violations may result in a civil penalty of up to $10,000 per violation.

■ **AB 44 – Medical Assistance for Domestic Terrorism Attacks**

This new law provides that where the Governor has declared a state of emergency in connection with an act of domestic terrorism, employers must provide immediate support from a nurse case manager to employees who were injured in the course of employment by an act of domestic terrorism, appoint a nurse case manager to assist employees in obtaining necessary medical treatment, and provide a notice to employees of these rights. The Division of Workers' Compensation will issue and adopt the new notice, as well as define the qualifications of the nurse manager and outline the timing requirements related to providing "immediate support" to employees. Employees shall be eligible for medical assistance for all accepted physical or mental injuries (including counseling and mental health services).

■ **AB 46 – Equal Pay Act Amendment: Applies to public employers**

This new law specifies that the term "employer" as used in the Equal Pay Act includes both public and private employers. The Equal Pay Act was recently amended to require equal pay for substantially similar work based on sex, ethnicity, or race.

■ **AB 978 - IIPP Provided to Employee Upon Written Request**

California employer are required to maintain a written Injury and Illness Prevention Program (IIPP). This new law requires that employers who receive a written request for a copy of the written IIPP from a current employee (or their representative) must provide a copy of the IIPP free of charge within 10 business days from the date of the request. The bill authorizes certain affirmative defenses and

specifies that the employer can take reasonable steps to verify the identity of the employee or the employee's representative prior to providing the IIPP.

■ SB 3 - Minimum Wage Increase

In April 2016, Governor Brown signed minimum wage legislation that will increase California's minimum wage in gradual steps up to $15.00 per hour by January 1, 2022. The scheduled increases will apply to employers with 26 or more employees as of January 1, 2017 and to employers with 25 or fewer employees as of January 1, 2018.

The scheduled increases are as follows:

- January 1, 2018: 26+ $11.00; 25- $10.50
- January 1, 2019: 26+ $12.00; 25- $11.00
- January 1, 2020: 26+ $13.00; 25- $12.00
- January 1, 2021: 26+ $14.00; 25- $13.00
- January 1, 2022: 26+ $15.00; 25- $14.00
- January 1, 2023: 26+ Lesser of 3.5% or Consumer Price Index increase; 25- $15.00
- January 1, 2024: ALL EMPLOYERS Lesser of 3.5% or Consumer Price Index increase

Don't forget that other wage obligations will hinge on the current minimum wage rate. Overtime rates will increase, salary minimums for exempt employees will increase (just wait until you see the mess that makes!), split-shift pay obligations will increase, and so forth.

Remember, finally, that minimum wage amounts may be even higher based on local ordinances (San Francisco, San Jose, parts of Los Angeles). Employers should carefully plan and budget for these rising costs. Have I mentioned how great California is?

■ AB 1066 - Agricultural Workers: Wages, Hours, Working Conditions

Currently, certain agricultural workers are only entitled to overtime if they work more than ten hours in a day or more than 60 hours in a week. This new law removes those overtime exemptions for agricultural worker regarding hours, meal breaks, and other working conditions. In addition, it creates a specified schedule to phase in overtime for agricultural workers over the course of four years.

For employers with more than 25 employees, beginning January 1, 2019, agricultural workers shall be entitled to time and a half overtime if they work in excess of 9.5 hours in a single workday or 55 hours in a single workweek. Beginning January 1, 2020, agricultural workers shall be entitled to time and a half overtime if they work in excess of 9 hours in a workday or 50 hours in a workweek. Beginning January 1, 2021, agricultural workers shall be entitled to time and a half overtime if they work in excess of 8.5 hours in a workday or 45 hours in a workweek. Beginning January 1, 2022, agricultural workers shall be entitled to time and a half overtime if they work more than 8 hours in a single workday or 40 hours in a single workweek and shall also be entitled to double time overtime if they work over 12 hours in a workday.

For employers with 25 or fewer employees, these requirements shall not be imposed until 2022. On January 1, 2022, employers with 25 or fewer employees will need to provide time and a half overtime to agricultural workers for hours beyond 9.5 in a workday or 55 hours in a workweek. Beginning January 1, 2023, time and a half overtime shall be owed if the employee works more than 9 hours in a workday or 50 hours in a workweek. Beginning January 1, 2024, time and a half overtime shall be owed if the employee works more than 8.5 hours in a workday or 45 hours in a workweek. Beginning on January 1, 2025, time and a half overtime shall be owed if the employee works more than 8 hours in a workday or 40 hours in a workweek and double time pay shall be required if the employee works more than 12 hours in a workday.

■ **AB 1221 – Responsible Beverage Service Training Program Act of 2017**

This new law establishes the Responsible Beverage Service (RBS) Training Program and requires the Department of Alcoholic Beverage Control to develop a curriculum for RBS Training. Beginning July 1, 2021, alcohol servers will be required to have successfully completed RBS training.

■ **SB 295 – Expanded Sexual Harassment Training Requirements for FLCs**

California law requires that farm labor contractors provide employees with sexual harassment prevention training. This new law adds an additional requirement that the training be conducted in the language understood by the employee. In addition, in the month prior to license renewal, the FLC must provide a complete list of all materials used to provide the training in the prior year and the number of agriculture employees trained in the prior year.

■ **AB 260/SB 225 – Human Trafficking Notice**

California law requires certain specified businesses to post a notice related to slavery and human trafficking. Among those who are required to post this notice are airports, adult businesses, public premises licensed by ABC, truck stops, bus stations, ERs, Urgent Care Centers, Farm Labor Contractors, massage establishments, etc. These new laws expand that definition to include hotels, motels, and inns. In addition, by January 1, 2019, the notice must specify a number that a person can text for services and support.

■ **AB 1840 – Hiring Preference: Homeless Youth / Formerly Incarcerated Youth**

This law specifies that state agencies must give preference to homeless youth and formerly incarcerated youth when hiring for internships and student assistant positions. California law already provides that state agencies must give preference to those who are in foster care. This new law also requires that applications for a state agency internship or student assistant program has an area where the applicant can voluntarily specify that they are eligible for such preferential treatment, but that does not require them to disclose which specific category applies to them.

■ **AB 1710 – Expanded Protections Military Personnel**

This new law specifies that employers cannot discriminate with respect to "terms, conditions, or privileges of employment" for individuals who have or will serve in the military. Employers should ensure that military protection provisions in the Employee Handbook are updated to include this new language.

■ **AB 306 – Expanded DLSE Retaliation Enforcement Authority**

This new law enhances the DLSE's authority to investigate and enforce compliance with various Labor Code provisions. More specifically, this law allows the DLSE to investigate an employer without receiving a complaint of retaliation, provided the DLSE "suspects" that retaliation has occurred in the course of adjudicating a wage claim, a field inspection, or in cases of suspected immigration-related threats. This law also the DLSE to petition for preliminary injunctive relieve if the DLSE finds "reasonable cause" to believe that an employer has engaged in unlawful retaliation.

AB 306 also accelerates the method for the DLSE to enforce violations by removing the requirement that the DLSE initiate a civil action to enforce an issued determination. Moving forward, if the DLSE issues a citation and the employer disagrees with that citation or with the required relief, the employer will have the burden of seeking review through an administrative hearing within 30 days of the citation being issued. Any subsequent decisions can be appealed to Superior Court.

Employers who refuse to comply with a DLSE citation are subject to penalties of $100 per day (up to a maximum of $20,000) for "willful" refusal.

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■ **SB 219 – LGBT Rights Long-Term Care Facilities**

This law creates the LGBT Long-Term Care Facility Resident Bill of Rights. Residents are now entitled to be referenced with their preferred name or pronoun. This law also imposes new posting and record keeping requirements on Long-Term Care facilities.

■ **AB 1102 – Whistleblower Protections**

This law increases the maximum fine for a violation of whistleblower protections in healthcare facilities from $20,000 to $75,000.

■ **SB 1015 – Domestic Worker Bill of Rights Extended**

This law extends the Domestic Worker Bill of Rights, which regulates the hours of work for personal attendants and calls for the payment of overtime. The Domestic Worker Bill of Rights was scheduled to expire on January 1, 2018. This law deletes the repeal date.

■ **SB 179 – Gender Recognition Act: Male, Female, Nonbinary**

Previously in California, a resident was required to obtain a new birth certificate in order to effectuate a gender transition. This new law allows California residents to choose from three equally recognized gender categories (male, female, or nonbinary) for state-issued identification cards, licenses, and birth certificates.

Effective September 1, 2018, changes to birth certificates will no longer require that the applicant has undergone any treatment, but will require an affidavit that the person is seeking to change gender in accordance with their gender identity and not for any fraudulent purpose. Effective January 1, 2019, an applicant for a driver's license or renewal of a license can select any of the three gender categories (including gender elections as required for organ and tissue donation).

■ **AB 396– Expanded Training: Gender Identity, Gender Expression, Sexual Orientation**

This law specifies that supervisor sexual harassment training (mandated for employers with 50 or more employees) must include a discussion related to harassment based on gender identity, gender express, and sexual orientation. In addition, this law requires employers to display a poster on transgender rights which will be published by the DFEH.

■ **AB 1556 – Gender Neutral Language**

This law deletes gender-specific personal pronouns (he, she, his, her, him, etc.) from the FEHA and CFRA. Gender-specific pronouns are replaced with neutral terms such as "the person" or "the individual" or "the employee.

■ **AB 1701 – Construction Contractors Jointly Liable for Wage Claims**

This new law adds Labor Code Section 218.7 which makes general building contractors jointly and severally liable with their subcontractors for any failure to pay wages, fringe benefits, or other benefit payments or contributions on building contracts entered into after January 1, 2018. Subcontractors are defined as contractors who do not have a direct contractual relationship with the owner and includes contractors who have contracts with other subcontractors.

