A REVIEW OF RECENT DEVELOPMENTS
OF INTEREST TO EMPLOYERS

2017 Employment Law Update

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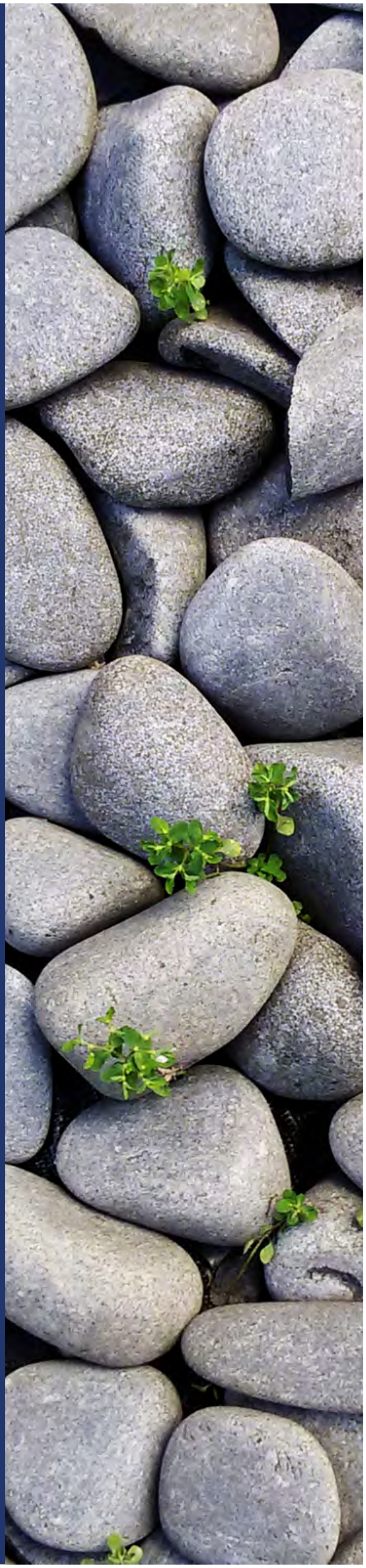

Introduction

Hopkins & Carley is once again pleased to provide its clients and friends with a summary of the new laws and legal developments from the past year that we believe will have the greatest impact on employers in 2017. As always, if you have questions or concerns relating to employment law or human resource management, we invite you to contact us.

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Seminars

2017 Schedule of Seminars

Hopkins & Carley's Employment Law Department offers periodic seminars on topics of interest to employers. Our attorneys discuss issues and present information in a practical, interactive manner, providing attendees with knowledge they can apply in their daily work. You are invited to attend any or all of the seminars that we will host in 2017.

Date	Topic
January 12, 2017	2017 Annual Update (San Jose)
January 25, 2017	2017 Annual Update (Redwood City)
February 22, 2017	Developing Effective Employee Handbooks
March 22, 2017	Managing Legal Risk in the Hiring and Onboarding Process
April 20, 2017	Alphabet Soup of Leave Laws
May 18, 2016	Reasonable Accommodation and the Interactive Process — Getting it Right
September 21, 2017	Performance Management, Discipline & Termination
October 26, 2017	Pay Them Now, or Pay Them Later: A Review of Current Issues and Recent Developments in Wage and Hour Law
November 2017	A Manager's Guide to Discrimination, Harassment & Abusive Conduct

Visit www.hopkinscarley.com for date, cost and location details. Dates are subject to change.

Wage & Hour Developments

The flow of regulations and court decisions on wage and hour issues continued unabated in 2016. In some cases, recent developments have clarified rules and provided meaningful guidance to employers. In other instances, however, recent developments have only created more uncertainty.

New Federal Overtime Regulations Adopted, Then Enjoined by Court

Employees in California must satisfy the requirements of both state and federal law to qualify as exempt from overtime. For many years, California's exemption criteria have been more stringent than the federal criteria, rendering the federal rules less important for practical purposes.

Last year, in response to a directive from President Obama to update the regulations that define the overtime exemption criteria for white-collar workers, the Department of Labor announced new regulations that would, if implemented, affect millions of employees nationwide. The new regulations change the rules regarding exemptions from federal overtime in four important ways. They:

- increase the minimum salary that must be paid to exempt white-collar employees under the Federal Labor Standards Act to $913 per week, or $47,476 annually, an amount that exceeds the salary required by state law;
- permit employers to count non-discretionary bonus compensation and certain other incentive pay for up to 10% of the minimum salary;
- increase the minimum total compensation that must be paid to employees who qualify as exempt pursuant to the so-called "highly compensated employee" exemption to $134,004 per year; and
- provide for automatic adjustments in the salary and total compensation levels for these two exemptions every three years, starting in 2020.

The new regulations were scheduled to go into effect on December 1, 2016. As a result, employers paying salaries of less than $47,476 (the new federal minimum) to exempt employees were forced to decide whether to re-classify such employees as non-exempt or increase their salaries to meet or exceed the new federal minimum. In many cases, employers made and implemented their decisions prior to the effective date of the new regulations.

On November 22, 2016, however, a federal court issued a preliminary injunction that blocks implementation of the new regulations until the court can analyze their validity in greater detail. Even if the court eventually approves the regulations, the Trump administration may seek to repeal them, so the ultimate fate of the new regulations may not be known for some time. As a result, the minimum salary required for white collar employees under federal law remains $23,660, and the minimum required under California state law is now $43,680 for employers with 26 or more employees.

What Should Employers Do Now?

- Await further guidance regarding the enforceability of the new regulations – The court has not yet scheduled the hearing at which it will issue its final ruling on the validity of the new regulations, and it is possible that the ruling may be appealed to a higher court, so we do not know when the legal process will conclude. Employers who pay salaries of less than $47,476 to any of their exempt employees should remain alert for further rulings that could approve implementation of the regulations, however.
- Be prepared to comply with the regulations if they go into effect – If the regulations become effective, employers who pay salaries of less than $47,476 to any of their exempt employees must either re-classify such employees as non-exempt or increase their salaries to meet or exceed the new federal minimum. Employers should also recall that paying the required salary is only one of three requirements an employee must satisfy (along with the duties test and the salary-basis test) to qualify as exempt, however.
- Confer with counsel if you have already implemented changes and want to consider rescinding them – Some employers who either converted employees to non-exempt status or increased their salaries in anticipation of the new regulations becoming effective in December of 2016 may wish to consider rescinding their actions. Although it may be possible to do so in some instances, rescinding the changes could give rise to legal issues, so prudent employers should confer with counsel before reversing any actions already taken.
- Don't lose sight of California state law rules – Recall that recent legislation will result in periodic increases in California's state minimum wage until it reaches $15.00 per hour in 2022 for employers with 26 or more employees. If the new federal regulations become effective, California's minimum salary level for employees subject to the white-collar exemptions (twice the state minimum wage) will exceed the federal minimum salary level again on January 1, 2019 for those employers and for smaller employers in the following year.

Calculating the Regular Rate of Pay: Guidance and Uncertainty

When a non-exempt employee is entitled to overtime compensation, the hourly rate of pay on which overtime calculations are based is known as the employee's "regular rate of pay." If an employer does not determine the regular rate of pay properly, it will calculate overtime pay incorrectly, exposing itself to potential liability.

In general, a non-exempt employee's regular rate of pay is equivalent to his or her total compensation for the week (excluding the overtime premium) divided by the total number of hours worked. An employee's regular rate of pay will be equal to his or her straight-time hourly rate if the employee's compensation consists solely of hourly wages during the pay period, but the regular rate can vary from the straight-time rate because the regular rate calculation includes other forms of compensation as well, such as bonuses paid for productivity or quality of work. Purely discretionary bonuses not based on production or efficiency, such as a holiday bonus, are not included in an employee's regular rate of pay.

The *Flores* Decision – "Cash In Lieu" Stipend Included in Regular Rate

In June 2016, the federal Ninth Circuit Court of Appeal issued a decision in *Flores v. City of San Gabriel* that affects the regular rate of pay for employers that provide cash payments to employees who waive their right to enroll in group health insurance plans.

In the *Flores* case, the City of San Gabriel offered a "Flexible Benefits Plan" to its employees. In general, employees eligible to participate in the Plan were allocated a specified amount of money for the purchase of health care benefits. Employees could decline to purchase medical coverage and instead choose to receive the funds in cash as a so-called "cash in lieu" payment. Since the Plan's inception, the City treated the "cash in lieu" payments as benefits, not compensation, and excluded the payments from the regular rate of pay of the employees who received it.

In 2012, a group of the City's police officers brought suit, alleging that the "cash in lieu" payments were, in fact, compensation for hours worked that must be included in the regular rate of pay. The City argued that the "cash in lieu" payments were not based on the number of hours worked and should therefore be excluded from the regular rate of pay under the Fair Labor Standards Act (FLSA), as are payments for leave and expenses. The City further argued that the "cash in lieu" payments should be considered the functional equivalent of payments to a third party in connection with a bona fide benefit plan for health care insurance, which are also excluded from the regular rate of pay under the FLSA.

