2018 Employment Law Update

A REVIEW OF RECENT DEVELOPMENTS OF INTEREST TO EMPLOYERS

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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 2018. 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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Contents

Seminars

2018 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 2018.

Date	Topic
January 11, 2018	2018 Annual Update (San Jose)
January 16, 2018	2018 Annual Update (Burlingame)
February 15, 2018	Developing Effective Employee Handbooks
March 15, 2018	Managing Legal Risk in the Hiring and Onboarding Process
April 12, 2018	Alphabet Soup of Leave Laws
May 17, 2018	Reasonable Accommodation and the Interactive Process — Getting it Right
September 20, 2018	Performance Management, Discipline & Termination
October 18, 2018	Pay Them Now, or Pay Them Later: A Review of Current Issues and Recent Developments in Wage and Hour Law
November 15, 2018	A Manager's Guide to Discrimination, Harassment & Abusive Conduct

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

Discrimination, Harassment and Retaliation

Avalanche of Sexual Harassment Claims Brings Increased Focus to the Issue, and Heightens Risk for Employers

Bill Cosby ... Roger Ailes ... Donald Trump ... Bill O'Reilly ... Harvey Weinstein ... Kevin Spacey ... Mark Halperin ... James Toback ... Louis C.K. ... George W. Bush ... Roy Moore ... Al Franken ... Charlie Rose ... Matt Lauer. The list of prominent figures accused recently of sexual harassment continues to grow almost daily as this article goes to print, leaving little doubt that harassment will be one of the central issues employers confront as 2018 begins.

The law regarding sexual harassment is not new. It has been in effect, largely unchanged, for more than 50 years. Two key factors appear to have changed, however. First, more victims of harassment are willing to come forward and tell their stories. Second, many people are now more inclined than in the past to find complaints of harassment to be credible. The extraordinary number of recent complaints, the multiplicity of claimants in most cases, and the admission or overwhelming evidence of wrongdoing in most cases has forced many to confront the fact that harassment in the workplace is not a rare or isolated occurrence, but an experience shared by all too many.

Although it is too soon to know the long-term impact that recent events will have on the workplace, one easily foreseeable consequence is, of course, an increase in claims. Not only is an increase in the volume of claims foreseeable, but the probability of claimants prevailing is also likely to be greater than in the past. The burden of proof in harassment cases has not changed – it still rests with the plaintiff – but the willingness of many to believe that allegations of harassment are credible has increased.

Many of the catch phrases used by defendants in the past to dismiss allegations of harassment or marginalize complaining employees, such as "it's just locker room talk," "boys will be boys," "that's just John" and "it's a case of 'he said, she said'" (suggesting that allegations are not credible unless corroborated by a witness) will no longer be accepted and are likely to be seen as evidence of indifference to the issue. Defendants may still succeed in defeating claims with credible denials of harassing conduct, but defendants who seek to avoid liability by acknowledging the existence of certain behavior and merely minimizing its importance are likely to fare poorly in future litigation.

Just as the frequency of claims and employee victories is likely to increase, so, too, is it logical to anticipate that the amounts awarded by juries and arbitrators are likely to increase. Jurors who are less tolerant of harassing behavior than they were in the past may not only be more likely to find in favor of complaining employees, but also more likely to award substantial damages as a result of their increased sensitivity to the issue.

Prudent employers should be mindful of the trend, actively assessing their risk, and implementing measures to reduce it.

Recognizing Indicia of Risk

In the past, many employers comforted themselves with the belief that harassment was a relatively rare and isolated occurrence, something that might be found in other workplaces, but not their own. Recent cases indicate that the problem is pervasive, however. Still, some work environments pose a greater risk than others.

In 2016, a task force appointed by the Equal Employment Opportunity Commission identified 12 factors that could signal an increased risk of harassment in the workplace. Recent cases highlight other factors that suggest a heightened risk. Some of the factors identified by the task force, or notable from recent cases, include:

- Workforces with unusually powerful or highly valued employees – Organizations occasionally hesitate to challenge inappropriate behavior by employees who are 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. Many of the cases publicized recently in the media appear to involve harassers who held extraordinary power, or were perceived as extraordinarily important, in their organizations.