■ **SB 258 – Cleaning Product Right to Know Act of 2017**

This new law requires that cleaning product manufacturers provide a list of chemicals used in designated products on their label or website by January 1, 2020. Employers who use any of the designated products must obtain safety data sheets from the manufacturers, maintain them in the workplace, and make them available upon request.

■ **SB 490 – Barbering / Cosmetology Wages**

This law requires that commission wages paid to any employee who is licensed as a barber or cosmetologist be due and payable at least twice each calendar month on a regularly designated payday. This law also permits barbers and cosmetologists to be paid a commission amount in addition to an hourly rate, provided certain criteria are met.

■ **AB 2899 – Bond Posting Requirements**

This new law specifies that employers seeking a writ of mandate to contest a Labor Commissioner ruling must post a bond with the Labor Commissioner in an amount equal to the unpaid wages assessed (excluding penalties).

■ **SB 189 – Workers Comp: Exclusions to "Employee" Definition**

Effective July 1, 2018, certain owners, officers, partners, managing members, and board of director members may be excluded from workers compensation laws if certain criteria are met.

■ **DFEH Regulations – Criminal Background**

New regulations issued by the DFEH went into effect in July 2017 which limit an employer's ability to seek or use criminal background history. The regulations prohibit the use of criminal history if it has an adverse impact on a protected class, unless the information is job-related and consistent with business necessity. The employee or applicant has the burden of demonstrating adverse impact on the protected class and can use statistical data to make this showing.

In addition, employers are prohibited from using criminal history in employment decisions, regardless of whether it is job-related and consistent with business necessity, if the employee or applicant can demonstrate a less discriminatory means of achieving the specific business necessity just as effectively.

In order for criminal history to be "job-related and consistent with business necessity" the practice must bear a "demonstrable relationship" to successful performance in the job and in the workplace and must relate to the person's fitness for a specific position considering the nature and gravity of the offense, the amount of time that has passed since the offense, and the nature of the job. Employers can demonstrate that the policy is appropriately tailored in one of two ways: 1) By conducting an individualized assessment of the circumstances and qualifications of the employee or applicant. Employers should provide the excluded person with a notice that he or she has been screened out based on the conviction and give the person a reasonable opportunity to show why the conviction should not be grounds for exclusion; or 2) By showing that a bright-line disqualification policy properly distinguishes between those who do and do not pose an unacceptably high risk based on the conviction's direct negative bearing on the person's ability to perform the duties of a given position. Bright-line rules should not consider convictions that are more than 7 years old.

If employers utilize a third-party to conduct criminal background checks, they must provide the applicant or employee with an opportunity to dispute the findings.

■ DFEH Regulations – Transgender Protections

The DFEH issued new regulations related to protection for transgender identity and expression in the workplace. The regulations expand key definitions and add new terms such as transitioning and sex stereotype. Among the amended and newly included terms are the following: 1) Transitioning (process that transgender people go through to begin living as the gender with which they identify rather than the gender assigned at birth based on their sex which may include changes in name, pronoun, bathroom preference, surgery, or other medical procedures); 2) Gender Expression (gender-related appearance and behavior whether or not associated with assigned sex at birth); 3) Gender Identity (person's identity as male, female, any gender other than that assigned at birth, or transgender); 4) Sex Stereotype (assumption about a person's appearance or behavior or about their ability/inability to perform certain kinds of work based on generalizations or social expectations about the person's sex); and 5) Transgender (a person whose gender identity differs from their sex at birth regardless of their gender expression or their identification as being transsexual).

The new regulations require employers to provide equal access to restroom facilities without regard to sex and must permit employee to use restroom facilities that align with the person's gender identity or gender expression, regardless of the person's assigned sex at birth. In order to balance privacy interests of other employees, employers who do not have private restroom facilities must employ other means such as locking stalls, staggered shower schedules, shower curtains. Employers with single facility restrooms must utilize gender-neutral signage. The regulations provide that transitioning employees cannot be required to undergo or provide proof of any particular medical treatment in order to use a particular restroom.

The regulations clarify that dress and grooming standards that serve a legitimate business purpose are permitted so long as they do not involve discrimination based on a person's sex, gender, gender identity, or gender expression. In addition, employers cannot require employees to dress or groom themselves in a manner that is consistent with a particular gender identity or gender expression.

Employers cannot require that an employee or applicant disclose that they are transgender. Applicants who indicate male or female on a job application will not be deemed to have provided fraudulent information if that designation does not correspond with their assigned sex at birth.

Employers must comply with an individual's request to be referenced by a particular name or pronoun, but may use the person's legal name (based on government-issued documentation) for legally-mandated documents.

■ Federal Overtime Revisions Still on HOLD

The final DOL regulations slated to take effect in December 2016 remain on hold. In September 2017, a public commentary period ended. A revised rule is expected in 2018. California employers may not feel the impact of this change if state minimum wage rates result in higher salary minimums.

CASE LAW & OTHER NEWS:

Hiring Issues / Independent Contractor Issues

- *Howard v. City of Coos Bay* – FAILURE TO RE-HIRE WAS NOT RETALIATORY

  Plaintiff was terminated based on allegations of shop-lifting. She filed suit against the city employer alleging that the termination was actually due to retaliation based on complaints she had previously filed with the city. Plaintiff eventually won that lawsuit. However, while the lawsuit was ongoing, her former position opened up again and Plaintiff re-applied. She was not hired and then filed suit alleging that the decision to not re-hire her was in retaliation for having filed the initial lawsuit. Finding that the city would have rejected her second application regardless of the pending lawsuit, Plaintiff's retaliation claim was rejected. Plaintiff's whistleblower claims were also rejected on the grounds that whistleblower protections apply to employees but not to "former employees."

- *Hy-Brand Industrial Contractors (NLRB)* – JOINT EMPLOYMENT RE-DEFINED BY NLRB

  A December 2017 NLRB decision rejected the *Browning-Ferris* joint employment test. Under *Browning-Ferris* two entities would be deemed to be joint employer based on the existence of joint control, indirect control or limited and routine control. This decision returns to the pre-*Browning-Ferris* joint employer test which finds joint employment only if both entities have direct and immediate control over the worker and where that control is not simply limited or routine.

- *Jones v. Royal Admin Services* – TELEMARKETERS WERE INDEPENDENT CONTRACTORS

  Plaintiffs registered their cell phones on a "Do Not Call" list but still received telemarketing calls. They eventually sued Royal Administration Services for violating the Telephone Consumer Protection Act based on calls that were make by telemarketers employed by All American Auto Protection. Both the trial court and the Ninth Circuit agreed that the telemarketers working for All American Auto were independent contractors based on findings that All American Auto was a distinct business, its callers made calls for numerous entities (including Royal Services), callers were not supervised by a Royal Services employee, American Auto set its own hours and used its own equipment.

- *Linton v. Desoto Cab Company, Inc.* – BURDEN OF PROVING IC STATUS FALLS ON EMPLOYER

  Plaintiff alleged that he was an employee, not an independent contractor, and should therefore not have been charged a fee for the use of the Company's taxi cabs. Although the trial court ruled in favor of the employer, the court of appeal remanded the case finding that the employer bears the burden of demonstrating independent contractor status (as opposed to the Plaintiff having the burden to prove an employment relationship). The Court of Appeal also held that the *Borello* factors apply to wage and hour claims. The *Borello* test for independent contractor status focuses on the level of control the employer exerts over the individual, as well as various other secondary factors.

- *Syed v. M-I, LLC.* – FCRA DISCLOSURE STATEMENT INCLUDED ILLEGAL WAIVER

  Syed applied for a job with M-I and was given a "Pre-employment Disclosure Release" that informed him that his credit history and other information could be collected and used as a basis for making the hiring decision. The document also stated that by signing it, Syed was waiving his right to sue M-I and its agents for violations of the Fair Credit Reporting Act (FCRA). Syed alleged that including the waiver in the document was a violation since the FCRA requires that the disclosure document "solely" contains the disclosure. The 9th Circuit ruled in favor of Syed and found the violation to be willful.

- Pending Cases:

  - *Dynamex Operations West Inc. v. S.C.*
    Pending Review by CA Supreme Court
    In the context of certifying a class action, what is the proper test for determining whether a driver is an employee or an independent contractor as between the *Martinez* test (employer control) versus the *SG Borello & Sons* test (multi-factor)?

  - *DirecTV LLC v. Marlon Hall*
    Pending Review by US Supreme Court
    What is the proper test for establishing joint-employment?

- In the News:

  - **New I-9 Form.**
    As of September 18, 2017, employers were required to begin using a new I-9 Form issued in July 2017.

  - **DOL Announces New Test for Determining Whether Interns are Employees under FLSA**
    The DOL announced a new test to determine whether interns are employees under the FLSA. The DOL is aligning with the "primary beneficiary" standard adopted by numerous appellate courts. The new test comes from the *Glatt v. Fox Searchlight Pictures* case and looks at seven factors to determine who is the primary beneficiary of the relationship.

  - **DOL Withdraws Prior Guidance Letters on Misclassification & Joint Employment**
    In June 2017, the DOL announced that it was withdrawing two guidance letters previously issued. Specifically, the 2015 letter related to the misclassification of employees as independent contractors and the 2016 letter related to joint employment relationships. Although the DOL noted that withdrawing the letters does not change the employer's obligations in these areas, most view this as a step toward rolling back the broad expansions in employer liability that were seen during the Obama administration.