The Ninth Circuit disagreed with the City, finding instead that the payments constitute compensation for work even if they were not specifically tied to the amount of time an employee worked for the City. Further, the court determined that the payments did not qualify under the health care insurance exception because the funds were paid directly to the employee, rather than a third party. Finally, the court acknowledged that its decision might cause employers to discontinue "cash in lieu" plans, but indicated that such a result was a policy decision for Congress, not the courts, to address.

The *Alvarado* Decision

As mentioned above, an employer calculating the regular rate of pay for a non-exempt employee must consider not only the employee's straight-time hourly rate, but also bonuses paid for productivity or quality of work. How should employers calculate the regular rate of pay during weeks in which an employee receives a flat sum bonus? In 2016, a California appellate court provided guidance on that issue in *Alvarado v. Dart Container Corporation of California*.

Dart Container Corporation provided a $15 attendance bonus to each employee who completed working a scheduled weekend shift. The company used a formula consistent with the federal regulations interpreting the FLSA. By way of example, assume that an employee earning $20 per hour works 45 hours during a week and receives a $100 bonus for her work. To calculate the employee's regular rate of pay under the FLSA regulations, the employer would multiply the total number of hours worked by the straight time hourly rate
(45 x $20 = $900), add to that amount the sum received as a bonus ($900 + $100 = $1,000), and divide that sum by the total number of hours worked to obtain the regular rate of pay ($1000/45 = $22.22). The employee is then entitled to be paid $1,055.45 for the week (40 hours at $22.22 plus 5 hours at $33.33).

The plaintiff, Hector Alvarado, filed a complaint alleging that Dart Container Corporation's method resulted in an underpayment of wages. Alvarado argued that the company should have calculated the regular rate of pay consistent with guidance from California's Division of Labor Standards Enforcement (DLSE) Manual which specifically addresses flat sum bonuses. Under the DLSE's method, only the straight time hours worked, rather than all hours worked, are used in the initial calculations, resulting in a higher regular rate of pay. Under Alvarado's method, the total earnings in the previous example would be divided by the straight time hours worked ($1000/40), resulting in a higher regular rate of pay ($25.00) and therefore a higher overtime rate ($37.50).

The court, after first confirming that federal regulations do not preempt more protective California law, ruled that the DLSE Manual's provisions do not carry the force of law and declined to apply them. Fundamentally, the court ruled that, in the absence of state law to the contrary, the company's reliance on federal regulations in computing Alvarado's overtime was sound.

The California Supreme Court has since granted review of the Court of Appeal's decision, so the decision may be affirmed, reversed or modified, leaving employers without clear guidance on this issue until the Court issues its opinion.

What Should Employers Do Now?

- Either include "cash in lieu" payments in the regular rate of pay, or discontinue offering cash in lieu of benefits – In the wake of the *Flores* decision, employers that offer employees the option of cash payments in lieu of health care benefits must either include the "cash in lieu" payments in the regular rate of pay of non-exempt employees who receive them, or discontinue offering the payments. In making that decision, employers would be wise to evaluate the financial and administrative impact of continuing the practice, as well as the potential impact on morale if the practice is discontinued.
- While awaiting guidance from the California Supreme Court, carefully consider how to calculate the regular rate of pay for employees who receive flat sum bonuses – Pending a decision from the Court, employers must decide whether to calculate the regular rate of pay based on the federal regulations (a method likely to be approved by federal courts) or the method outlined in the DLSE Manual (the method likely to be favored by the California Labor Commissioner). Employers may be wise to confer with counsel before making a final decision.

Rounding Time Practices are Alive and Well: The Corbin Decision

In order to comply with their obligation to maintain accurate records of the hours worked by their non-exempt employees, most employers require employees to record the times at which they start and stop work each day. Some employers utilize electronic timekeeping software, while others utilize mechanized time clocks or timecards that are completed by hand. Regardless of the method they utilize to track the time worked by non-exempt employees, however, employers are often confronted with time records that reflect employees working slightly more or less than they were scheduled or expected to work. An employee scheduled to work from 8:00 a.m. to 4:30 p.m. may clock in at 7:57 a.m., for example, and clock out at 4:29 p.m.

Employers should maintain records that reflect the precise times at which their non-exempt employees begin and end work each day, as well as the precise times at which they begin and end their meal periods. When calculating time worked for payroll purposes, however, federal law permits employers to round starting and stopping times to the nearest increment of five, six or 15 minutes, provided that rounding practices are utilized in such a manner that they do not result, over a period of time, in a failure to compensate employees for all the time they actually worked. Although rounding of time records has long been permitted under federal law and been a common practice among most employers for a similarly long time, no legal authority clearly authorized the practice under state law for many years.

In 2012, a California appellate court finally addressed the issue and held that employers may round employee timecards to the nearest tenth of an hour if the rounding policy (a) is fair and neutral on

its face and (b) "is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all time they have actually worked." Although the court's decision specifically endorsed only rounding practices that involve rounding to the nearest tenth of an hour, the opinion suggests strongly that employers may utilize five-minute or 15-minute increments for rounding as well as six-minute increments, as long as they use the same increment consistently.
In May 2016, the Ninth Circuit Court of Appeals re-confirmed that California employers may round timecards so long as the "policy is neutral, both facially and as applied," and shed additional light on the requirement that rounding policies compensate employees properly for all time they have actually worked. In *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership*, the plaintiff asserted that Time Warner's practice of rounding time stamps to the nearest quarter hour deprived him and other employees of earned overtime compensation. Corbin further alleged that he had worked off the clock for a single minute on one occasion when he mistakenly opened a different software program prior to logging into Time Warner's timekeeping system. In fact, Corbin's entire case, and his bid to bring the matter in a class action setting, turned on a claim that he lost $15.02 in compensation due to Time Warner's rounding practices, and one minute of compensation due to his mistake in failing to punch in appropriately.

In first addressing the rounding claim, the court noted that Time Warner employed a practice whereby employee punch times were rounded to the nearest quarter-hour. For example, an employee clocking in at 8:07 a.m. to begin the workday would see his or her wage statement reflect a start time of 8:00 a.m., crediting the employee with seven minutes of work not actually performed. Similarly, an employee clocking out at 5:05 p.m. would generate a time card reflecting a punch-out time of 5:00 p.m., reducing by five minutes the time actually worked by the employee.

Corbin worked 269 shifts subject to Time Warner's rounding practices and lost $15.02 in aggregate compensation over a 13-month period. Corbin argued that Time Warner's rounding practices could not be considered neutral if an employee lost *any* compensation as a result of their application. In other words, Corbin argued that unless the employee always gains or breaks even as a result of a company's rounding practices, the practice is illegal.

The court was not impressed by Corbin's arguments. After first noting that federal regulations in effect for more than 50 years endorsed rounding practices, and that California courts had confirmed that rounding is permissible so long as the policy is neutral in application and impact, the court found that Corbin's interpretation of the regulations "…completely misunderstands the purpose of a rounding policy," which is to balance out the advantages and disadvantages to the parties over the long-term. The court found Time Warner's practice to be permissible because it permitted both upward and downward rounding, was neutral, and did not result in a failure to properly compensate employees over the long-term.

The court also rejected Corbin's claim that Time Warner violated the law by failing to compensate him for a single minute of work, applying the federal *de minimis* doctrine which stands for the proposition that, "in light of the realities of the industrial world," a "few seconds or minutes of work beyond the scheduled work hours…may be disregarded." The California Supreme Court is currently reviewing the question of whether the *de minimis* doctrine applies to claims under California state law, and a decision on that question may be forthcoming in 2017.

What Should Employers Do Now?

- <u>Confirm that practices permit both upward and downward rounding in all instances</u> – Policies which permit rounding only in the employer's favor are facially invalid.
- <u>Perform spot checks to assure rounding practices operate in an even-handed manner</u> – Periodically audit a representative sampling of time records to confirm that the rounding practices do not result in advantages to either the employer or the employee over a meaningful period of time.
- <u>Maintain and publish a policy prohibiting employees from working off the clock</u> – While Corbin's claim that Time Warner had deprived him of a single minute of pay seems absurd, the court noted that Time Warner had enforced a published policy prohibiting employees from working off the clock. In the absence of clear authority for the application of the *de minimis* doctrine under California state law, a policy of this type may be extremely valuable.

Employees' Ability to Edit Time Records Can Prevent Class Certification

In another case that is fairly characterized as a victory for employers, the Ninth Circuit Court of Appeals affirmed in *Coleman v. Jenny Craig, Inc.* that a group of plaintiffs was not entitled to pursue their claims as a class because they had the authority to edit the time records that served as the basis for their claim.