- Homogenous workforce – 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.

- 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.

- Lacks of women in senior positions – Statistics seem to indicate that harassment is much more likely to occur in workplaces where women do not hold a meaningful number of senior management positions. When women hold a third or more of the senior, most powerful positions in an organization, however, harassment is less prevalent.

Recent Regulations and Guidance 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 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 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 timely responses, (d) provides for a timely and impartial investigation by a qualified individual, (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 specific instruction to supervisors to report complaints to a designated company representative;

- 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.

Many employers have adopted policies that contain some, but not all, of these elements. Courts may interpret inadequate policies as evidence of an employer's indifference to harassment, so employers should review their policies and update them as necessary to ensure that they comply with the new requirements.

In May of 2017, the Department of Fair Employment & Housing (DFEH) issued further guidance to employers on workplace harassment and investigations. The guidance does not carry the force of law, but it reflects the DFEH's perspective on the standards to which employers should adhere in addressing harassment complaints. The DFEH recommends that anti-harassment programs include the following key elements:

- "Buy-in from the top" – Senior managers should serve as role models for the entire organization by understanding applicable policies and procedures and demonstrating appropriate workplace behavior. By insisting that senior executives attend training, for example, employers send the message that they consider the topic important and expect others to do likewise. In the words of the DFEH, senior management should not only "talk the talk," it should "walk the walk."

- Trained, impartial investigators – Persons who conduct investigations on behalf of an employer should not only be impartial, they should avoid even the perception of bias in order to encourage open discussion of the issues. Investigators should be trained in standard investigatory practices, including proper documentation and assessing credibility, and should possess more than just superficial knowledge of the law relating to harassment. In most cases, employers would benefit from utilizing independent outside investigators (licensed private investigators or attorneys, not human resources consultants) to conduct their investigations.

- Policies and procedures for investigations – The investigation procedure should satisfy basic due process standards by including interviews with the complaining employee, the accused employee, and any other persons with knowledge of facts relevant to the case, as well as a review of any relevant documentation, including email or text messages. Once the relevant evidence has been collected, the investigator should evaluate it and make any credibility determinations that may be necessary if the evidence is conflicting. The investigator should reach factual conclusions (i.e., "John made sexually suggestive comments to Marie"), not legal conclusions ("John sexually harassed Marie"), and report them to the employer so the employer can then determine if corrective action is necessary.

What Should Employers Do Now?

Employers who truly want to prevent prohibited conduct and reduce their risk will take some familiar steps, but do so with greater focus and urgency than in the past, consistent with the increased sensitivity that now exists. Employers should focus their attention initially on the following steps:

- Update policies as necessary – Employers should review existing policies to ensure they comply with recent changes in the law summarized above.

- Translate and distribute policies as required – 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 ensure that employees actually receive it.

- Provide meaningful, serious training – Employers of all sizes, not just those subject to mandatory training obligations under the law, should provide anti-harassment training to all managers, and a modified version of the training to non-managerial employees. Employers can maximize the impact and value of the training by providing it in person, rather than through online courses that, at best, typically elicit casual attention from participants. Employers should not tolerate employees who do not treat anti-harassment training seriously.

- Maintain records – Employers should be careful to maintain records reflecting their distribution of appropriate policies and their provision of training to managers and supervisors

- Investigate potential problems properly – When employers learn of potential harassment in their workplace (whether through a formal complaint or through other means), they should investigate. Investigations should be conducted by qualified, impartial investigators; human resources representatives are often ill-suited to conduct a proper investigation. In every case, the purpose of the investigation should be to determine whether harassment has occurred, and never to discredit the complaining employee or sweep a potentially sensitive issue under the rug.

- Take meaningful corrective action in response to violations – In today's environment, employers should demonstrate through actions, and not just words, that they will not tolerate harassment. If an investigation reveals that harassment has occurred, the employer should take corrective action that demonstrates its intolerance for the behavior and is reasonably calculated to ensure that the behavior does not occur again. Employers should not shy away from issuing strong written warnings because they do not want to sully a valuable employee's personnel file, and they should not resist terminating employment in cases involving more serious harassment. The primary purpose of corrective action should be to prevent further harassment and demonstrate intolerance of it; not to avoid alienating the harasser.