Wage & Hour Issues

- *Batze v. Safeway Inc.* – ASSISTANT MANAGERS DUTIES WERE PRIMARILY MANAGERIAL SO EMPLOYEES WERE PROPERLY CLASSIFIED AS EXEMPT

  A California court of appeal analyzed a misclassification claim brought by grocery store managers who alleged that they should have been entitled to overtime since they primarily engaged in "non-managerial" duties (stocking shelves, checking purchases, building displays, etc.). However, the court upheld a lower court ruling that found that there was sufficient evidence of exempt duties, including the fact that the managers supervised the entire stores, directed employees, and had the authority to hire/fire. In addition, the managers were all paid the requisite salary to qualify as exempt.

- *Beck v. Stratton* - ATTORNEY'S FEES UPHELD ON UNPAID WAGE CLAIM

  Plaintiff filed a wage claim with the Labor Commissioner for unpaid wages in the amount of $303.55. The Labor Commissioner awarded the unpaid wages, along with an additional $5,757.46 in interest and penalties. Defendant appealed the decision in Superior Court, where he lost again. The trial court then awarded the Plaintiff his attorneys' fees in the amount of $31,365. Wait, what? $31,000 spent to recover $300 in fees? Yep. And that award of fees was later upheld on appeal. Lesson: Even the little mistakes can cost a bundle.

- *Brunozzi v. Cable Communications Inc.* – BONUS THAT DECREASED AS OVERTIME INCREASED VIOLATES FLSA

  Both federal and state law require that overtime be paid based on the regular rate of pay. The "regular rate" must reflect all payments that the employee receives aside from overtime pay. Here, the 9th Circuit examined a bonus program that provided for a bonus that would decrease in proportion to increased overtime hours for piece-rate employees. Noting that regulations prohibit employers from lowering the hourly rate during statutory overtime hours, the court determined that the bonus plan ran afoul of FLSA requirements.

- *Encino Motorcars v. Navarro* - AUTOMOBILE SERVICE ADVISORS NOT EXEMPT FROM OVERTIME UNDER THE FLSA

  Exempt or Not Exempt, that is the question. And apparently, no one seems to know the answer.

  By way of background, in 1987 the DOL issued an opinion letter stating that "service advisors" who sell repair services fell within the FLSA exemption for "any salesman, parts man, or mechanic engaged in selling or servicing automobiles." In 2008, the DOL stated that it intended to change its regulations to include service advisors in this exemption. But then in 2011, the DOL issued a final rule that took the opposite position and found service advisors not to be exempt from overtime under the FLSA.

  Although the Fourth and Fifth Circuits refused to adopt the DOL's 2011 position, the Ninth Circuit did accept the new rule and held that service advisors are not exempt. The US Supreme Court granted review. In a 6-2 ruling, the US Supreme Court voted to vacate a Ninth Circuit opinion which had held that automobile service advisors are entitled to overtime. The US Supreme Court directed the Ninth Circuit to reconsider the case without giving weight to the

DOL's regulations. The Court was particularly critical of the DOL's inconsistency with regard to whether automobile service advisors are exempt or not-exempt and with the lack of reasoned explanation behind the DOL's reversal of course with respect to exempt status.

On remand, the Ninth Circuit engaged in a long analysis of the statute and the legislative history, and concluded that the overtime exemption was intended to apply only to salesmen, partsmen, and mechanics, but not to service advisors.

- *Ferra v. Loews Hollywood Hotel* – MEAL AND REST PERIOD PREMIUM SHOULD BE PAID AT BASE COMPENSATION RATE

  This case looked at the proper rate of pay for missed meal and rest premiums that are owed to employees under Labor Code 226. According to the statute, the meal and rest premium must be paid at the employee's "regular rate of compensation." Plaintiff raised a claim that paying the missed meal and rest periods based on the regular, hourly base rate was a violation of the statute because she was entitled to be paid based on the "regular rate" that would be used for overtime purposes which included additional compensation for service charges.

  The court analyzed the issue and found no prior state law authority on this question, but identified two federal cases that had both determined that "regular rate of compensation" was different from the definition of "regular rate of pay." Considering that authority and the legislative history, the court concluded that meal and rest premium payments need only be paid at the employee's regular base hourly rate, and not at a higher regular rate.

- *Flores v. City of San Gabriel* – US SUPREME COURT DECLINES TO REVIEW CASE: REGULAR RATE CALCULATION MUST INCLUDE MONETARY PAYMENTS MADE IN LIEU OF BENEFITS

  The City of San Gabriel ("City") offers a Flexible Benefit Plan that provides employees with a set monetary amount to purchase various benefits. Employees may decline to use these funds for medical benefits, receiving them instead as cash payments added to their paychecks. The City did not include these cash-in-lieu of benefits payments in its determination of recipients' regular rates of pay, and consequently did not incorporate them into its calculation of non-exempt employees' overtime rates. Fifteen current and former police officers sued the City, arguing that the payments should have been included in calculating the officers' regular rates of pay and overtime rates. After the trial court ruled on the issues, the case went to the Ninth Circuit Court of Appeals. Ruling on an issue that had never been decided by any court in the country, the Ninth Circuit Court of Appeals held that an employer must include monetary payments made in lieu of benefits when calculating an employee's regular rate of pay for purposes of determining overtime payments under the Fair Labor Standards Act ("FLSA"). The Ninth Circuit further held that under FLSA's liquidated damages provision, the employer was liable for double the amount of unpaid overtime compensation covering the three years before the complaint was filed. The June 2nd ruling will significantly affect most employers operating in the Ninth Circuit, increasing the amount of overtime payments due their employees and opening the door to lawsuits seeking to recover ordinary and liquidated damages over a three-year period.

- *Greer v. Dick's Sporting Goods Inc.* – CLASS CERTIFICATION GRANTED ON SECURITY CHECK CASE

  A judge has certified a class of thousands of Dick's employees who claim that they were not compensated for time they were required to spend waiting to have belongings inspected. Dick's had attempted to align with a prior decision where class certification was denied based on a similar policy at Nordstrom's. However, the court distinguished that policy since it applied only to bags from the Dick's policy that required bags, jackets, and other personal belongings to be searched prior to leaving the store.

- *Guillen v. Dollar Tree Stores* – JURY SIDES WITH EMPLOYER IN WAGE STATEMENT CASE

  A California federal jury determined that Dollar Tree's practice of providing pay stubs on cash register was not a violation of California's requirement that employers provide accessible wage statements to employees. The case involved claims from 5,400 retail employees who received payment via direct deposit or pay cards and were required to print off the wage statement at the cash registers. Dollar Tree asserted that the register pay stub system was designed to be convenient and free and highlight that the register stub did not exclude any of the legally required information. In addition, employees were permitted to call a company phone number and request a paper statement in the mail.

- *Kao v. Joy Holiday* – EMPLOYEE ENTITLED TO WAGES PROTECTIONS DESPITE NOT HAVING WORK VISA

  Plaintiff came to the US and applied for a H-1B work visa. While his work visa was pending, he lived with employer's owners and was compensated for approximately one year. Once he received his visa, he was employed for an additional year, but was later terminated. Plaintiff sued alleging unpaid overtime and breach of contract. Ultimately, a court of appeal ruled that Plaintiff was entitled to compensation under the wage statutes irrespective of his work visa status. The court noted that wage protections apply to undocumented aliens and noted that, under California law, to "employ" someone means to exercise control over wages, hours, and working conditions or to suffer/permit to work, or to engage in an employment relationship. This definition was found to be broad enough to cover a situation where a proprietor permits work to be performed even if the person has not been formally hired.

- *Lopez v. Friant & Associates LLC* – WAGE STATEMENT VIOLATION DOES NOT REQUIRE KNOWING AND INTENTIONAL SHOWING

  Lopez filed a PAGA lawsuit based on a wage statement violation stemming from the fact that the pay stub did not include the last four digits of the social security number. Although the trial court ruled that Lopez needed to show more than a mere violation of Labor Code Section 226(a), the Court of Appeal disagreed. The Court of Appeal ruled that where a PAGA penalty is sought, the plaintiff does not need to show an injury resulting from a knowing and intentional violation as outlined in Labor Code Section 226(e). Instead, PAGA allows for a claim based on a violation of Section 226(a) without making any showing related to an "injury" or a "knowing and intentional" violation.

- *Marsh v. J. Alexander's LLC* – DOL'S FIELD OPERATIONS HANDBOOK CONFLICTS WITH DOL "DUAL JOBS" REGULATION

The Ninth Circuit declined to follow interpretive guidance issued in the DOL's Field Operations Handbook after concluding that it was in conflict with the DOL's "dual jobs" regulations. The court reasoned that the dual jobs regulation was concerned with cases where the employee works two distinct job and not with differentiating between different tasks or duties contained within a single job. As such, the Court found that the Plaintiffs could not establish a "dual job" based on the different tasks performed intermittently throughout the day.

- *McKeen-Chaplin v. Provident Savings Bank* – MORTGAGE UNDERWRITERS WERE NOT EXEMPT UNDER ADMINISTRATIVE EXEMPTION

  A class of mortgage underwriters filed suit alleging they were misclassified as exempt. The lower court ruled that the underwriters qualified for the administrative exemption, but the 9th Circuit reversed finding that the underwriter's primary job duty did not relate to the bank's management or general business operations.

  The underwriters were responsible for reviewing and analyzing loan applications to determine creditworthiness. However, in making this evaluation, they following guidelines established by the employer and the secondary loan market. That is, they did not decide whether the employer would take on risk but instead followed guidelines to determine whether a loan fell into a particular range of risk that had already been approved by management. Where the underwriter would deviate from the guidelines, they were required to seek approval. Based on these facts, the court found that the underwriters' duties were more akin to generating a product/service rather than running, managing, or administering the business itself.