In *Coleman*, the plaintiff filed a lawsuit against Jenny Craig, Inc. on behalf of herself and other similarly situated employees, alleging violations of state and federal law regarding overtime and failure to provide meal and rest periods. With respect to the latter, Coleman alleged that the company had a practice of forcing non-exempt employees to miss meal periods and rest breaks, or take shortened meal periods and rest breaks, and that the company's payroll system only paid the required premium when the employee's time records showed that he or she missed the *entire* meal period or rest break. Consequently, in the event an employee took a shortened meal or rest period, Jenny Craig's payroll system was not programed to pay the required premium automatically, as it would for meal periods or rest breaks that were missed completely.

In her motion for class certification (a ruling by the court indicating that the claims being pursued are suitable for class treatment rather than a claim by an individual), Coleman argued that Jenny Craig's uniform payroll practice of failing to pay the required premium automatically was evidence that it had a common practice of forcing employees to take short or late meal periods, and therefore the claim was suitable for class treatment. The court disagreed, finding that while Jenny Craig's payroll system did not pay employees the required premium automatically when their meal periods or rest breaks were short or late, it did permit employees to request those premiums whenever they were owed. Accordingly, the court ruled that an employee's ability to edit and correct time records demonstrated that the company did not maintain a policy of not paying the required premiums on a class-wide basis.

What Should Employers Do Now?

The decisive fact upon which the court's decision turned was that Jenny Craig's employees had the ability to edit their own time entries to ensure that they were paid the required premium in the event of a short of missed meal or rest period. To take full advantage of the potential defenses suggested by this outcome, employers should:

- Require employees to complete their own time records – Employees that complete their own time records will be hard-pressed to prove that the records are inaccurate and/or that the employer maintains a systematic policy of not paying employees properly.
- Adopt and publish a policy permitting employees to request corrections in their time records – Update published timekeeping policies to include a process by which employees can request corrections in pay in the event of an improperly completed timecard, or a payroll error. Employers that utilize electronic timekeeping systems should consider enabling software features that permit employees to edit or request corrections in their records.

Court Decisions Offer Tips on How to Handle Tips

In many industries, gratuities or tips from customers can comprise a substantial portion of an employee's income. Perhaps not surprisingly, the handling of tips has received increased attention in recent years from courts and legislators.

The California Labor Code defines a tip as any "…money or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for any goods, food, drink or articles sold or served to the patron." Importantly, California law states clearly that tips are "…the sole property of the employee or employees to whom it was paid, given, or left for."

In contrast with federal regulations that permit employers to count tips in satisfying their obligation to pay the minimum wage, California law requires employers to pay non-exempt employees at least the minimum wage without regard to any tips they may receive. California law also prohibits employers from passing the cost of credit card transactions along to employees who receive a tip through a credit card payment.

When calculating the regular rate of pay for a non-exempt employee who receives tips, employers exclude tip income. Mandatory service charges (such as a 15% service surcharge on food and beverages at a banquet) are considered payments owed by a customer to the business, rather than tips, however, so if an employer distributes some or all of a mandatory service charge to employees, those payments are included in regular rate calculations.

Although California generally considers tips to belong to the employee who receives them, so-called "tip pools" – which require employees who receive tips to share a portion of those tips with other employees – have been around for decades. In 2011, the federal Department of Labor issued regulations prohibiting employers from requiring employees to contribute tips to a pool that includes other employees who do not customarily receive tips. In the consolidated cases of *Oregon Restaurant & Lodging Association v. Perez* and *Cesarz v. Wynn Las Vegas, LLC*, the Ninth Circuit Court of Appeals upheld the regulation and confirmed that employers may enforce tip-pooling policies if the pool consists only of employees who customarily receive tips.

What Should Employers Do Now?

- Include only eligible employees in tip pools – As the Ninth Circuit confirmed, only those employees who customarily receive tips, such as waitresses, bellhops, and casino dealers, can be included in a tip pool. A tip pool is invalid if it includes employees such as dishwashers, cooks, and typical "back of the house" employees who typically do not receive tips.
- Do not include tips in calculations of an employee's regular rate of pay – Proper calculation of the regular rate of pay can be a complicated process, and errors can be costly, so employers benefit greatly from the ability to exclude tips from the calculation.
- Do not pass credit card service charges along to employees who receive tips through credit card payments – Credit card transaction fees are generally considered to be a cost of doing business and cannot be passed along to employees through offsets against wages, including tips.

Employees Not Always Entitled to Reimbursement of Training Costs

Many employees receive training related to their jobs, or to positions to which they might be promoted. Employers sometimes require employees to undergo training and provide the training in-house. In other situations, employers require employees to receive training from outside vendors. Employees sometimes pursue training voluntarily and upon their own initiative as well. Employers sometimes mistakenly believe that they are not obligated to pay employees for time spent in training. In reality,

employers' obligations depend on the circumstances of the training.
When employers provide mandatory training to their employees, time spent by non-exempt employees in training is considered work time and is compensable. Time dedicated to training by exempt employees is also considered work time, but is not compensable separately from the employee's salary.

When an employer requires an employee to pursue training from an outside vendor, not only must the employer pay non-exempt employees for the time they spend training, they must also pay the cost of the training. Employers sometimes attempt to recoup the cost of such training from employees through various means, but if an employer requires an employee to undergo training, it cannot force the employee to bear any portion of the cost, even if the employee resigns shortly after completing the training.

If an employee pursues training in a truly voluntary fashion, the time spent in training does not count as work time and is not compensable. Employers sometimes agree to pay some or all of the cost of training that an employee elects to pursue on a purely voluntary basis, however. In those situations, the employer may want to protect itself against the possibility that it would pay for the non-mandatory training only to see the employee resign a short time later, before the employer is able to recoup the value of its investment.

In *USS-Posco Industries v. Case*, an employee enrolled in a completely voluntary training program. The employer agreed to pay the cost of the training in exchange for the employee's promise to reimburse a portion of the cost if he was terminated for cause or voluntarily resigned within 30 months of completing the program. The employee signed the agreement, completed the program, then resigned two months later. When the employer sought reimbursement, the employee sued, claiming that the reimbursement agreement was an unlawful attempt to pass work-related expenses along to employees. The court rejected this argument, however, noting that the employee did not incur any expenses and participation in the program was not necessary or required for the employee to perform his current job duties.

What Should Employers Do Now?

- Cover the cost of all mandatory training – Employers must always pay the cost of any training that they require employees to complete as a condition of employment.
- Put reimbursement agreements for voluntary training in writing – Employers that agree to reimburse some or all of the cost of voluntary training should memorialize the terms of the agreement in writing, and the agreement should confirm that the employee is pursuing the training in question on a purely voluntary basis.
- Consider alternative means of protecting against the risk that employees may fail to reimburse – Employers can fully eliminate their risk of bearing the costs of voluntary training by not paying the

cost up front and, instead, reimbursing the employee in a lump sum only after she has completed some minimum term of employment after finishing the training. Alternatively, rather than paying the cost of training directly, employers can increase the employee's compensation after she has completed training, essentially reimbursing the employee in installments each pay period.

Don't Delay Paying Retirees Final Wages

California law regulates the payment of an employee's final wages at the termination of employment. If the employer terminates the employment relationship, the employee's final wages are due and payable on the date on which the employment relationship ends. (Note that the date on which employment officially ends may be a date other than the date on which the employee last renders service to the employer.) If the employee resigns and provides more than 72 hours advance notice of the effective date of his or her resignation, final wages are also due and payable on the date of termination. If the employee resigns and provides less than 72 hours advance notice of the effective date of his resignation, however, his or her final wages are due within 72 hours. Since California law equates vacation pay and Paid Time Off with wages, vacation or PTO which was accrued but not used during employment is also due and payable in accordance with these rules.

In 2016, a California appellate court confirmed that retirements are equivalent to resignations, triggering the employer's obligation to pay final wages in a timely manner. In *McLean v. State of California*, Janis McLean retired from her job with the California Department of Justice. When the State did not pay her final wages on her last day of employment, McLean sued and sought penalties for late payment under Labor Code sections 202 and 203. The State argued that retirement is different than resignation, and that the statutes applied only to employees who resigned. The California Supreme Court rejected the State's semantic argument, explaining that the prompt payment of wages to retirees is consistent with the public policy that "timely payment" of an employee's wages is "indispensable to the public welfare."

What Should Employers Do Now?

- Always pay final wages in a timely manner – Courts and the Labor Commissioner are generally unsympathetic to employers who fail to pay final wages in a timely manner, resulting in the imposition of avoidable and potentially significant penalties.
- Recognize that retirement is equivalent to resignation – When an employee expresses the intent to conclude his or her employment, employers should treat the employee's departure as a resignation, regardless of whether the employee intends to retire or continue her career with another employer.