Pervasive Hugging May Create a Hostile Work Environment

In *Zetwick v. County of Yolo*, a federal appellate court weighed in on hugs in the workplace, and held that evidence of pervasive and unwelcome hugging is sufficient to support a claim of hostile environment harassment.

In *Zetwick*, County correctional officer Victoria Zetwick sued the County of Yolo and her supervisor, County Sheriff Edward Prieto, alleging that the Sheriff's habit of greeting her with unwelcome hugs created a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964, and the Fair Employment and Housing Act (FEHA).

Zetwick alleged that the Sheriff hugged her over a hundred times from 1999 to 2012. On one occasion, the Sheriff attempted to kiss Zetwick, ostensibly to congratulate her on her recent marriage. Because Zetwick turned her head away, the kiss partially landed on her lips. The Sheriff first became aware that Zetwick disliked his hugging in 2012, when she filed her administrative claim. Zetwick also claimed that she saw the Sheriff hug and kiss several dozen other female employees, but that the Sheriff only gave male employees handshakes. The County and Sheriff acknowledged that the Sheriff was a hugger, but disputed the number, frequency, and sexual nature of the hugs. The Sheriff also claimed that he hugged men on occasion.

After the lower court granted summary judgment for the County, the appellate court reversed the decision, finding that the trial court erred in believing that hugs and kisses on the cheek are "common workplace behavior" and in requiring the plaintiff to prove that the offensive conduct was "severe *and* pervasive," rather than "severe *or* pervasive." While the Sheriff's hugs may have been common in the workplace, and while some same-gender hugging may have occurred, the appellate court concluded the Sheriff's hugging was not necessarily within the scope of "ordinary workplace socializing." Rather, the court found that a reasonable juror might conclude from the frequency of the hugs that the Sheriff's conduct was not "ordinary workplace socializing" and had become abusive.

In addition, the appellate court concluded that the trial court's reduction of the number of hugs to a mathematical formula (finding that Zetwick was hugged only "around seven or eight times per year"), rather than considering the "cumulative effect" of the Sheriff's conduct was error. Instead, the court concluded a reasonable juror could find that hugs, in the "kind, number, frequency, and persistence," described by Zetwick, created a hostile environment. In addition, the court noted the potential "greater impact of harassment" from a supervisor as opposed to a co-worker.

What Should Employers Do Now?

- Remember to evaluate harassment claims from the perspective of the complaining employee – The Sheriff in the *Zetwick* case contended that he did not realize until 2012, years after he began hugging the plaintiff, that she found his behavior offensive. The *Zetwick* decision serves as a reminder that courts consider hostile environment claims from the perspective of the complaining employee, however, not from the perspective of the alleged harasser. If the complaining employee is offended, a hostile environment may exist, regardless of whether the alleged harasser intended to create such an environment.

Undocumented Workers Are Protected Against Discrimination, Harassment and Retaliation

The spotlight shined on immigrant workers this past year when the Trump administration decided to end the Obama-era immigration program known as "DACA," or, the Deferred Action for Childhood Arrival. DACA allowed some undocumented immigrants who entered the country illegally as minors to avoid deportation and be eligible for a work permit. The announcement concerning the end of DACA sparked not only nationwide protests, but also much attention and discussion about the rights of documented and undocumented immigrants in the workplace.

Some people believe that undocumented workers are taking jobs away from U.S.-born workers and thus should be deported. Others believe that undocumented workers should be embraced and treated fairly, as they accept lower-paying jobs most Americans do not want. Independent of any political viewpoint, employers should ensure they understand their legal obligations with respect to undocumented workers.

The FEHA and Title VII of the Civil Rights Act prohibit discrimination and harassment on numerous bases, including national origin. The protection created by the law extends to all employees, including undocumented workers. California Labor Code Section 1171.5 specifically extends legal protections granted under state law to California workers regardless of immigration status. As a result, employers should recognize that an employee's undocumented status does not create any defense to most claims for violation of employment law rights.