  Classification of underwriters has remained in flux over the las decade, and at least two other Circuit courts considering this issue have reached opposite conclusions.

- *Mendoza v. Nordstrom, Inc.* – CALIFORNIA SUPREME COURT CLARIFIES "DAY OF REST" RULES

  California employers are prohibited from "causing" and employee to work more than six days in seven unless the total hours of employment do not exceed 30 hours in a week or six hours in any one day.

  The court was asked to clarify three distinct questions related to these obligations:

  1) Is the day of rest calculated by workweek or does it apply for any a rolling 7-day period? (Answer: Calculated by workweek, not on a rolling basis.)

  2) Does the 6-hour per workday exception mean that each day of the workweek must be under 6 hours or does it apply if any single day of the workweek is under 6 hours? (Answer: Exception applies only if the employee never works beyond 6 hours in any day of the week.)

  3) When does the employer "cause" an employee to forego a day of rest? (Answer: "Causing" means that the employer has induced the employee to forego the rest period. The employer must inform employees of their right to a day of rest and thereafter remain neutral. If the employee chooses to work the 7th day without coercion from the employer, the employer will not be liable.)

  The Court recognized that the day of rest protections are not absolute and acknowledged that an accumulation of days of rest is permitted when the nature of the employment reasonably

requires that the employee work seven or more consecutive days and the employee receives in each calendar month the equivalent of one day's rest in seven.

- *Rodrieguez v. Nike Retail Services Inc.* – WAIT TIME DEEMED DE MINIMUS IN BAG CHECK CASE

  A California federal judge granted summary judgment to Nike in a class action bag check case alleging that workers were not paid for off the clock time spent going through security checks. The judge found that employees failed to show that they spent more than a few seconds having bags checked before they left at the end of their shift. Evidence in the case (gleaned from more than 700 hours of video footage) showed that bag inspection on average took no more than 18.5 seconds and that 60% of the time required zero wait time. The judge also found that re-positioning the time clocks so that employees could clock out after the bag check was administratively impractical.

  This ruling was somewhat surprising, given that the application of the "de minimus" doctrine under CA law is currently pending before the CA Supreme Court in *Troestar v. Starbucks.*

- *Silva v. See's Candy Shops, Inc.* – ROUNDING POLICY AFFIRMED

  See's used a rounding policy that rounded to the nearest tenth of an hour and allowed for a 10-minute grace period before and after a shift, but calculated wages based on the scheduled start/stop times. In a prior appeal, the court held that rounding policies are permitted if they are fair and neutral on face and if they are not used in a manner that will result in failing to compensate the employee for all time actually worked. The case was remanded and the lower court granted summary judgment in favor of See's. On appeal again, the employee challenged the summary judgment ruling. Again, the appellate court upheld the rounding policy finding that the employer demonstrated that employees were paid for all worked time under the policy, that the policy was mathematically neutral over time, that the company prohibited employees from working during the grace periods, and that employees did not work and were not subject to the employer's control during those grace periods. The court affirmed dismissal of the PAGA claims but found that the plaintiff's individual claims for missed meal breaks and expense reimbursement could proceed.

- *Vaquero v. Stoneledge Furniture LLC* – COMMISSION EMPLOYEES ARE ENTITLED TO SEPARATE COMPENSATION FOR REST PERIODS

  Plaintiffs filed a class action alleging that Stoneledge's commission pay policy violated CA law because it did not separately compensate employees for time that was spent on tasks other than selling, including rest periods. The court of appeal held that because rest periods are on the clock, they are "hours worked" that must be compensated. Because the company's policy provided payment only for sales made, there was no separate compensation for the time when the employee was resting and not selling. The court determined that commission plans must separately account and pay for rest periods to comply with CA law. The decision was later modified to clarify that the court did not intend to create a rest period claim for nonexempt salaried employees who are not separately compensated for rest periods.

- Pending Cases:

  - *Alvarado v. Dart Container Corp*
    Pending Review by CA Supreme Court
    What is the proper calculation of the "regular rate of pay" when an employee receives a flat-rate bonus? The Court of Appeal ruled that the formula previously adopted by the California Labor Commissioner was not supported by statutory authority, and instead adopted the formula used under federal law. This was a great decision for the 15 minutes it was allowed to stand. Stay Tuned!

  - *Frieken v. Apple Inc.*
    Pending Review by US Supreme Court
    This case looks at whether store employees were entitled to compensation for time spent checking their personal bags. At issue is whether the bag check time was "voluntary" or "mandatory." Apple previously was successful in arguing that the time spent on the bag check was voluntary because employees did not have to bring a bag to work.

  - *Gerard v. Orange Coast Memorial Medical Center*
    Pending Review by CA Supreme Court
    CA law requires that employers provide employees with two 30-minute meal periods if they work over 10 hours in a workday. Employees can waive the second meal period if they work less than 12 hours and have already taken the first meal period. A provision in Wage Order 5 allows for greater flexibility on meal periods for healthcare employees who work shifts exceeding 10 hours. More specifically, they are allowed to voluntarily waive one of their two meal periods even if they work in excess of 12 hours. This healthcare exception was challenged in previous litigation and ultimately gave rise to specific legislation (SB327) confirming that the healthcare waiver was permitted. The Court will now consider whether SB327 was a clarification of the law or a new law and whether the waiver in Wage Order 5 is illegal.

  - *Goonewardene v. ADP, LLC*
    Pending Review by CA Supreme Court
    Does the aggrieved employee in a lawsuit based on unpaid overtime have viable claims against the outside vendor that performed payroll services under a contract with the employer?

  - *Troestar v. Starbucks*
    Pending Review by CA Supreme Court
    The Ninth Circuit asked the CA Supreme Court for its opinion on whether California law recognizes a de minimis standard similar to the de minimis standard that has been recognized and applied under the Fair Labor Standards Act for decades. The Department of Labor Standards Enforcement itself has endorsed the de minimis standard. However, many plaintiffs' lawyers nonetheless argue that California wage and hour law is more protective of employees than the FLSA and that California does not recognize a de minimis standard whereby de minimis time worked need not be compensated.

- *Voris v. Lampert*
  Pending Review by CA Supreme Court
  Is conversion of earned but unpaid wages a valid cause of action?

■In the News:

- **Local Ordinance Minimum Wage**
  Employers are reminded that various local ordinances have specific minimum wage rules that will apply in addition to California's state-wide requirements. Among the cities with local ordinances in effect related to minimum wage are the following: Berkeley ($15.00 as of 10/1/18); Cupertino ($13.50); El Cerrito ($13.60); Emeryville ($15.00 or $15.60 as of 7/1/18); Los Altos ($13.50); Los Angeles and Los Angeles County ($12.00 or $13.25 as of 7/1/18); Malibu ($13.25 as of 7/1/18); Mountain View ($15.00); Oakland ($13.25); Palo Alto ($13.50); Pasadena ($13.25 as of 7/1/18); Richmond ($13.00); San Diego ($11.50); San Francisco ($15.00 as of 7/1/18); San Jose ($13.50); San Leandro ($13.00 as of 7/1/18); San Mateo ($13.50); Santa Clara ($13.00); Santa Monica ($12.00 or $13.25 as of 7/1/18); and Sunnyvale ($15.00).

- **IRS Mileage Reimbursement Rate**
  Effective January 1, 2018, the new IRS reimbursement rate for business miles driven will move to 54.5 cents per mile.

- **Physicians and Surgeons Overtime Exemption Rate**
  Effective January 1, 2018, the new overtime exemption rate for Physicians and Surgeons will be $79.39/hour.

- **Computer Professionals Overtime Exemption Rate**
  Effective January 1, 2018, the new overtime exemption rate for Computer Professionals will be $43.58/hour or $7,565.85/month, or $90,790.07/year.

- **Victoria's Secret Reaches $12M Deal on Clerks Wage Suit**
  Victoria's Secret agreed to pay $12 million to settle a proposed class action alleging that the Company cheated workers scheduled for "call in" shifts out of reporting time pay. Clerks claims that the they had to call in two hours before a scheduled shift in order to find out whether they would be needed that day and that they were sometimes sent home after reporting to work.

- **Permanente Medical Group Settles "Boot Up Time" Claim for $6M**
  A $6 million deal was preliminarily reached based on claims by a class of nurses at Kaiser Permanente who alleged that they were not compensated for the time spent booting up and shutting down their computers (estimated to take from four to ten minutes to boot up and approximately two minutes to shut down).

- **Wal-Mart Suitable Seating Case Scheduled for Trial in Fall 2018**
  After years of litigation, an expected trial date has been set on the Wal-Mart suitable seating class action. In 2016, the CA Supreme Court ruled that employees must be given seats if the nature of the work that they are doing can be done sitting down. *Nisha Brown v. Wal-Mart Stores* will be heard in the fall of 2018 after nearly 9 years of litigation.

Discrimination, Harassment & Retaliation Issues

- *Alamillo v. BNSF Railway* – TERMINATION FOR EXCESSIVE ABSENCES WAS NOT DISABILITY DISCRIMINAITON

  Plaintiff was a locomotive engineer and had multiple absences from work, including three absences after he was warned about regular, predictable attendance requirements. While the Company was considering disciplinary action, Plaintiff informed the Company that he suffered from sleep apnea but did not provide any medical documentation that the sleep apnea caused him to call in sick to work. The Company ultimately determined to fire the employee. He filed suit alleging disability discrimination.