Accrued Vacation Pay Need Not Be Listed on Wage Statement

California Labor Code section 226 requires employers to provide employees with certain information together with their paychecks. The necessary information can be provided in a document separate from the paycheck, but is most often reflected on a detachable check stub. Regardless of the format chosen, employers must provide employees with an itemized listing of the following information:

- gross wages earned
- total hours worked by the employee, except for exempt employees paid on a salary basis
- the number of piece-rate units earned and any applicable piece rate, if the employee is paid on a piece-rate basis
- all deductions
- net wages earned
- the inclusive dates of the pay period
- the name of the employee and only the last four digits of his or her Social Security number or an employee identification number other than a Social Security number
- the legal name and address of the employer
- all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate.

Although the rule is relatively simple and straightforward, violations are all too common. Pay stubs may not contain the full, legal name of the employer entity, for example, or may reflect an employee's full Social Security number. Violations are particularly common for employers who process payroll checks internally, rather than through a vendor. Violations of the pay stub rules entitle employees to recover $50 for the first violation, and $100 per employee for each violation in subsequent pay periods, not to exceed an aggregate penalty of $4,000. Employees are also entitled to recover the legal fees and costs they incur in pursuing such claims, so liability can mount quickly.

In *Soto v. Motel 6*, the employee alleged that her employer had violated section 226 by failing to show the value of her accrued vacation time on her wage statement. The court rejected Soto's argument, however, explaining that "unused vacation time does not become a quantifiable vacation wage until the employee separates from the employment." Thus, the court ruled, "[i]f an employer is not required to compensate an employee for unused vacation in a particular paycheck, there is no statutory duty to identify the monetary amount of the accrued vacation balance."

What Should Employers Do Now?

- Verify that wage statements comply with section 226 – Although Soto did not succeed with her claim, violations of section 226 are common and the law provides few meaningful defenses, so employees often have little incentive to compromise in settling claims. Regardless of whether they utilize a payroll service or prepare paychecks internally, employers should review their wage statements to assure that they contain all of the information required by section 226.

California Supreme Court Rules: "You May Be Seated"

The majority of California's Wage Orders require employers to provide "suitable seats when the nature of the work reasonably permits the use of seats." Employers must also provide an adequate number of seats near the employees' work area for use when not actively performing job duties. Until recently, however, the law has provided little guidance on how the "suitable seating" requirement should be interpreted.

In November 2013, the Federal Ninth Circuit Court of Appeals sought guidance from the California Supreme Court on the issue, specifically asking how courts should determine whether the "nature of the work" requires a "suitable seat" and "reasonably permits" the use of a seat. Last year, in *Kirby v. CVS Pharmacy, Inc.*, the California Supreme Court finally provided at least a partial answer to the question.

In *Kirby*, the Court focused its attention on three interrelated questions posed by the Ninth Circuit Court of Appeals:

- whether courts should evaluate the obligation to provide suitable seating based on the entire range of tasks an employee performs during the workday, or on a task-by-task basis;
- what factors should be considered in determining whether the nature of the work "reasonably permits" use of a seat?; and
- if a seat is not provided, does an employee have to demonstrate that a suitable seat was available in order to prove a violation of the Wage Orders?

The Supreme Court's responses to these questions largely favor employees.

According to the Court, the "nature of the work" refers to the tasks that can be performed at a given location while sitting. In other words, if tasks can reasonably be performed while sitting, and providing a seat would not interfere with the performance of other tasks, then the employer is required to provide a seat. The Court expressly rejected the "holistic approach" advocated by employers, which would have allowed employers to classify a job as a "standing job," and be excused from providing a seat if it has more "standing" tasks than "sitting" tasks. The Court also rejected the "task-by-task evaluation" urged by employee groups. Rather, employers must look at subsets of an employee's "total tasks and duties by location." If it is feasible for an employee to perform specific tasks at a particular location while seated and without interfering with the performance of "standing" tasks, then a seat must be provided. Employers must examine the actual tasks performed or reasonably expected of an employee, as opposed to duties stated in a job description.

With respect to determining whether the nature of the work "reasonably permits" use of a seat, the Court adopted an "objective" inquiry based on the "totality of the circumstances." Employers must first analyze the relevant duties, grouped by location, and whether those duties can be performed while sitting. Next, employers should consider the "feasibility" of providing a seat. Relevant factors include whether providing a seat would interfere with other "standing" tasks, whether the frequency of transition from seating to standing may interfere with an employee's work, and whether seated work would impact the quality or effectiveness of an employee's overall job performance.

In short, employers must consider the "totality of the circumstances" in determining whether the nature of the work "reasonably permits" use of a seat, and employers will bear the burden of proving that suitable seating is not available in the event an employee requests the opportunity to sit while working.

What Should Employers Do Now?

- Carefully and honestly evaluate job duties by location to identify tasks that can be performed while sitting – Employers should assess their obligation to provide seating in light of the factors and guidelines announced by the Supreme Court, and should provide seating when required to do so.

Remember The Good Ol' Days When Paying Minimum Wage was Easy? Not Anymore

On January 1, 2017, California's minimum wage rose to $10.50 per hour for employers with 26 or more employees; the minimum wage for smaller employers will rise to that amount next year. Employers seeking to comply with minimum wage laws need to be familiar not only with the state minimum wage, however, but also any local minimum wage laws that may be applicable to them.

In recent years, many cities and counties have enacted their own minimum wage rules. Compliance with local ordinances can be complicated, because some ordinances apply only to businesses that are based in the city in question, while others apply to all employees who work some minimum number of hours in the city. Minimum wage rates in effect as of January 1, 2017 for some of California's largest job centers include:

City	Minimum Wage
City of Los Angeles	$10.50 per hour for employers with 25 or fewer employees as of July 1, 2017; $12.00 per hour for employers with 26 or more employees as of July 1, 2017
Mountain View	$13.00 per hour
Oakland	$12.86 per hour
Palo Alto	$12.00 per hour
San Diego	$11.50 per hour
San Francisco	$14.00 per hour
San Jose	$10.50 per hour; rising to $12.00 per hour on July 1, 2017
Santa Clara	$11.10 per hour
Sunnyvale	$13.00 per hour

California's white collar exemptions require employers to pay exempt employees an annual salary of at least twice the state minimum wage. As a result, employers evaluating the exempt status of their white collar employees should focus on whether the employee's salary is equivalent to at least twice the state minimum wage, rather than any minimum wage that may be applicable by virtue of local ordinances.

What Should Employers Do Now?

- Identify any local ordinances that may be applicable – Employers should check to see if local minimum wage ordinances are in effect in any of the cities in which they operate, or in which their employees work.
- Determine whether local ordinances apply only to employers who are based in the city, or to employees who work in the city – Once they identified a local ordinance may apply, employers should determine whether the ordinance applies to employees who perform some minimum number of hours of work in the city, or only those who are based in the city.
- Comply with posting requirements – Most minimum wage laws include provisions requiring employers to post notice of the applicable minimum wage in the workplace.

Developments Regarding Discrimination Laws

Headlines from 2016 and New Regulations Bring Increased Focus to Sexual Harassment, Heighten Standard of Care

While 2016 did not bring major changes in the law governing discrimination or harassment, the 2016 presidential election campaign brought renewed public attention to issues of discrimination and harassment. The very public accusations against the head of Fox News and comedian Bill Cosby also drew attention and added to the ongoing public discussion. Although it is too soon to know the long-term impact these recent events will have on the workplace, many commentators predict that they will lead to increased awareness and sensitivity and, correspondingly, to an increase in claims. Employers concerned about preventing discrimination and harassment in the workplace, and the claims that result from workplace cultures tolerant of such behavior, should assess their risk and take steps to reduce it.

Recognizing Indicia of Risk

In 2016, a task force appointed by the Equal Employment Opportunity Commission (EEOC) identified 12 factors that could signal an increased risk of harassment in the workplace. Although the task force focused primarily on harassment, its findings apply with equal force to discrimination. Some of the factors identified by the task force include:

- <u>Homogenous workforce</u> – Harassment is statistically more likely to occur in workforces that lack diversity. Sexual harassment is more likely in workforces dominated by males, for example, while racial harassment is more likely in organizations where one race dominates others.
- <u>Workplaces where a small number of employees do not conform to societal norms</u> – When a small portion of a workforce does not conform to societal norms, those who do not conform are more likely to be subjected to ridicule or harassment for being perceived as different.
- <u>Recent change in the composition of the workforce</u> – Incidents of harassment are more frequent in organizations that have experienced a recent change in the demographic composition of the workforce, as employees adjust to interacting with persons from a different or unfamiliar background.
- <u>Coarse public debate outside the workplace</u> – Harassment appears to increase when events outside the workplace prompt the expression of strong opinions. Following the September 11 attacks, for example, workplace harassment based on religion and national origin surged notably.