During 2017, the Ninth Circuit Court of Appeals reaffirmed that California public policy considers immigration status to be irrelevant in the enforcement of state labor, employment, and civil rights. In *Santillan v. USA Waste of California*, USA Waste terminated a 53-year-old garbage truck driver, Gilberto Santillan, after 32 years of employment for allegedly having four accidents in a 12-month period. Santillan disputed the accidents and claimed he was one of five older, Spanish-speaking employees fired or suspended after the company hired a new manager. Following a public outcry against Santillan's termination by his loyal customers, USA Waste agreed to reinstate Santillan if he passed, among other things, an E-Verify check to prove his right to work in the United States. (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.) When Santillan failed to provide information sufficient to enable USA Waste to complete the E-Verify check, the company terminated his employment again. The Ninth Circuit reversed the lower court's summary judgment finding in favor of USA Waste on the wrongful termination claim, determining California public policy prohibited the company from making Santillan's reinstatement remedy contingent upon the verification of his immigration status.

Use of E-Verify is voluntary for most employers, but some federal contractors and government agencies are required to utilize E-Verify to confirm an employee's eligibility for employment. California Labor Code Section 2814 generally prohibits employers from using E-Verify to check the status of an existing employee or an applicant that has not been offered employment, except as required by federal law or as a condition of receiving federal funding. Penalties up to $10,000 may be imposed for unlawful use of the E-Verify system.

What Should Employers Do Now?

- Be vigilant about harassment or discrimination based on "immigrant" status – The *Santillan* decision demonstrates that employees enjoy the protections of California's employment laws regardless of whether they possess documentation proving their right to work. While employers must comply with immigration laws, they must also recognize that even undocumented employees possess legal rights, and that they cannot evade liability for violations of law by relying on an employee's undocumented status.

- Ensure that I-9 status is checked properly, and at the right time – Employers who use the E-Verify system should properly train their personnel to ensure that it is used at the proper time – after an applicant has been offered employment. Employers should *not* seek to re-verify the identity or right to work of existing employees by requiring them to re-submit Form I-9 after commencing employment in the absence of specific information calling into question the validity of documents utilized at the time of hire because doing so could be construed as discriminatory.

Employer Not Required to Allow Employee to Rescind Resignation as Reasonable Accommodation

While the obligation of employers to provide reasonable accommodation to disabled employees is flexible and far-ranging, a California appellate court has held that it does not extend to permitting an employee to rescind her voluntary resignation.

In *Featherstone v. Southern California Permanente Medical Group*, the plaintiff, Ruth Featherstone, suffered from a chronic sinus condition that required her to take a medical leave of absence. Soon after she returned to work without any work restrictions, Featherstone notified her employer by phone that she had decided to resign. Her employer asked her to confirm her resignation by email, which Featherstone did three days later. Shortly thereafter, Featherstone claimed that she had resigned while she was suffering from an adverse drug reaction, and requested she be allowed to rescind her resignation. Her employer declined.

Featherstone sued, arguing that the refusal to allow her to rescind her resignation amounted to a failure to provide reasonable accommodation and constituted disability discrimination. The court of appeal rejected her claim, however, finding that an employer's refusal to allow a former employee to rescind a voluntary resignation (i.e., "a resignation free of employer coercion or misconduct") is not an adverse employment action, one of the essential elements of a claim for discrimination. The court held that "refusing to accept rescission of a resignation is 'not an adverse employment action for the simple reason that the *employment relationship has ended*.'"

What Should Employers Do Now?

- Recognize that rigid adherence to standard practices is inconsistent with reasonable accommodation – Despite the favorable outcome in the *Featherstone* case, employers should recognize that the obligation to provide reasonable accommodation is far-reaching, and that deviation from normal practices is the essence of reasonable accommodation. The appropriate response to a particular request depends heavily upon the specific facts and circumstances involved. As a result, it is not possible to provide "one-size-fits-all" advice suitable for every situation. In general, however, employers should almost never respond to a request for accommodation with a flat "no" – take any request under advisement, consider it carefully and, if it appears unreasonable, consider alternatives that might meet the employee's needs.