  The trial court ruled in favor of the employer finding that he could not sue for disability discrimination because he was terminated for absences that occurred before the Company knew of his diagnosis and before the Company was on notice of any accommodation obligations. The Court of Appeal affirmed and rejected the argument that the Plaintiff should have been given an accommodation that consisted of a second chance to control his disability in the future. The Court reasoned that employers do not have to excuse past misconduct and have no obligation to accommodate conditions of which the employer is not aware.

- *Arias v. Raimondo* - EMPLOYER'S ATTORNEY COULD BE SUED FOR RETALIATION

  In the worst court decision of all time (based in my estimation), the 9th Circuit ruled that an immigrant employee could pursue retaliation claims against his former employer's attorney. Arias brought a wage and hour suit against his former employer, Angelo Dairy. Angelo was represented by Raimondo of Raimondo & Associates. During the course of the lawsuit, Raimondo arranged for US Immigration and Customs Enforcement to take Arias into custody for deportation. Arias then brought a claim alleging that the attorney's interactions with ICE constituted retaliation since the action was taken in response to his assertion of workplace rights.

  The Ninth Circuit panel determined that the FLSA allows individuals to sue their "employer" for retaliation and that "employer" is defined as any person acting directly or indirectly in an employer's interest in relation to the employee. This definition was broad enough to include the employer's attorney. The panel did clarify that while the attorney could be held liable for retaliation, the attorney could not be held liable for any underlying substantive wage and hour violations.

- *Atkins v. City of Los Angeles* – PORTION OF $12M JURY AWARD VACATED ON FAILURE TO ACCOMMODATE CLAIM

  A California court of appeal vacated portions of a $12 million jury verdict awarded to ex-police recruits who were injured during training at the academy. The court determined that the recruits were not "qualified individuals" because they were not able to perform the essential job duties of recruits with or without reasonable accommodation. The court also vacated a portion of the future lost pay damages which awarded them damages through retirement even though some had completed only hours or weeks of training.

- *Aviles-Rodriguez v. LA Community College District* – STATUTE OF LIMITATIONS BEGINS AT TIME OF TERMINATION

  Plaintiff was notified in May that he would not receive tenure. He contacted the DFEH and was told that he had one year from his last day of employment to file a claim. His last day was June 30th and he filed suit the following year on June 29. The trial court dismissed his case finding that he had one year from the date when he was notified of the employment action to file the suit. However, on appeal the California Supreme Court held that the statute of limitations began running on the date of the termination, not on the date when the person was notified of the impending termination.

- *Barrie v. State of California* – JURY AWARDS $3M IN ALLERGY BULLYING CASE

  A California jury awarded $3 million to a Cal Trans worker whose boss intentionally aggravated his allergies by spraying perfume when he left his desk and bullied him in the office. John Barrie suffered from a disability called allergic rhinitis the caused him to suffer extreme reactions to certain chemicals. He disclosed his condition at the time he was hired and for 5 years the agency accommodated him by instructing employees not to wear certain perfumes and instructing cleaning staff to avoid certain products. In 2010, Barrie was assigned to a new supervisor who ignored the prior accommodations. Barrie ultimately suffered severe symptoms and filed a workers comp claim and was out for two months. When he returned to work, he was stripped of many of his prior duties. At trial, Barrie produced witnesses who testified that the new supervisor instructed them to spray his desk with perfume, that she called him "idiot," "stupid," and "jerk," and engaged in other acts of bullying.

- *Diego v. City of Los Angeles* – DISCRIMINATION CLAIM CANNOT BE BASED ON TREATMENT OF THIRD PARTY

  Two Hispanic police officers sued for race discrimination and retaliation after they were taken off duty following a fatal shooting of an African-American. They alleged that a Caucasian officer was not removed from duty following the fatal shooting of a Hispanic victim. They also alleged that they were retaliated against for filing suit based on the discrimination claim.

  The jury found in favor of the officers, but the verdict was reversed on appeal. The Court of Appeal clarified that the city could properly consider returning an officer of any race to the field following the shooting of an individual of a particular race. The Court noted that the race of the victim, alone, was not sufficient to support a discrimination verdict because discrimination cannot be based on how the employer treats some third party, but must be based on how the employer treats the complaining employee. The Court of Appeal also found that the retaliation claim failed because the officers did not show that they were subjected to any change in status following their filing of the lawsuit.

- *EEOC v. Consol Energy, Inc.* – EMPLOYEE ENTITLED TO RELIGIOUS ACCOMMODATION

  This case is a good reminder for employers of the need to take religious accommodations seriously. Beverly Butcher worked for Consol Energy but expressed concern about having to use the Company's biometric hand scanner based on a belief that the scanner would result in a "mark of the beast" branding described in the Bible. When the Company failed to accommodate, Butcher sued and won a $600,000 jury verdict that was later upheld on appeal by the Fourth Circuit.

Employers are reminded that once on notice of a request for religious accommodation, the interactive dialogue needs to be initiated by the employer and that "religion" is broader than simply the religions commonly known. Accommodation requests should be considered on an individualized basis and should not refuse accommodation on grounds such as pleasing customers or generic policy prohibitions. Finally, it is always important to always clearly document the interactive dialogue process in order to demonstrate compliance later on if a claim arises.

- *Featherstone v. Southern California Permanente Medical Group* – EMPLOYER DID NOT HAVE TO ALLOW EMPLOYEE TO RESCIND RESIGNATION

  California law prohibits employers from discriminating and retaliating against employees for various reasons, including mental disabilities. In this case, plaintiff alleged that her employer violated those protections when it did not allow her to rescind her resignation, which she claimed to have submitted when she was suffering from a temporary mental disability. Plaintiff alleged that she suffered from an altered mental state as a result of an adverse drug reaction and that she resigned (orally and in writing days later) while in this altered state. When she later asked to rescind her resignation, the Company refused.

  The court determined that the employer was not liable for two reasons. First, the court found that refusing to allow rescission of the resignation was not an "adverse employment action" since the act took place after the employment relationship had already ended. Second, the court noted that when the employee resigned, the Company had no knowledge of her altered mental state nor any reason to suspect that she was suffering from any disability. In addition, since she only notified the Company of her disability AFTER the employment relationship had ended, the Company had no obligation to engage in an interactive dialogue.

- *Husman v. Toyota Motor Credit Corp* – PLAINTIFF COULD PROCEED WITH DISCRIMINATION CLAIM DESPITE SAME ACTOR DEFENSE

  Plaintiff alleged sexual orientation discrimination based on a perception that he was "too gay" and alleged retaliation for comments he made related to the Company's commitment to diversity. Plaintiff was openly gay and had been charged with spearheading the Company's diversity program, which won the Company recognition and accolades. Over time, Plaintiff's performance diminished and he was ultimately terminated. Plaintiff sued.

  With regard to the discrimination claim, the Company raised the "same actor" defense, asserting that the person who made the termination decision was the same person who had promoted and encouraged the Plaintiff during his tenure at the Company. The trial court ruled in favor of the employer. However, on appeal the Court concluded that Plaintiff had raised a triable issue as to whether his termination was substantially motivated by a discriminatory reason (ie, being too gay). The court rejected the same actor defense finding that although the same person was responsible both for promoting and terminating him, there was also evidence of cat's paw influence that was exercised by another supervisor who may have been biased against Husman.

- *Light v. California Dept. of Parks and Rec.* – EMPLOYER ACTIONS MAY CONSTITUTE RETALIATION

  Plaintiff claimed to have suffered various incidents of retaliation after she refused to lie in connection with an investigation into another employee's complaints against the employer. She later went on medical leave and was diagnosed with mental health issues (including PTSD) due

to the stress she suffered on the job. She requested accommodation and was offered positions at her old office, or at a new office with the option to relocate once the retaliating supervisors had retired or been removed.

The trial court determined that the Plaintiff had failed to make a showing of retaliation because she did not suffer any adverse employment action. However, the Court of Appeal reversed finding that moving the Plaintiff to a different office isolated her, and noting various other verbal comments she endured as well as being denied a promotion. Importantly, the Court found that even though each individual action alone might not have supported a showing of retaliation, when taken together they exhibited a course of conduct that could support a retaliation claim if sufficiently severe or pervasive.

The department argued that it had legitimate, non-retaliatory reasons for any actions taken against the Plaintiff, but the court held that this showing was not sufficient to support a summary judgment finding.

Finally, the court also held that workers comp is not the exclusive remedy for intentional infliction of emotional distress. That is, only acts that are a normal part of the employment relationship or are motivated by something that does not violate public policy will be limited by workers comp exclusivity.

- *Mayes v. WinCo Holdings Inc.* – ALLEGED BEHAVIOR SUFFICIENT TO SUPPORT GENDER DISCRIMINATION CLAIM

  Mayes worked as a supervisor of the night-shift freight crew for 12 years. During one shift, she took a stale case from the store bakery to share in the break room with fellow employees without obtaining prior permission. WinCo terminated her for theft and dishonesty. Mayes filed suit alleging that she was actually terminated because the company wanted a man in charge of the crew. In support of her claim, Mayes produced evidence of a statement by the general manager that a "girl" should not run the freight crew, the fact that Mayes was replaced by a less qualified male employee, and that taking cakes to the break room was a common practice among supervisors. The 9th Circuit reversed a summary judgment ruling, allowing Mayes to proceed with her discrimination claim.