- Workforces with many younger workers – Younger employees are often less aware of employment laws and expectations regarding appropriate behavior in the workplace, so harassment claims tend to be more common in organizations with higher than average percentages of young workers.
- Workforces with unusually powerful or highly valued employees – Organizations occasionally hesitate to challenge inappropriate behavior by employees perceived to be very powerful or valuable, which leads such employees to believe that they are immune from consequences for conduct that would result in discipline for others, and to perpetuate such conduct.
- Isolated workplaces – Complaints of harassment are more frequent in workplaces where employees are physically isolated or have little opportunity for interaction with management.
- Workplace cultures that tolerate or encourage consumption of alcohol – Perhaps not surprisingly, organizations that tolerate or encourage the consumption of alcohol by employees, such as sales teams charged with entertaining clients, receive complaints of harassment more frequently than those that do not permit alcohol on the job.

New Law Creates Heightened Standard of Care

California employers have long had an obligation to prevent and promptly correct discrimination and harassment in the workplace. For many years, however, the law did not clearly define the steps that employers must take in order to satisfy their obligations. In April of 2016, the California Fair Employment and Housing Council adopted regulations that require employers to adopt and maintain policies against discrimination and harassment that contain specific provisions. Among the key policy provisions required by the new law are:

- a list of all categories protected by the Fair Employment and Housing Act (FEHA);
- a statement that managers, supervisors, co-workers and any third parties who interact with employees are prohibited from engaging in conduct deemed unlawful under FEHA;
- a complaint process that (a) allows employees to complain to someone other than their supervisor, (b) ensures complaints will be kept as confidential as possible, (c) provides for a timely and impartial investigation by a qualified individual, (d) provides for timely responses, (e) includes some form of documentation and tracking for progress, and (f) provides for appropriate options for resolution and remediation, and timely closure of complaints;
- a statement that investigations will be treated as confidential to the extent possible;
- a specific instruction to supervisors to report complaints to a designated company representative;
- a statement that the employer will conduct a fair, thorough and timely investigation that provides due process to the parties and reasonable conclusions based on the evidence;

- a statement that appropriate remedial action will be taken if misconduct is found; and
- assurance that employees who complain or participate in any investigation will not be subject to retaliation.

Employers who truly want to prevent prohibited conduct and reduce their risk will provide quality training to their managers and supervisors, insist that senior executives attend training sessions, and emphasize that the purpose of their policies and training is to create and preserve a strong, welcoming workplace culture, rather than merely avoid legal liability.

What Should Employers Do Now?

- <u>Update policies as necessary</u> – Employers should review existing policies to assure that they comply with current law and include all the provisions now required by the new regulations.
- <u>Translate and distribute policies as required</u> – The new law requires employers to translate their anti-discrimination and anti-harassment policies into languages spoken by 10% or more of the workforce, and to distribute the policy in a manner calculated to assure that employees actually receive it.
- <u>Comply with training obligations</u> – Employers subject to AB 1825 should ensure they provide the required training to new supervisors within six months of promotion, and that they repeat training every two years. In light of the increased sensitivity of the subject, employers should assure that those who conduct training on their behalf treat the subject seriously and genuinely try to improve understanding and behavior among employees.

EEOC Issues Guidance Regarding the ADA and Obligations Regarding Leaves of Absence

The laws prohibiting disability discrimination impose obligations on employers which go far beyond the mere avoidance of discrimination. In addition to refraining from discrimination, employers must also provide reasonable accommodation to an employee when doing so will enable the employee to perform the essential functions of his or her job, and they must engage in an "interactive process" when an employee requests a reasonable accommodation. Most employers are familiar with the general prohibition of discrimination set forth in the disability discrimination laws, but many do not fully understand the obligation to provide reasonable accommodation or engage in the interactive process.

Perhaps the most common context in which the issue of reasonable accommodation arises is that of an employee who is unable to work due to illness or injury and requests a leave of absence, or an extension of a leave of absence, to recover. Whether granting or extending a leave of absence is reasonable is often a vexing question for employers, and a frequent subject of controversy. In 2016, the EEOC issued guidance discussing leaves of absence, the interactive process as it relates to leaves, reinstatement, and reassignment. While the EEOC guidance does not break new ground, it does highlight the many issues regarding leaves of absence and the interactive process that are worthy of attention.

As articulated in the EEOC guidance, the fundamental purpose of the Americans with Disabilities Act (ADA) is to allow persons with disabilities to work. As a result, the EEOC interprets the reasonable accommodation and interactive process as requiring an employer to change customary practices if they can do so without undue hardship. Some of the notable elements of the guidance include:

- The mere fact that a leave of absence, or an extension of a leave, may extend an employee's absence from the workplace beyond the 12 weeks authorized by the FMLA does not, by itself, constitute undue hardship justifying denial of the leave;
- Indefinite leaves, in which neither the employee nor the medical provider can estimate a date by which the employee will be able to return to work, constitute undue hardship; and
- If an employer is unable to accommodate an employee in his or her current position, but a vacant position for which the employee is qualified exists in the organization, the employer must transfer the employee to the vacant position without requiring the employee to compete for it unless an established seniority system entitles another employee to the position.

The EEOC also emphasized in its guidance that an employer's use of a third party administrator to manage leaves of absence for its employees does not absolve the employer of potential liability.

What Should Employers Do Now?

- <u>Review leave policies and practices</u> – As the EEOC correctly observed, administering leaves in compliance with the ADA is a difficult proposition for employers. Employers should assure that their leave policies and practices take into account the obligation to engage in the interactive process and provide reasonable accommodation.
- <u>Train supervisors</u> – The obligation to engage in reasonable accommodation and the interactive process is counterintuitive to many supervisors because it requires them to deviate from normal practices. Prudent employers should train their supervisors to understand the concept of reasonable accommodation, recognize the obligation to engage in the interactive process, and engage with the Human Resources department when accommodation issues arise.
- <u>Document efforts to engage in the interactive process</u> – In order to protect themselves from potential claims, employers should not only comply with their obligations, but also utilize carefully drafted letters and memoranda to confirm that they have done so. Cases focused on the interactive process and reasonable accommodation are particularly likely to involve disputes about "who said what to whom and when," therefore, good documentation is even more critical than

normal. Employers are usually wise to work with counsel to craft documentation which can be used to demonstrate compliance with the law in the event a dispute arises.

Associational Disability Discrimination — What Does it Mean?

Both state and federal law require employers to provide reasonable accommodation to qualified disabled employees. California law extends protection against discrimination to employees associated with a disabled person, but does not specifically include an obligation to accommodate employees who are associated with a disabled person. However, in *Castro-Ramirez v. Dependable Highway Express, Inc.*, a California appellate court held that an employer's denial of reasonable accommodation to a nondisabled employee may support a claim for associational disability discrimination.

In *Castro-Ramirez*, Luis Castro-Ramirez was not disabled, but he had a disabled son. When Castro-Ramirez began working as a delivery driver for Dependable Highway Express, he notified the company that his disabled son required dialysis at home on a daily basis and requested a work schedule that allowed him to administer the dialysis each evening. For nearly three years, the company accommodated his request.

After three years, Castro-Ramirez began reporting to a new supervisor, who switched him to an evening schedule. Based on his need to be at home with his disabled son, Castro-Ramirez requested a return to his former schedule, but the new supervisor refused. When Castro-Ramirez refused to accept the evening shift, the company terminated his employment, prompting Castro-Ramirez to file suit for associational disability discrimination.

While the company prevailed at the trial court level, the court of appeal reversed. In doing so, the appellate court concluded that Castro-Ramirez presented evidence from which a reasonable jury could conclude that his association with his disabled son was a substantial motivating factor in the company's decisions to deny his request for a schedule change and eventually to terminate his employment. The court noted that his supervisor assigned Castro-Ramirez to the later shift when several earlier shifts were available. The supervisor also lied about the reason for the reassignment, telling Castro-Ramirez that an unhappy customer asked that he no longer make deliveries to it when in fact the customer specifically requested Ramirez. The court concluded that a jury could infer that the supervisor based his decisions on a desire to avoid the inconvenience and distraction of Castro-Ramirez's need to care for his disabled son.

The appellate court expressly stated that it was not deciding whether FEHA establishes a separate duty to reasonably accommodate employees who associate with a disabled person, but it recognized that an employer's duty to provide reasonable accommodation is "significantly intertwined with the statutory prohibition against disability discrimination." The court also observed, without deciding, that FEHA "may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." It reasoned that FEHA requires employers to reasonably accommodate the "disabled" and the "disabled" is defined by FEHA to include those associated with the disabled.

What Should Employers Do Now?

- Ensure management understands the concept of "association" with disabled person – Most managers are aware of the prohibition on discrimination against disabled employees, but many are not familiar with the concept of discrimination against one associated with a disabled person. Employers should familiarize supervisors with the concept so they can recognize the issue when it arises.
- Use common sense regarding requests from employees – Even without a specific legal obligation, Dependable Highway Express should have acted differently. Castro-Ramirez was highly sympathetic given his disabled son, had apparently been a good employee, and the supervisor's reasons for denying his preferred schedule made no sense. The combination of these factors made for a difficult fact pattern to defend.