Wage & Hour Developments

Employers are familiar with the ongoing wave of wage-and-hour litigation that has plagued companies for the past 15 or more years. Unfortunately, the wave has neither crested nor lost its force. For that reason, we once again have numerous wage and hour developments on which to report.

The California Supreme Court Clarifies Rules Regarding Days of Rest

Most employers in California know that the Labor Code limits the number of consecutive days an employee may work. The relevant statutes, Labor Code Sections 551 and 552, provide that "[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven," and "[n]o employer of labor shall cause his employees to work more than six days in seven." Labor Code Section 556 exempts an employee from the previous two statutes if the employee's total hours of employment do not exceed 30 hours, "[i]n any week or six hours in any one day thereof."

Although they have been part of California law for many decades, the "day of rest" rules have not been actively litigated until recently. In June 2017, the California Supreme Court issued a decision clarifying the meaning of the "day of rest" rules, and providing much needed guidance to employers struggling with the plausible, multiple interpretations of these Labor Code sections.

Mendoza, et al. v. Nordstrom, Inc., involved two former Nordstrom employees who claimed they had worked more than six consecutive days on at least three occasions during their employment. Although initially unsuccessful at the district court level, the Ninth Circuit Court of Appeals asked the California Supreme Court to resolve three questions regarding the interpretation of the relevant Labor Code provisions:

- Is the day of rest required by Sections 551 and 552 calculated by the workweek, or does it apply on a rolling basis to any period of seven consecutive days?
- Does the exemption for workers employed six hours or less per day apply so long as an employee works six hours or less on at least one day of the applicable week, or does it apply only when an employee works six hours or less on every day of the week?
- What does it mean for an employer to "cause" an employee to go without a day of rest – force, coerce, pressure, schedule, encourage, reward, permit, or something else?

The California Supreme Court examined the legislative history and statutory intent behind the Labor Code provisions and answered the questions posed by the Ninth Circuit Court of Appeals as follows:

- The law requires one day of rest per workweek, rather than one day of rest in seven on a rolling basis. As a result, periods of six or more consecutive days of work are not *per se* unlawful.
- The rule regarding employees who work six hours or less applies only to those who work six hours or less on every day of the workweek in question.

- An employer "causes" an employee to go without a day of rest if it induces the employee to forego a day off to which he or she is entitled. Employers are not prohibited from permitting employees to work seven consecutive days within a workweek if they are fully informed of their right to rest but voluntarily choose to work instead of taking a day off.

What Should Employers Do Now?

- Define your workweek – Employers should confirm that their Employee Handbook specifically defines the company's workweek. Recall that the definition of a "workweek" is any seven consecutive days, starting with the same calendar day each week, beginning at any hour of the day, so long as it is a fixed and regularly recurring period of 168 hours. If an employer fails to establish its workweek, the California Labor Commissioner, for example, will use the default of Sunday through Saturday, with the workday lasting from 12:01 a.m. to midnight.

- Don't require more than six consecutive days of work – Be careful not to require non-exempt employees to work seven days within a single workweek unless they work no more than 30 hours during the workweek, and no more than six hours in any single work day.

- Seek employee consent in appropriate circumstances – For those situations when an employer permits an employee to work seven consecutive days within a workweek, consider implementing a practice of providing written notice to the employee of their rights, and gaining confirmation that the employee is electing to voluntarily work the seventh day.

The Vaquero Decision Further Complicates Rules Regarding Commission Pay Plans

In 2013, the California Court of Appeal ruled in *Gonzales v. Downtown LA Motors, LP*, that mechanics paid on a piece-rate basis were entitled to be paid at least the minimum wage for time spent performing tasks not compensated on a piece-rate basis, in addition to the piece-rate compensation for repair work. The *Gonzales* court specifically declined, however, to address the question of whether employers are obligated to pay hourly wages during rest breaks to non-exempt employees generally paid on a piece-rate basis, leaving that question to be addressed in future cases. In *Vaquero v. Stoneledge Furniture LLC*, the Court of Appeal extended the reasoning of the *Gonzales* decision to employees paid on a commission basis or "any other compensation system that does not separately account for rest breaks and other nonproductive time."