- *Merrick v. Hilton Worldwide* – NO AGE DISCRIMINATION WHERE BUSINESS HAD LEGITIMATE REASON TO JUSTIFY LAY OFF

  Plaintiff was a 60-year old director of operations for a hotel who was terminated as part of an overall company-wide reduction in force. In determining who to lay off, the Company considered the fact that plaintiff had the second highest salary after the GM, and that many of Plaintiff's duties had been outsourced. Reasoning that expense reduction could be met by eliminating a single position, the Company determined to lay off Plaintiff. Plaintiff sued alleging age discrimination. The trial court ruled in favor of the employer and Plaintiff appealed.

  On appeal, the court determined that the Plaintiff had made a prima facie showing of discrimination, but that the Company had rebutted that showing with legitimate, non-discriminatory reasons for the termination. Having made that showing, the burden shifted back to the Plaintiff to show that those reasons were pretextual. Although the Plaintiff argued that he could have been moved to another position as per standard Company policy. However, the Court

found no pretext since there were no open positions available at the time. The court noted that although deviations from Company policy might suggest pretext, those deviations must be considered in context of the overall justification for the action.

- *Nakai v. Friendship House* – MARITAL STATUS DISCRIMINATION DOES NOT EXTEND TO STATUS OF BEING MARRIED TO A SPECIFIC PERSON

  A former employee sued after he was fired following his wife informing the Company CEO that the former employee was angry at co-workers, that he owned a gun, and that the wife had obtained a restraining order against him. The former employee alleged marital status discrimination and asserted that the Company had failed to properly investigate the matter.

  The Court ruled that marital status discrimination claims do not extend to the status of being married to a specific person. Finding that the plaintiff was asserting that he was being discriminated against based on being the spouse of a particular person (rather than based on discrimination against being married vs. unmarried in general, the Court ruled in favor of the employer. With regard to the investigation, the Court noted that FEHA does not grant an at-will employee with due process investigation rights.

- *Neufield v. WinCo Holdings Inc.* – EMPLOYER NOT GUILTY OF DISABILITY DISCRIMINATION

  WinCo successfully defended a disability discrimination claim involving an ex-cashier after the Ninth Circuit ruled that the employer was not obligated to keep him on as an employee when his anxiety kept him from working a regular schedule. The court reasoned that the Plaintiff was not a "qualified individual" under the FEHA because he could not perform the essential functions of the job (ie, operating a cash register) if he was not present at work. The Court reaffirmed that regular, predictable attendance is an essential job duty and found no reason why that would not apply in the case of a cashier. Although the Plaintiff argued that he should have been offered accommodation in the form of a leave of absence, intermittent leave, or reassignment to a shelf-stocking position, the Court determined that these accommodations were not reasonable because they would have exempted him from the fundamental functions of his job as a cashier.

  The FEHA prohibits employers from firing employees because of a mental disability. However, it does not prohibit them from firing workers if the disability is such that they are unable to perform the essential job duties even with reasonable accommodation. Employees claiming disability discrimination must show that they have a disability, that they are able to perform their job with or without accommodation, and that they were subjected to adverse action because of their disability.

- *Reynaga v. Roseburg Forest Prod.* – HOSTILE WORK ENVIRONMENT EXISTED BASED ON RACIALLY CHARGED COMMENTS

  Reynaga and his son were both employed as millwrights and were the only employees of Mexican descent. Reynaga complained to management that the lead millwright had made harassing and racially-disparaging comments. The company undertook an investigation and responded by re-organizing schedules so that Reynaga and his son would not work on the same shift as the lead millwright. Despite this schedule change, on one occasion, Reynaga was going to have to work with the lead millwright. Reynaga refused and was terminated by the Company. The 9th Circuit reversed a summary judgment ruling in favor of the employer holding that the demeaning

comments that directly referenced race were not "off-hand" or "mere utterances" and were sufficiently severe or pervasive to create a hostile work environment.

- *Rizo v. Yovino* – EMPLOYER PAID FEMALES LESS THAN MALES BASED ON PRIOR SALARY MAY NOT BE LIABLE

  The 9th Circuit recently exposed a divide among circuit courts over whether the federal Equal Pay Act allows employers to base an employee's salary on pay history alone. Aileen Rizo was a public school employee in Fresno County who sued under the federal Equal Pay Act after learning that male co-workers who performed the same work were paid more. Although the District Court ruled that pay based exclusively on prior wages was not a factor other than sex, the 9th Circuit vacated the ruling. The 9th Circuit held that if the employer is able to show that prior salary effectuates business policy and the employer uses prior salary reasonably in light of its stated purpose, prior salary can be a factor other than sex. Notwithstanding this ruling, California employers should avoid relying solely on prior salary as is codified in Labor Code Section 1197.5(b)(3).

- *Santillan v. USA Waste of Cal.* – EMPLOYEE WHO FAILED TO PROVIDE PROOF OF RIGHT TO WORK COULD BRING AGE DISCRIMINATION CLAIM

  Santillan worked for 32 years before he was terminated by a new manager after he was involved in four accidents in a 12-month period. After he raised allegations of age and race discrimination, a public outcry ensued. Following this, USA Waste agreed to reinstate him if he passed a drug test, physical examination, criminal background check, and used e-verify to prove his right to work in the US. Santillan failed to provide the information to enable USA Waste to use e-verify and was then fired again for filing to provide proof of employment eligibility. The lower court granted summary judgment in favor of the employer but the 9th Circuit reversed, allowing him to proceed with his age discrimination claim. The Court held that Santillan was exempt from the Immigration Control and Reform Act because he was a "continuing" and not a "new" employee and further held that immigration status is irrelevant in the enforcement of employment law protections.

- *Zetwick v. County of Yolo* – HUNDREDS OF HUGS AND ONE KISS SUFFICIENT TO BRING HARASSMENT CLAIM

  The 9th Circuit reversed a finding of summary judgment in a sexual harassment case. A correctional officer alleged that the country sheriff created a hostile work environment by greeting her with unwelcome hugs on more than 100 occasions and kissing her one time during her 12 years of employment. The court noted that the standard in evaluating a hostile work environment requires a showing of severe or pervasive conduct, not severe and pervasive conduct.

- In the News:

  - **#metoo**
    Increased awareness surrounding sexual harassment in the workplace started in October 2017 when the New York Time published an expose on Harvey Weinstein. Since then, hundreds of others harassment allegations have been raised in multiple industries. Most expect the CA legislature to respond to the influx of claims, and new legislation has already been proposed which would disallow confidentiality provisions in harassment settlement

agreements. Now more than ever, it is critical that employers take a firm stance when it comes to offensive workplace behavior. Best practices include encouraging whistleblowing, searching for potential problems, thoroughly investigating complaints, leading by example, and offering repeated training to employees and supervisors. #dontbenext.

- **What Workplace Behavior Costs $1M in Punitive Damages? This Behavior!**
  A California Court of Appeals upheld a verdict of $1.325 million (including $1 million in punitive damages) for a former self-storage clerk who alleged that she was fired for getting pregnant. Among the allegations were claims that the supervisor berated her about her pregnancy in a meeting, pressured her to quit, scaled back her hours, and reassigned her to cleaning duties, and terminating her after she reported the reduced hours to the EDD.

- **The EEOC Stats are In.**
  The EEOC announced that it won $484 million in 2017 for aggrieved employees ($355.6 million through mediation and $42.4 million in litigation). The agency also announced that it has reduced backlog to its lowest level in years. Most expect 2018 to be another high-volume year for the EEOC, particularly since they recently launched a new on-line intake and inquiry program in late 2017.

- **DFEH Issues Workplace Harassment Guidance**
  In May 2017 the DFEH announced that a Workplace Harassment guide had been released to provide guidance to California employers. The guidance aims to help employers develop effective anti-harassment programs, understand how to respond to complaints and investigate reports of harassment, and identify possible remedial measures. The DFEH also issued a revised Harassment brochure (DFEH-185).

  The DFEH guidance outlines elements of an effective anti-harassment policy including 1) a clear written policy that is distributed and discussed regularly; 2) modeling of appropriate behavior by management; 3) legally mandated harassment training; 4) specialized training for individuals addressing complaints; 5) policies and procedures for investigating and responding to complaints; and 6) prompt and thorough investigation and remediation.

  The DFEH explains that complaints should be given top priority and the company should consider whether the complaint is serious enough to warrant a more formal investigation. By way of example, discomfort with an off-hand compliment was identified as a matter that might not be so serious. The guidance provides tips on conducting investigations, maintaining confidentiality, and timeliness.

- **EEOC Issues Final Rule related to Wellness Programs**
  The EEOC issued final rules related to how the ADA and GINA apply to employer wellness programs that are part of a group health plan. The rule sets limit on programs that require employees to answer disability-related questions or undergo medical exams in order to win an award or avoid a penalty. The rule will apply prospectively to programs beginning on or after January 1, 2017.

- **EEOC Issues Guidance Related to Mental Health Conditions**
  On December 12, 2016, the Equal Employment Opportunity Commission (EEOC) published a resource document that addresses workers' rights to protection against discrimination and harassment because of mental health conditions, privacy regarding mental health information, and reasonable accommodation in the performance of job functions. The resource document provides guidance regarding an employer's obligation not to discriminate against an individual on the basis of their mental health condition, and the employer's right to not hire or retain an employee if the employee cannot perform the essential functions of the job or if the employee poses a "direct threat" to safety (i.e., a "significant risk of substantial harm to self or others"). Importantly, the EEOC warns against the reliance on "myths or stereotypes" about mental health conditions when making employment decisions and advises employers to collect objective evidence of an employee's inability to perform essential job functions or any direct threat to safety before making an employment decision. The resource document also provides details regarding the EEOC's position with regard to an employee's right to keep their mental health condition(s) private. The guidance asserts that employers cannot ask medical questions, including ones about mental health conditions, unless one of following scenarios applies: 1) The employee requests a reasonable accommodation. 2) After the employee receives a job offer, but before employment begins (so long as this practice is used for all applicants in the same job category). 3) The employer is engaging in affirmative action for individuals with disabilities (in which case a response is optional). 4) There exists objective evidence that an employee may be unable to perform their essential job functions or may pose a safety risk to themselves or others. With regard to an employee's right to seek a reasonable accommodation, the EEOC explains that employees may be entitled to a reasonable accommodation when their mental health condition, if left untreated, would "substantially limit" a "major life activity." While the definition of "substantially limit" is not made entirely clear, the resource document indicates that the EEOC intends to adopt a very liberal interpretation of the phrase. Additionally, the resource document provides various examples of accommodations the EEOC considers "reasonable."