New Enforcement Guidance from the EEOC on Workplace Retaliation

Claims alleging retaliation are among the most common and challenging types of claims faced by employers. In August of 2016, the EEOC issued its Enforcement Guidance on Retaliation and Related Issues, which not only clarifies the position the EEOC will take in addressing allegations of retaliation, but also appears to interpret the law in an expansive manner that is favorable for employees. Along with the Guidance, the EEOC issued two accompanying documents, a questions-and-answers publication and a Small Business Fact Sheet, which address and summarize major points from the Guidance.

While the Guidance does not create new law, it does reflect the manner in which the EEOC will interpret and enforce federal employment laws and may be viewed as persuasive authority by the courts. As a result, it is important for employers to be aware of the Guidance, which relates to Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Section 501 of the Rehabilitation Act, the Equal Pay Act, and the Genetic Information Non-Disclosure Act.

Key provisions of the new Guidance address the three elements required for a retaliation claim: (a) the employee's participation in "protected activity"; (b) the existence of a material "adverse employment action" against the employee; and (c) the existence of a "causal connection" between the protected activity and the adverse employment action.

The Guidance clarifies the EEOC's expansive view of the conduct that qualifies as "protected activity." Under established law, "protected activity" includes (a) participation in an equal opportunity process or (b) opposition to an unlawful practice under the equal opportunity laws. So-called "participation conduct" generally encompasses a narrow range of activities, such as filing an administrative proceeding or lawsuit alleging harassment or discrimination. The Guidance, however, broadly states that participation conduct is protected regardless of its content, expressly rejecting case law that has held an employee's false, malicious statements to be unprotected activity.

"Opposition conduct" generally encompasses a broader range of activities than participation conduct, such as communicating opposition to any perceived employment harassment or discrimination. The protection afforded to opposition conduct applies only where the employee's conduct is reasonable and where he or she acts with a reasonable, good-faith belief that the conduct opposed is unlawful. The Guidance provides a list of examples of reasonable opposition conduct that includes not only active opposition (such as complaining or threatening to complain about alleged discrimination), but also more passive conduct, such as refusing to implement an instruction to dissuade another from filing a discrimination complaint or accompanying a co-worker to file a complaint. The Guidance's examples of unreasonable opposition conduct include submitting an overwhelming number of patently specious complaints or badgering a subordinate employee to give a witness statement. Notably, the Guidance states that "[o]pposition to perceived discrimination ... does not serve as license for the employee to neglect job duties. If an employee's protests render the employee ineffective in the job, the retaliation provisions do not immunize the employee from appropriate discipline or discharge."

The Guidance also defines "materially adverse employment actions" very broadly. Consistent with the United States Supreme Court, the EEOC views an employment action as materially adverse if it "might well deter a reasonable person from engaging in protected activity." According to the EEOC, a materially adverse action need not have any tangible effect on employment, be work-related, or even take place at work.

Finally, the Guidance includes a section listing various "promising practices" that employers "may wish to consider implementing in an effort to minimize the likelihood of retaliation violations." Although these practices will not insulate an employer from liability or damages, the EEOC will consider them in assessing claims. Examples of these "promising practices" include (a) maintaining a written, plain-language anti-retaliation policy that provides practical guidance on the employer's expectations and user-friendly examples of what to do and not to do; (b) training managers, supervisors, and employees on the policy and providing periodic refresher training; and (c) advising parties and witnesses to an alleged act of discrimination or harassment about the anti-retaliation policy, how to report alleged retaliation, and how to avoid engaging in it.

What Should Employers Do Now?

- Review and supplement anti-retaliation policies as necessary – Many California employers will not need to change their anti-retaliation policies if they already conform to California law. This is a good time, however, to consider supplementing established written policies to align with the Guidance's "promising practices." For instance, the EEOC believes that anti-retaliation policies should include examples of retaliation that managers may not otherwise realize are actionable, a reporting mechanism for employee concerns about retaliation, and a clear explanation that retaliation can be subject to discipline.

- Proceed with caution when making any employment decisions regarding employees who have engaged in protected activity – Before making an unfavorable decision regarding an employee who has engaged in protected activity, prudent employers will confer with counsel to assess the risk involved and identify potential means of reducing the risk.

Age Discrimination Claims Likely to Rise as Workforce Grows Older

Members of the Baby Boomer generation (those born between 1946 and 1964) began to reach retirement age in the past decade, and thousands more will do so every day for the next 15 years. As a result of the recession of 2008, many Baby Boomers have deferred their retirement and remain in the workforce, however, competing for a seemingly shrinking pool of desirable jobs. As the presence of older employees in the workforce grows more common, so, too, do claims of age discrimination. A brief survey of recent verdicts and lawsuit filings in California are illustrative of the risk faced by employers.

In 2016, a California appellate court affirmed a verdict of $16.3 million in favor of a 64 year-old former Staples employee who sued for age discrimination and wrongful termination. Four former employees of Hewlett-Packard filed a class action lawsuit for age discrimination, alleging that they, along with "hundreds if not thousands" of other former HP employees, were unlawfully laid off as part of the technology giant's publically stated goal "to transform itself from an 'old' company into a 'younger' operation." In yet another case, a 54 year-old former employee of Cox Communications sued for age discrimination after her supervisor made multiple ageist comments to her, including a remark that "your Alzheimer's must be kicking in."

Many age discrimination suits arise from reductions in force and termination decisions affecting older employees. Companies facing financial pressure may attempt to reduce costs by laying off highly paid employees and replacing them with lower earning workers, for example. Employers may not actually intend this cost-saving strategy to adversely affect older employees, but employment practices which are neutral on their face (such as a desire to reduce cost by eliminating some highly paid employees) can lead to liability if they have an adverse effect upon older employees as a group. Similarly, comments that an older employee worker "does not have the drive that this position requires," is "getting up there," is "starting to drag" and "slowing down," and is "not a cultural fit" (in the context of a younger workforce) can all be interpreted as evidence of bias against older employees, leading to the filing of claims and potential liability.

What Should Employers Do Now?

- Carefully define the criteria used to select employees for reductions in force – When planning a reduction in force, employers should carefully select the criteria they will use to decide "who stays" and "who goes," recognizing that their ultimate decisions will be scrutinized against the stated criteria. To the extent possible, employers should include objective criteria in their selection processes in order to minimize the appearance of bias, while recognizing that some facially neutral criteria may have an adverse impact on older workers and create potential liability.
- Recognize that a decision to favor "young blood" creates a risk of liability, regardless of any perceived justification – In organizations with a predominately older workforce, it may seem to make sense from a business perspective to favor younger persons in hiring and promotion decisions. Managers sometimes explain that favoring younger employees can add diversity to an aging workforce, or help to bring knowledge of new trends or recent industry advances into an organization. Personnel decisions based on the age of the applicant or employee are illegal, however, regardless of whether the employer can articulate some justification for them.

Transgender Guidance Issued by the Department of Fair Employment and Housing Department

Transgender issues continued to emerge in the workplace in 2016 and present an area of developing law. In February 2016, the California Department of Fair Employment and Housing (DFEH) issued guidelines regarding the rights of transgendered employees, which may increase litigation and administrative claims.

The DFEH's guidance in a brochure entitled "Transgender Rights in the Workplace," does not create new law. It does, however, reflect the posture the DFEH is likely to take in addressing complaints of discrimination against transgender employees and provide a resource for employers seeking assistance in navigating through transgender issues in the workplace.

The term "transgender" typically refers to a person whose gender identity or expression differs from the person's gender at birth. Transgendered persons may or may not express themselves in a manner that is consistent with traditional social expectations of male and female gender roles. Transgendered persons may transition socially, legally, and/or medically to live their lives as the gender with which they more closely identify or express themselves. Transitioning may take a variety of forms, including coming out to family, friends, and co-workers; adopting a new name; preference for new pronouns; adopting a more feminine or masculine appearance; and undergoing medical treatments, such as hormone therapy, laser hair removal, and surgery.

The DFEH guidance addresses such topics as an employer's obligation concerning restroom and locker room facilities. The DFEH clearly contends that employees have the right to use a restroom or locker room that corresponds to their gender identity. The DFEH also suggests that employers provide a unisex single stall bathroom, whenever possible, for use by any employee who desires increased privacy, regardless of the underlying reason. The guidance cautions, however, that use of a unisex bathroom should be voluntary.

The guidance also identifies certain inquiries not permitted during the hiring process. The unlawful inquiries include questions designed to elicit a person's sexual orientation or gender identity, such as questions regarding marital status, spouse's name, and relation of household members to one another. The guidance also warns employers not to ask questions about a person's body or whether they plan to have surgery because the information is generally protected by the Health Insurance Portability and Accountability Act.

The guidance also addresses dress and grooming standards. According to the DFEH, an employer that adopts dress or grooming policies must do so in a non-discriminatory manner, and California law prohibits an employer from denying an employee the ability to dress in a manner suitable for that employee's gender identity. The guidance explains that a transgendered person who identifies with being a woman must be allowed to dress in the same manner as a non-transgendered woman, and that her compliance with the dress code cannot be judged more stringently than a non-transgendered woman.