The *Gonzales* case involved mechanics paid on a piece-rate basis for their work in repairing automobiles. As is common in the auto repair industry, Downtown LA Motors credited its mechanics for a flat number of hours of work for performing a particular repair task, regardless of the actual time the mechanic spent performing the repair. When not performing repairs, mechanics engaged in other work, such as attending meetings and cleaning their work stations. Downtown LA Motors guaranteed that the mechanics' average compensation for all hours worked would not fall below the minimum wage, but it did not pay the mechanics separately for the time spent performing the non-repair tasks not paid on a piece-rate basis if their piece-rate wages, divided by their total hours of work, matched or exceeded the minimum wage. The appellate court held that the compensation plan represented illegal "pay averaging" and that the mechanics were entitled to be paid at least the minimum wage for time spent performing tasks not compensated on a piece-rate basis, in addition to the piece-rate compensation for repair work.

In *Vaquero*, the plaintiffs worked as sales associates and alleged that their compensation plan violated California law because it did not provide them with separate pay for rest breaks, which are considered paid time under California law. The appellate court analyzed the language of the applicable Wage Order and relevant statutes before concluding that the Wage Order "requires employers to separately compensate employees for rest periods if an employer's

compensation plan does not already include a minimum hourly wage for such time." As a result, employees paid on a commission basis are entitled to be paid at least the minimum wage for time devoted to tasks that do not generate commissions, including rest breaks.

Many businesses pay some of their employees on a commission basis. In the wake of the *Vaquero* decision, employers who pay employees on a commission basis should ensure that they comply with the following rules in order to avoid potential liability.

What Should Employers Do Now?

- Compensate employees separately for time spent performing tasks not paid on commission – If employees perform some work that is paid on a commission basis and other tasks that cannot generate commission income, employers must pay the employees separately for the time spent performing the latter work. In order to comply with this obligation, employers must require employees paid on a commission basis to track and record the time they devote to tasks that cannot generate commission income.

- Compensate commissioned employees separately for time spent on rest breaks – The *Vaquero* decision clearly requires employers to pay employees paid on a commission basis at least the minimum wage for time spent on rest breaks.

- Calculate overtime correctly for non-exempt employees who earn commissions – Non-exempt employees are generally entitled to overtime compensation if they work more than eight hours in a day or 40 hours in a week. The calculation of overtime can become complicated when a non-exempt employee's compensation includes both hourly wages and incentive compensation such as commissions. A thorough explanation of overtime compensation is beyond the scope of this publication, but a non-exempt employee's regular rate of pay (the rate used to calculate overtime) is generally equivalent to his or her total non-discretionary compensation for the week (excluding the overtime premium) divided by the total number of hours worked.

The Labor Commissioner, the Superior Court, and Attorney Fees: A Sobering Reminder

In a case that can fairly be characterized as a tale of caution, a California Court of Appeal affirmed a lower court ruling and award of $31,365 in attorney's fees flowing from a dispute originally involving just $303.55 in unpaid wages.

In *Beck v. Stratton*, defendant Thomas Beck hired Anthony Stratton in September of 2013. Mr. Stratton quit his job two months later, in November 2013, while Mr. Beck was out of town. Mr. Stratton left a "confusing note" on Mr. Beck's desk claiming that he was owed a total of $1,957.95 in wage, overtime, and other compensation. Of that, $1,075 was for 43 hours of straight time work at Mr. Stratton's hourly wage of $25.

Mr. Beck contacted his payroll provider, ADP, and instructed it to pay the $1,075 in straight time wages. For some reason, ADP paid Mr. Stratton $771.45 instead. Mr. Beck later paid the other monies Mr. Stratton requested, but did not pay the $303.55 difference making up the remainder of Mr. Stratton's straight time wages. Mr. Stratton filed a claim for unpaid wages with the Division of Labor Standards Enforcement which awarded Mr. Stratton the $303.55 he sought, plus $5,757.46 in liquidated damages, interest, and statutory penalties.

Mr. Beck promptly sought review of the Labor Commissioner's order in the Los Angeles County Superior Court, and the matter proceeded to a bench trial. The Labor Commissioner elected to represent Mr. Stratton in the matter.