- **EEOC Issues Guidance Related to National Origin Discrimination and Harassment**
  On November 21, 2016, the Equal Employment Opportunity Commission (EEOC) issued new guidelines on "national origin" discrimination and harassment. The new guidelines will be helpful to employers confronted with various hiring, firing, and discipline issues related to language abilities, citizenship, and origin-related harassment in order to avoid violations of Title VII of the Civil Rights Act of 1964. The EEOC warns against hiring practices that may result in perpetuation of the historical makeup of a workforce. For example, "word of mouth" recruiting can lead persons of one national origin to recruit, promote or hire similar persons of the same national origin. Similarly, an apprenticeship program that only admits candidates who are sponsored by existing employees could lead to few minority hires if the industry or workplace is not diverse. Employers must ensure they have legitimate business reasons for making language-based employment decisions. A decision cannot be based on accent unless (1) the ability to communicate in spoken English is required to perform job duties effectively; and (2) the individual's accent

materially interferes with job performance. Fluency may be required if it is necessary for the effective performance of the position. Language-restrictive policies (ie, "English Only" policies) are unlawful unless they are required to promote safe and efficient job performance or business operations, and are only enforced for those purposes. Employers cannot use United States citizenship requirements as a pretext for discrimination in hiring. The Immigration Reform and Citizenship Act of 1986 makes it illegal for an employer to discriminate based upon an individual's citizenship or immigration status. Unless the law requires an employer to do so based on the specific industry, an employer cannot limit its employees to U.S. citizens or lawful permanent residents, and should not consider immigration status in hiring. Employers do not have to accommodate national origin traditions or practices. However, national origin often overlaps other protected classes, such as religion, in which accommodations may be required.

Leave of Absence/Time Off Issues

- *Bareno v. San Diego Community College District* – EMPLOYER OBLIGATED TO INQUIRE ABOUT NEED FOR CFRA LEAVE PRIOR TO TERMINATION

  Bareno was terminated after failing to return from a CFRA medical leave. Over the course of her employment, she had received numerous disciplinary warnings related to performance (including for excessive absence). Following a 3-day suspension, Bareno called in sick. She later provided a medical certification taking her off work and claims to have also provided a second certification extending that leave. When she failed to report back to work on the return date identified in the initial certification and remained out for 3 consecutive days, the employer sent her a letter stating that her unauthorized absences constituted voluntary resignation.

  Bareno sued. The trial court granted summary judgment for the employer but the court of appeal reversed. The court held that an employer is obligated to inquire further about an employee's need for CFRA leave before terminating employment and noted that under CFRA employees have 15 days to provide the necessary certification.

- *Minmick v. Automotive Creations, Inc.* – EMPLOYER COULD EXCLUDE EMPLOYEES FROM VACATION POLICY UNTIL COMPLETING FULL YEAR OF SERVICE

  In this case, the employer's vacation policy specified that employees did not earn vacation until they had completed one full year of continuous service. Plaintiff worked for 6 months and was then terminated. He filed suit alleging that he had been denied vacation pay. The trial court and appellate court found in favor of the employer based on the fact that the employer's policy specifically stated that vacation would not be earned during the first year of employment. Because it is not illegal or impermissible to establish a waiting period before an employee is eligible to accrue vacation, the employer had not acted illegally.

- In the News:

  - **Local Ordinance Paid Sick Leave Rules**
    Employers are reminded that various local ordinances have specific paid sick leave rules that will apply in addition to California's mandatory paid sick leave requirements. Among the cities with local ordinances in effect related to paid sick leave are Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica.

Health & Safety / Whistleblower

- *Babyak v Cardiovascular Systems Inc.* – JURY AWARDS $22.4M IN PUNITIVE DAMAGES

  Steven Babyak claimed that he was terminated in retaliation for making complaints about doctor kickbacks and promotion of off-label medical device uses. In April 2017, a CA jury found in favor of Babyak and awarded $2.7 million in compensatory damages and $22.4 million in punitive damages.

- *Boeing Co. and Society of Professional Engineering Employees* (NLRB) – NLRB OVERTURNS PRIOR RULING RELATED TO HANDBOOK POLICIES

  The NLRB reversed a prior ruling from 2004 which held that handbook provisions are unlawful if they could be "reasonably construed" to interfere with an employee's rights under Section 7A of the NLRA (protecting the right to engage in concerted activity to further better working conditions). In this case, the Handbook policy concerned a prohibition on the employee's use of camera-enabled devices on Company property.

  Under this new decision, the NLRB will balance the employers interest against the employee's rights by classifying rules into one of three categories: 1) rules that are inherently lawful because they could not be construed to interfere with protected NLRA rights because any interference is outweighed by competing business justifications; 2) rules that are lawful depending on their specific application; and 3) rules that are unlawful in all circumstances.

- *Lynn v. Tatitlek Support Services, Inc.* – EMPLOYER NOT LIABLE FOR INJURY CAUSED BY EMPLOYEE IN AUTO ACCIDENT

  Lynn sued TSSI in a wrongful death action following an automobile accident involving one of TSSI's temporary employees, Abdul Formoli. Lynn claimed that the "coming and going rule" should not preclude TSSI from being vicariously liable due to the nature of Formoli's employment which involved working at a remote location and undertaking a long commute home after working many hours. Both the trial court and the court of appeal ruled in favor of TSSI and finding that the employer was not vicariously liable for the accident.

- *Somers v. Digital Realty Trust* – DODD-FRANK WHISTLEBLOWER PROTECTIONS APPLY TO AN EMPLOYEE WHO MERELY "REPORTS UP"

  The Sarbanes-Oxley Act of 2002 protests whistleblowers who "report up" and "report out" about wrongdoing at a company. The Dodd-Frank Act of 2010 also protects whistleblowers who report to the Commission. The language of these distinct laws has created some ambiguity and a split among the courts with regard to whether Dodd-Frank also protects whistleblowers who report up, but not necessarily report out. Reviewing this issue, the 9th Circuit ruled that Dodd-Frank does protect workers who merely report up within the company, but not out to the SEC.

- *Sumrall v. Modern Alloys, Inc.* – EMPLOYER MAY FACE LIABILITY FOR EMPLOYEE COLLISION

  Modern Alloys' employee Juan Campos was involved in a collision that injured Plaintiff Michael Sumrall while on his way to the "yard" before his shift began. Campos was charged with driving from his home to the yard to collect co-workers that he would then drive to the worksite. Sumrall sued the Company. The Company argued that the employee was commuting TO work and therefore was not acting within the course of his employment under the "coming and going" rule. The coming and going rule precludes vicarious liability against the employer during the commute to and from work.

  The lower court agreed with Modern Alloys but the court of appeal reversed, holding that the "business errand" exception might apply to Campos' commute to the yard to collect co-workers.

- *Whole Foods Market Group Inc. v. NLRB* – 2ND CIRCUIT AFFIRMS NLRB RULING ON WORKER RECORDING BAN

  The Second Circuit affirmed a controversial NLRB ruling that barred Whole Foods from enforcing a policy barring employees from making workplace recordings. The NLRB ruling reasoned that the rule could be read as blocking workers from recording activity that is protected by the NLRA. Employers should review their policies to ensure that they do not include a ban on recording. Other companies (including Verizon) have also had similar policies struck down.

- In the News:
  - **Cal OSHA adopts Workplace Violence Prevention in Health Care Standard**
    Under a new Cal OSHA rule, health facilities are now required to create, implement, and maintain an effective workplace violence prevention plan. The plan must be in writing, be specific to the hazards and corrective measures or the operations of the specific facility, and be available to employees.

  - **OSHA Inspections: Limited to Authorized Union Agents and Employees**
    OSHA has withdrawn a previously issued letter of interpretation which allowed employees to be represented during an inspection by anyone selected by the employees. The implication of this new development is that only authorized union agents or employees will be permitted to participate in an OSHA investigation.

  - **OSHA electronic reporting requirements effective December 15, 2017**
    Employers are required to begin submitting all injury and illness data to OSHA electronically through the OSHA website as of December 15, 2017. Affected employers must create an account on OSHA's Injury Tracking Application website and submit data by the December deadline. However, employers with 20-249 employees in specified high-risk industries do not need to submit data until July 1, 2018.

Under a new Cal OSHA rule, health facilities are now required to create, implement, and maintain an effective workplace violence prevention plan. The plan must be in writing, be specific to the hazards and corrective measures or the operations of the specific facility, and be available to employees.

- **DOT Drug Testing: Final Rule**
  The DOT issued a final rule regarding drug testing in November 2017. The Final Rule becomes effective January 1, 2018 and makes the following changes: 1) adds testing for semi-synthetic opioids including hydrocodone, oxycodone, hydromorphone, and oxymorphone; 2) eliminates texting for MDEA; 3) adds MDA as an initial test analyte; and 4) changes terminology to rename "opiates" as "opioids."