What Should Employers Do Now?

- Accept the law and assure that Human Resources staff and managers understand it – Although some may disagree with the evolving law regarding transgender rights for political reasons, employers seeking to avoid unnecessary claims should assure that their Human Resources staff and managers understand the law and comply with it. Among other things, HR staff and managers should be familiar with appropriate and inappropriate interview questions and rules regarding restroom use and dress and grooming standards.

Leaves of Absence Developments

San Francisco Enacts New Law Requiring Benefits for Parents

San Francisco recently became the first city in California requiring employers to supplement the Paid Family Leave (PFL) benefits offered by the State of California. The new law essentially provides employees working in San Francisco with 100% of their wages when taking time off from work to bond with a new child.

PFL is a state-based insurance program that provides eligible California employees who experience a full or partial loss of wages in order to care for a seriously ill family member or to bond with a new child with short-term benefits. These short-term benefits are equal to 55% of the employee's wages, subject to a maximum weekly benefit amount of $1,129. Employees may receive these benefits for up to six weeks in a 12-month period.

The name "Paid Family Leave" is misleading because PFL does not create any job protection rights for employees. PFL only provides partial wage replacement benefits for employees who cannot work due to the need to take care of an ill family member or bond with a new child. The program is completely separate from federal and state laws that entitle employees to reinstatement following a leave of absence, such as the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA).

San Francisco's Paid Parental Leave Ordinance is an add-on to PFL. Essentially, the Ordinance will require most San Francisco employers to supplement PFL so that employees receive 100% of their gross weekly wages while on a parental leave of absence. Key provisions of the Ordinance include:

- <u>Covered employers</u> – As of January 1, 2017, the law applies to employers with 50 or more employees, and it will apply to employers with 35 or more employees as of July 1, 2017. On January 1, 2018, the law will apply to employers with 20 or more employees.
- <u>Covered employees</u> – Employees eligible for supplemental benefits pursuant to the law include those who:
  a. have completed at least 180 days of employment with the employer;
  b. work at least eight hours per week for the employer in San Francisco;
  c. work at least 40% of their total weekly hours of work for the employer in San Francisco; and

d. are eligible for paid family leave benefits from the State of California for the purpose of bonding with a new child.

- Benefits provided – The supplemental benefits available to eligible employees will be equivalent to the difference between the employee's regular earnings during the benefit period and the benefits available through PFL. PFL presently provides eligible individuals with benefits of up to 55% of their regular wages, subject to the maximum weekly benefit cap. San Francisco's new law will require covered employers to provide wage replacement benefits in an equivalent of up to 45% of the employee's wages, subject to the $1,129 weekly maximum.
- Effect of termination during benefit period – If a covered employer terminates the employment of a covered employee while the employee is PFL-eligible, the employer will be obligated to pay the supplemental benefits throughout the period in which the employee receives PFL.
- Effect of termination within 90 days of application for PFL benefits – If a covered employer terminates an employee within 90 days of the date on which the employee would become eligible for PFL benefits under state law, the law will presume that the employer terminated the employee in order to avoid its obligation to provide supplemental benefits unless the employer proves with clear and convincing evidence that it terminated the employee solely for another reason. If the employer does not meet its burden of proof, it must pay supplemental benefits to the employee during the period in which the employee receives PFL benefits.
- Interference and retaliation prohibited – Employers must not interfere with or restrain an employee's exercise or attempt to exercise his or her right to receive wage replacement benefits under the Ordinance. Nor can employers fire, threaten termination, demote, suspend or take any other adverse action against employees in retaliation for exercising or attempting to exercise their rights to these benefits.
- Option to use accrued vacation – Employers can apply up to two weeks of an employee's accrued vacation to help meet their obligation to provide supplemental compensation under the new law. If the employer chooses to apply accrued vacation under these circumstances, the employee must agree to it. If the employee does not agree to the use of his or her accrued vacation, the employer may choose to not provide supplemental benefits.

As with PFL, the new San Francisco law does not create a right to leaves of absence and does not obligate employers to reinstate employees to work when they exhaust wage replacement benefits. The Ordinance simply supplements the benefits available through the PFL program. New York has recently passed a similar law and other cities are likely to follow suit, as many have with paid sick leave ordinances.

What Should Employers Do Now?

- Determine whether you are subject to the San Francisco Ordinance – Employers are subject to the Ordinance currently if they employ 50 or more employees and have at least one employee who satisfies all of the criteria for eligibility.
- Comply with the Ordinance if it is applicable – Covered employers should comply with the Ordinance, including its posting and record-keeping provisions.

And Speaking of Paid Sick Leave….

In 2015, California became the first state in the nation to require employers to provide paid sick leave to most employees. The key rules regarding the new state law were summarized in last year's Annual Update. In general, eligible employees are entitled either to accrue one hour of paid sick leave for every 30 hours they work, or to receive a lump sum grant of three days of sick leave per year under the state law.

Apparently not content with the state law, many cities have enacted local ordinances that require paid sick leave benefits that are similar, but not identical, to those required under California's law. Among the cities that have enacted local sick leave ordinances are San Francisco, Oakland, Emeryville, Los Angeles and San Diego.

In many cases, the local ordinances contain provisions more favorable for employees than those applicable under state law. In order to satisfy their obligations under both laws, employers who are subject to a local sick leave ordinance must provide employees with the best of both worlds, essentially cobbling together a sick leave benefit that includes some components of the state law, where they are more beneficial for the employee, with some components of local ordinances.

What should employers do now?

- Determine whether you are subject to a local ordinance – Employers should carefully assess local ordinances that might be applicable to them. Some ordinances apply only to employees who are based in the city, while others apply to employees who may work in the city only occasionally, so identifying applicable ordinances is more complicated than simply identifying the cities in which an employer maintains a facility.
- Revise policies as necessary to assure compliance with both state law and applicable local ordinances – If subject to a local sick leave ordinance, employers should confer with counsel to revise their sick leave policies so they satisfy the requirements of both laws.

NLRB Developments

One of the most interesting questions regarding the National Labor Relations Board (NLRB) in 2017 will concern its members. The NLRB is generally comprised of five members. Due to Board vacancies and the decision of Senate Republicans to block confirmation of President Obama's appointments, however, the Board only has three members at present, two Democrats and one Republican.

President-elect Trump could appoint two members to the Board and shift the majority of its members from Democrat to Republican, but he may not view filling the Board as a priority. Indeed, President Obama took over a year to nominate candidates to fill vacant seats when he was elected, notwithstanding the fact that he had been supported by labor and had consistently supported pro-labor positions. If new members are not appointed and confirmed by December 17, 2017, one of the current member's terms will expire on that date, leaving the Board with only two members and unable to render decisions without the requisite quorum. Even if the NLRB itself cannot render decisions, however, the operations of the NLRB Regional Offices will continue, meaning that Representation Petitions and Unfair Labor Practice Charges will continue to be processed and the Regional Offices will continue to apply the current pro-union decisions unless and until those decisions are overturned by a federal court.

Although the NLRB is often viewed as relevant primarily in unionized workplaces, the current Board has issued decisions producing unprecedented impact upon non-union workplaces. Pro-labor rulings will remain in place for the immediate future and changes to them, if any, will not happen quickly or easily. Some of the key NLRB decisions from 2016 are summarized below. All employers, including those whose employees are not unionized, should remain alert to new developments in this area.

Board Continues to Scrutinize Employee Handbooks

The NLRB has focused substantial attention on Employee Handbooks for at least the past five years, particularly with respect to the question of whether employers' policies have the effect of "chilling" employees' rights under Section 7 of the National Labor Relations Act (NLRA). Section 7 of the NLRA protects employees from adverse action when they engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The NLRB considers discussion of shared workplace concerns around a water cooler or on a social media site to be protected activity, and it has closely scrutinized Handbook policies concerning confidentiality, non-disparagement, and use of social media.

The NLRB has found carefully tailored confidentiality policies that prohibit employees from revealing employer trade secrets, inventions, and proprietary information to be enforceable (*Minteq International* and *G4S Secure Solutions (USA)*), but it has rejected as overbroad policies that would prevent employees from discussing topics such as their wages, working conditions, and safety concerns with each other or with union representatives.

The NLRB has also been quick to strike down non-disparagement policies on the ground that the right to question an employer's actions is a protected activity under Section 7. In *Quicken Loans, Inc. v. National Labor Relations Board*, for example, the federal Court of Appeals for the D.C. Circuit quite pointedly upheld a decision of the NLRB to invalidate a very broad non-disparagement policy designed to protect the employer's reputation:

> The Non-Disparagement Rule similarly flies in the teeth of Section 7. That Rule, by its plain terms, bars mortgage bankers from "publicly criticiz[ing], ridicul[ing], disparag[ing] or defam[ing] the Company or its products, services, policies, directors, officers, shareholders, or employees" in any written or oral statement, including on the internet or even in private emails. . . .The Board quite reasonably found that such a sweeping gag order would significantly impede mortgage bankers' exercise of their Section 7 rights because it directly forbids them to express negative opinions about the company, its policies, and its leadership in almost any public forum.