The trial court found that Mr. Stratton was entitled to $303.55 in unpaid wages plus $6,778.85 in liquidated damages, interest, and statutory penalties. Almost 60 days later, Mr. Stratton filed a motion for attorney's fees in the amount of $43,835. Mr. Beck challenged the amount of fees requested as unsupported and unreasonable given the value of the underlying award. The court declined to award the full amount sought, but concluded that the time expended "by and large, seems reasonable" and awarded $31,365.

Mr. Beck appealed the Superior Court's decision, but the appellate court affirmed the fee award. In contrast with other cases of similar nature, the court found that although Mr. Beck had initially acted in good faith by calling ADP and arranging payment of straight time wages that were owed, he "could no longer claim in good faith the [payment ADP made] was the full amount of straight time owed" to Mr. Stratton by the time of the hearing before the Labor Commissioner, resulting in an intentional withholding of wages that justified penalties and attorney's fees.

What Should Employers Do Now?

- Pay all wages that are admittedly owed prior to any hearing – The *Beck* decision reinforces the importance of paying all compensation that is admittedly owed to an employee by the proper deadlines, and prior to the hearing of any disputed issues with the Labor Commissioner.

- Carefully consider the risks of appealing Labor Commissioner rulings to Superior Court – Employers should consider all potential risks before appealing a decision by the Labor Commissioner to Superior Court. Although both parties in a wage dispute have the ability to seek review if they are dissatisfied with a decision by the Labor Commissioner, the employee enjoys the distinct advantage of potentially being represented by the state. Additionally, Labor Code Section 98.2 provides for an award of reasonable attorney fees and costs against the party unsuccessful on appeal and further provides that "[a]n employee is successful if the court awards an amount greater than zero. Accordingly, the employer assumes significant additional risks when seeking superior court review in such circumstances.

The Brunozzi Decision – The Interaction Between Production Bonuses and the Regular Rate of Pay

When a non-exempt employee is entitled to overtime compensation, the hourly rate of pay from which the overtime compensation is calculated is known as the employee's regular rate of pay. The regular rate of pay forms the basis for all overtime calculations. If the regular rate is not determined properly, the employee's calculation of overtime pay will be incorrect, leading 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, since the regular rate calculation includes other forms of compensation as well, such as bonuses paid for productivity. Additionally, the *method* by which an employer computes production bonuses, and incorporates the production bonuses into the computation, may ultimately cause an error in an otherwise already complicated calculation.

In *Brunozzi v. Cable Communications, Inc.*, the Ninth Circuit Court of Appeals addressed the issue of whether Cable Communications' computation of production bonuses for its Comcast cable installers caused the company to under calculate the regular rate of pay, and ultimately cause the company to under compensate for overtime hours worked.

Cable Communications compensates its cable installers on a piece-work basis by paying the installer a fixed rate for each installation task, plus a production bonus. The company starts by calculating the value of all piece-work tasks performed, minus any adjustments made for incomplete work or similar reasons. If the installer works overtime,

the company divides the total earned and divides it by the number of hours worked to produce an "average hourly" rate of pay for that week. The "average rate" is then divided by two and multiplied by the number of overtime hours worked to arrive at the installer's base overtime rate. The company engaged in a complicated calculation to determine if the installer earned a production bonus by multiplying the sum of the installer's piece-rate total and overtime total by a fixed figure, then subtracting the overtime already accounted for in the previous calculation. In general, the installers argued that the company's practice enabled it to skirt the full burden of the overtime pay requirement because the production bonus decreased in proportion to the number of overtime hours worked. The installers claimed that the regular rate of pay should be equivalent to the amount earned for piece-rate tasks plus the production bonus, divided by the total hours worked.

Examining the issue under the Fair Labor Standards Act (FLSA), the court agreed with the installers. The court first found that Cable Communications did in fact reduce the installers' production bonus by the overtime premium they earned. However, because the production bonus formed part of the installers' income during a normal, non-overtime week, diminishing or eliminating the production bonus resulted in an installer being paid at a reduced hourly rate during weeks when he or she worked overtime. The court concluded that an agreement, practice, or device that lowers the hourly rate of pay during statutory overtime hours is expressly prohibited by FLSA regulations.