Termination Issues

- *Ayetisyan v. Drinker Biddle & Reath, LLP* – WRONGFUL TERMINATION SUIT DISMISSED

  Plaintiff claimed intentional and negligent misrepresentation against her former employer, claiming that she was promised continued employment so long as she delivered "average quality work." Plaintiff alleged both intentional and negligent misrepresentation by her law firm employer, but the Court found that she had not provided enough factual background to support these claims.

- *Oakes v. Barnes & Noble College Booksellers LLC* – WRONGFUL TERMINATION SUIT REVIVED

  A California appellate panel reinstated a wrongful termination claim filed by a long-time employee against Barnes & Noble after finding that there was a triable issue of whether the company unlawfully fired her without notice. Christine Oakes worked for 22 years for Barnes & Noble and was fired without notice. She claimed that she was terminated because of age and gender discrimination. Barnes and Noble asserted that she was an at-will employee who could be terminated for legitimate business purposes.

  On appeal, the court agreed that the gender and age discrimination claims should be thrown out, but found that a wrongful termination case could go forward on a theory of implied contract. The court noted that Oakes was fired without any progressive discipline procedures and found that this conflicted with the Company's consistent practice, notwithstanding disclaimers in the Company's handbook.

- *Pier Sixty / Harbor Rail* – NLRB RULINGS SHED LIGHT ON WHEN EMPLOYEE CAN BE TERMINATED FOR PROFANITY

  A comparison of two recent and seemingly contradictory NLRB rulings sheds additional light on the recommended approach for disciplining employees who use profane language to disparage their employer.

  In Pier Sixty, an NLRB ruling (later upheld by the 2nd Circuit) found that an employee was lawfully terminated after yelling "F—you and F—this job" to a management representative. The NLRB concluded that, although the employee was engaged in concerted activity to further better working conditions, he had forfeited those protections. In contrast, in Harbor Rail, and employee could not be terminated for calling his supervisor a "Nasty Mother F—er" in a Facebook post because he was engaged in conduct protected by the NLRA.

  The distinction between these cases lies in part in how they are analyzed. Off-duty, offsite conduct (such as social media) is evaluated under a totality of the circumstances test. Face-to-face confrontations are instead evaluated under a different test that looks at whether the conduct is so egregious and outrageous that it loses protected status. This distinction is important for employers to remember when seeking to discipline an employee for angry outbursts, particularly comments that are made via social media.

Arbitration Agreements

- *Esparza v. KS Industries* – LABOR CODE 558 WAGE CLAIM NOT COVERED BY PAGA AND CAN BE ARBITRATED

  Employees filed suit seeking unpaid overtime under Labor Code Section 558 and PAGA. The employer filed a motion to compel arbitration which was denied by the trial court, on the grounds that *Iskanian* precluded arbitration of PAGA claims. The employer appealed and the Fifth District Court of Appeal ruled in favor of arbitration. The court concluded that PAGA claims are limited to those where a portion of the recovery is allocated to the Labor Workforce Development Agency and that because plaintiff was pursuing private claims under Section 558, *Iskanian's* limits on PAGA arbitration for civil penalties. The Court's language indicates that employer's must decide whether they wish to pursue individual relief (ie, subject to arbitration) or representative claims for civil penalties (ie, no arbitration).

- *Garcia v. Pexco, LLC* – EMPLOYEE'S ARBITRATION AGREEMENT WITH STAFFING EMPLOYER REQUIRED ARBITRATION WITH CLIENT JOINT EMPLOYER

  A California court of appeal upheld an arbitration agreement and required the employee to arbitrate claims against both the staffing company and the client company where the employee was assigned, even though a signed arbitration agreement only existed as between the employee and the staffing company (but not the client joint employer). The court concluded that the employee was equitably estopped from denying the client employer's right to arbitrate and determined that the agency exception applied to undercut the general rule that only parties to an arbitration agreement can enforce them. Since all of the employee's claims against the client employer were intertwined with the employment relationship with the staffing company, the court determined that arbitration of both claims was appropriate.

- *McGill v. Citibank* – CA SUPREME COURT STRIKES DOWN INJUNCTIVE RELIEF WAIVER IN ARBITRATION AGREEMENT

  The California Supreme Court analyzed the enforceability of an arbitration agreement and struck down the injunctive relief waiver. The Court's ruling upheld the right to include class action waivers but distinguished class action waivers from the waiver of the right to pursue public injunctive relief under the UCL and related laws. However, the court did not rule on the enforceability of a provision drafted to require that injunctive relief be sought only through arbitration. Instead, the ruling prohibits an absolute waiver of the right to seek injunctive relief.

- *Network Capital Funding Corp. v. Papke* – ARBITER (NOT COURT) MUST DECIDE WHETHER EMPLOYEE CAN ARBITRATE CLASS CLAIMS

  A California appellate court ruled that an arbitrator should be the one to decide whether a former employee can pursue class claims in arbitration over alleged wage and hour violations. The 3-judge panel unanimously overruled a lower court finding that a court should make the decision with regard to class-wide arbitration. The appellate court relied on earlier precedent

from the CA Supreme Court (*Sandquist v. Lebo Automative Inc.*) which held that the question of whether class arbitration was available was a matter to be decided by the arbitrator.

The arbitration agreement in question stated that the arbitrator was charged with deciding "all claims, disputes, and controversies" between the parties which the court deemed to include whether class-wide arbitration was available.

- *Oto LLC v. Kho* - ARBITRATION PROVISION UPHELD

  Arbitration was upheld even though the employer's arbitration provision was attached to an at-will employment acknowledgment and presented to the employee well into the employment relationship rather than at the time of hire.

- *Sprunk v. Prisma LLC* – STRATEGIC DELAY BY EMPLOYER WAIVED RIGHT TO COMPEL ARBITRATION

  Plaintiff filed suit alleging that she and other exotic dancers were misclassified as independent contractors. Three years into the litigation, the employer raised arbitration for the first time. The court rejected the argument and certified a class action. One year later, the employer moved to compel arbitration. The court denied the motion and the employer appealed. The Court of Appeal found in favor of the Plaintiffs and noted that employers attempting to gain strategic advantage through litigation in court before seeking to compel arbitration will not be rewarded. Finding that 4 years of litigation (including lengthy discovery) had prejudiced the Plaintiffs, the Court refused to compel arbitration.

- *Valdez v. Terminex International* – 9TH CIRCUIT HOLDS THAT PAGA CLAIMS MAY BE ARBITRATED

  In a recent unpublished decision, the 9th Circuit rebuked the trend of cases holding otherwise and found that PAGA claims are eligible for arbitration. The court stated that the CA Supreme Court decision in *Iskanian* does not require that PAGA claims be litigated in a judicial forum, but simply holds that a complete waiver of the right to bring a PAGA claim is invalid.

- Pending Cases**:**

  - *Baltazar v. Forever 21, Inc.*
    Pending Review by CA Supreme Court
    Is an arbitration clause in an employment application that provides "I agree to submit to binding arbitration all disputes and claims arising out of the submission of this application" unenforceable as substantively unconscionable for lack of mutuality, or does the language create a mutual agreement to arbitrate all such disputes?

  - *Ernst & Young LLP v. Stephen Morris*
    Pending Review by US Supreme Court
    Can employers require employees to sign an arbitration agreement containing a class waiver as a condition of employment?

CLASS ACTION / MISCELLANEOUS

- *Kim v. Reins International California, Inc.* – INDIVIDUAL SETTLEMENTS KILL PAGA CLAIMS

  A 3-judge panel ruled that workers who settle individual claims alleging labor law violations lack standing to later pursue a PAGA suit for the same violations. The court held that if a plaintiff brings individual claims and PAGA claims, but later settles the individual claims, the employee is no longer an "aggrieved employee" under PAGA and therefore no longer has standing to bring a PAGA action.

  In this case, the plaintiff's individual claims were sent to arbitration while the PAGA claims were stayed. The individual claims were resolved and dismissed as part of the arbitration and the employer then successfully sought to dismiss the PAGA claims.

- *Kizer v. Tristar Risk Management* – CLASS CERTIFICATION ONLY AVAILABLE IF MISCLASSIFICATION AND HARMFUL EFFECT ARE BOTH SUSCEPTIBLE TO COMMON PROOF

  Plaintiffs worked as claims examiners and brought a misclassification case alleging unpaid overtime. The trial court denied class certification finding that even if misclassification was suitable for class treatment, plaintiffs did not show that the employer had a policy or practice mandating that employees work overtime. Plaintiffs provided statements attesting to the fact that they had to work overtime to finish assignments and argued that the amount of time worked by class members was a question of damages not liability. The court found the statements to be merely "anecdotal," rejected the damages argument, and denied certification.

  On appeal, the Court of Appeal reaffirmed that class certification is only proper where there is substantial evidence that proves BOTH the existence of a uniform, illegal policy (such as misclassification) and the harmful effect it had on the class. The Court reasoned that misclassification alone does not establish liability for overtime violations.

- *Williams v. Superior Court (Marshalls)* – PLAINTIFF CAN SEEK EMPLOYEE CONTACT INFORMATION AT OUTSET OF PAGA LAWSUIT

  The CA Supreme Court ruled unanimously that plaintiffs can seek contact information for fellow "aggrieved employees" when bringing a PAGA lawsuit without any showing of good cause for the potentially private information. Noting that discovery rules should be interpreted broadly, the Court determined that providing class information was necessary for the Plaintiff to ascertain the strength of the case.

  This decision sets the stage for employers to experience much larger litigation costs early in a case and will almost certainly embolden plaintiffs to make aggressive discovery demands with only a minimal factual showing that any violations occurred and hinder employers in limiting discovery.