The NLRB also continues to scrutinize social media policies because it contends that many such policies overly restrict employees in their online expression and communication. In a rare win for employers (but only on this point), the NLRB upheld in *Chipotle Services LLC* an employer's request that an employee delete tweets that were critical of the employer. While the NLRB agreed in this instance that the employee's complaints were individualized griping and not concerted activity, had the employee enlisted the assistance of even one co-worker in making the complaint, the decision might have gone the other way.

Some employers who are aware of the NLRB's enforcement positions have included disclaimers in their Employee Handbook stating that the Handbook should not be construed or applied in a way that violates employee rights under Section 7. (Disclaimers were at issue in both the *G4S Secure Solutions* and the *Chipotle* cases discussed above.) Unfortunately, the NLRB found that such disclaimers do not cure unlawful provisions. As of December 2016, it is uncertain whether the current Board would find any disclaimer sufficient to protect an employer from liability if its policies are otherwise impermissible.

What Should Employers Do Now?

- Review Handbook policies with a special focus on NLRB compliance – Employers should not only review and update their Employee Handbooks every 12 to 18 months, they should assure that the person responsible for doing so is familiar with recent NLRB decisions relevant to Handbooks.

Expansive Interpretation of Joint Employer Doctrine

In a major test of policy, the NLRB has filed charges against McDonald's Corporation, seeking to impose liability on McDonald's as a joint employer for unfair labor practices allegedly committed by 21 franchisees throughout the country. In essence, the NLRB contends that McDonald's so completely controls the manner in which franchises operate (from how to cook and present their meals, to the appearance of the restaurants, to how and when the facilities are to be cleaned, and more), that it is only fair to hold McDonald's responsible for violations of federal law committed by franchisees. While the timing of the decision is uncertain, there is a strong chance that the decision will be appealed all the way to the United States Supreme Court.

Usually, only the employees directly employed by an employer may be included in a bargaining unit. Led by the NLRB, however, several state and federal government agencies have recently been expanding the "joint employer" concept to hold employers that use staffing agencies accountable for violations of the rights of temporary workers. The NLRB determined in *Miller & Anderson, Inc.*, for example, that bargaining units may now include temporary employees of a staffing agency if the temporary employees share a "community of interest" and a joint employer determination has been made. Including employees of two different employers (a "user employer" and a "supplier employer," in the words of the NLRB) in the same bargaining unit creates significant complexities in bargaining. To help resolve these complexities, the NLRB generously offered the following advice:

> In the unit of the jointly employed contingent employees, the user employer, like the supplier employer, would have an obligation to bargain only as to the terms and conditions it has the authority to control.

In *Retro Environmental, Inc./Green Job Works*, the NLRB certified a bargaining unit comprised of construction company workers and a temporary staffing agency that had provided temporary workers on just two projects. The construction company and the staffing agency objected because it was speculative whether the two companies would ever again work together. The NLRB determined that "Retro and Green Job Works are joint employers of the employees in the petitioned-for unit because they share and codetermine essential terms and conditions of employment for the employees in the petitioned-for unit." The NLRB also found no basis for not certifying the petition, even though there was no evidence to suggest the two companies would work together again. It remains to be seen whether bargaining units comprised of employees of two employers are as workable as the NLRB suggests.

What Should Employers Do Now?

- Franchisors should carefully assess the degree to which they exercise control over the operations of franchisees in order to minimize the risk that they will be found to be joint employers of franchisee employees.
- California employers should recall that Labor Code section 2810.3 treats temporary staffing companies and their clients as joint employers with respect to workers' compensation and wage payment issues. Employers should assure that their staffing companies comply with applicable laws and request indemnity if they fail to do so.

Successorship Doctrine Bites Unsuspecting Employers

Whenever a non-union employer acquires a unionized facility, the non-union employer may become considered a "successor" that is subject to some or all of the prior owner/operator's obligations to the unionized employees. Traditionally, whether a purchasing entity qualifies as a successor depends on the structure of the transaction and whether the purchaser employs a majority of the acquired company's employees. Obligations relative to the union and collective bargaining unit may vary depending on how the business is acquired.

When an acquiring entity makes it "perfectly clear" that it will operate as a successor to the prior owner/operator, the acquiring entity is bound by the prior employer's terms and conditions of employment and must bargain any changes instead of setting the initial terms. In *Nexeo Solutions, LLC* (July 18, 2016) the NLRB found that statements in the purchase agreement, as well as statements made by the management of the acquired company, made it "perfectly clear" that Nexeo intended to be a successor and therefore had a duty to bargain before making changes to the pre-existing terms and conditions of employment.

What Should Employers Do Now?

- Confer with counsel regarding successorship issues whenever acquiring a unionized facility or entity – In order to minimize the risk of being considered a successor, employers should confer with experienced labor counsel whenever acquiring a unionized facility or company.

Board Sides With Labor in Interpreting Management Rights Clauses

Many collective bargaining agreements include carefully developed management rights clauses that set forth the actions the employer may take without further consultation with the union. In *Graymont PA,* *Inc.*, the NLRB found that the employer committed an unfair labor practice by unilaterally issuing new disciplinary policies, including a new attendance policy, notwithstanding the existence of a management rights clause allowing the adoption of work rules. The management rights clause in the collective bargaining agreement stated that the employer:

> [R]etains the sole and exclusive rights to manage; to direct its employees; … to evaluate performance, … to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees ....

The NLRB applied the "clear and unmistakable waiver" standard in deciding that the union had not specifically and knowingly waived the right to negotiate disciplinary policies through the management rights clause. As the Board explained:

> Here, the parties' collective-bargaining agreement includes a management rights provision reserving to the Respondent the right to "adopt and enforce rules and regulations and policies and procedures," but, unlike *United Technologies*, that provision does not specifically reference "discipline." Nor does it specify any other type of rule that the Respondent is authorized to unilaterally adopt and enforce. Without such an unequivocal and specific expression of the parties' mutual intent to permit unilateral employer action concerning the matter at issue, there is no basis for finding waiver.

What Should Employers Do Now?

- <u>Draft management rights clauses carefully</u> – As the *Graymont PA* decision reflects, employers should assure that the language of their management rights clauses is both broad and specific in order to minimize the risk that they will be forced to negotiate with a union over management decisions.
- <u>Proceed with caution in implementing unilateral changes</u> – Review carefully the language and bargaining history of the management rights clause before implementing any unilateral changes in working conditions. Prudent employers should also consider notifying their union of changes in working conditions before implementing them, even if the management rights clause gives them the authority to do so.

And What Lies Ahead? Potential Changes on the Horizon Under the Trump Administration

President-elect Trump will take office on January 20, 2017, and his inauguration will result in the first change of presidential administrations in eight years. For the first time in many years, the same party will hold the White House and hold a majority of seats in both the Senate and House of Representatives. As a result of the Republicans' control and of President-elect Trump's stated goals, 2017 may bring numerous changes in laws relevant to employers. It's not possible to predict all the changes that may occur, but some of the more significant changes that could occur in the near future include:

- Affordable Care Act – President-elect Trump has criticized the Affordable Care Act and, at different times, has pledged either to press for its repeal or amendment. The ACA is unlikely to remain in effect in its current form, but it may take some time to clarify the specific changes that will be made and to implement them.
- Use of E-Verify and immigration reform – E-Verify is an internet-based application that compares information from an employee's Form I-9 with data from the U.S. Department of Homeland Security and the Social Security Administration to confirm eligibility for employment. Some federal contractors and government agencies are required to utilize E-Verify to confirm an employee's eligibility for employment, but use of the system is optional for most employers. President-elect Trump has occasionally advocated in favor of requiring employers to use E-Verify before permitting newly hired employees to begin work, and he has argued in favor of sweeping, but vaguely defined changes in immigration laws.
- Federal overtime regulations – The federal overtime regulations that would raise the minimum salary for exempt white-collar employees are currently on hold as a result of an injunction. President-elect Trump may seek to have the regulations repealed or amended if the courts permit their enforcement.

In light of these and other potential changes, employers should be alert to developments from Washington and should confer with counsel regarding any actions that may become necessary as changes in current law are finalized.

Conclusion

We hope that this summary assists you in understanding some of the recent developments that will affect employers in 2017. Please recognize that this document does not contain a comprehensive listing of all new laws or decisions that regulate employment, and that the information provided is only a brief summary and should not be used as a substitute for legal advice tailored to a specific factual scenario.

If we can be of any assistance to you in understanding these new developments or in any other matter relating to employment, please do not hesitate to contact us.

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