What Should Employers Do Now?

- Be sure you calculate the regular rate of pay accurately – The Brunozzi decision reinforces the importance of calculating the regular rate of pay correctly in the first instance. In order to minimize the risk of calculating an employee's regular rate of pay incorrectly when the employee receives a production bonus, and thereby creating potential liability for unpaid overtime, employers should evaluate their current practice to ensure that production bonus amounts are fully credited in the subject calculation without regard to whether an employee worked overtime hours in any given workweek.
- Remember that both state and federal law may apply, and that they can differ – Recall that employers continue to await further guidance by the California Supreme Court regarding the proper method by which to calculate the regular rate of pay in connection with a flat sum bonus. Until the Supreme Court provides clarity, employers remain faced with the choice of applying federal law, which would probably survive scrutiny in a court setting, or following the DLSE Manual, which would probably receive favor before the Labor Commission.

The Lopez Decision – The Importance of Perfect Pay Stubs

Employers are all too familiar with the ongoing wave of wage-and-hour litigation that has plagued companies of all sizes for many years. Some claims arise from alleged failure to comply with new or complex laws, such as those relating to overtime exemptions. Other claims arise from a failure to comply with laws that are well-established and relatively straightforward. One of the latter types of claims, involving alleged violations of pay stub rules, has continued in popularity among plaintiffs' attorneys and is problematic for employers.

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, and
- 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. In April 2015, plaintiff Eduardo Lopez filed a complaint in Alameda County Superior Court alleging a single cause of action under the Private Attorneys General Act of 2004 (PAGA) for his employer's failure to include required information on itemized wage statements, in particular, the last four digits of its employees' Social Security numbers. In its defense, the employer argued that Mr. Lopez could not prevail because he did not suffer any injury resulting from a "knowing and intentional" violation of Section 226, as required by that section, and that the court should not award penalties for the employer's inadvertent wage statement error. The trial court agreed with the employer, and Mr. Lopez appealed.

The appellate court first analyzed PAGA, the legal vehicle pursuant to which Mr. Lopez promoted his claim. The court noted that PAGA was enacted to improve the enforcement of Labor Code violations because many Labor Code violations authorized criminal sanctions only, district attorneys had other priorities, and understaffed state enforcement agencies lacked sufficient resources to pursue civil sanctions. Accordingly, it was in the public interest to allow aggrieved individuals, such as Mr. Lopez, to act as a private attorney general to recover civil penalties for Labor Code violations. Importantly, the court further noted that PAGA creates a default civil penalty *in addition* to any other remedies available under state or federal law.

Ultimately, after examining legislative history of both Labor Code Section 226 and PAGA, the court concluded that the remedy provided under the Labor Code was, and continues to be, the recovery of individual damages, while a PAGA complaint seeks separate civil penalties within its own statutory framework. In other words, plaintiffs in PAGA suits do not need to prove a "knowing and intentional" violation of the statute to recover civil penalties.

What Should Employers Do Now?

- Ensure that pay stubs contain all required information – The *Lopez* decision is another reminder that employers must be diligent in ensuring that pay stubs include all information required under Labor Code Section 226. Regardless of whether employers process paychecks internally or through an outside vendor, employers should review the documentation provided to employees with each paycheck to assure that all of the information listed above is included in either the pay stub or in a separate document that accompanies each check. In the event documentation is not compliant, employers should confer with counsel to formulate a plan to achieve compliance and manage any existing risk of liability.

- Do not assume that pay stubs are compliant simply because a payroll vendor prepared them – Be aware that even some payroll vendors utilize pay stubs that do not comply with all of the requirements of California law, so employers should not assume that they are immune to risk merely because they utilize a vendor to process their payroll.

- Utilize the safe harbor when it is available – Recall that in October 2015, Governor Jerry Brown signed Assembly Bill 1506 amending PAGA to provide employers an opportunity to cure certain wage statement defects. That law impacts only PAGA claims where the alleged defects are that the employer failed to include (a) the inclusive dates of the pay period, and (b) the legal name and address of the employer. However, in that limited circumstance, the law permits the employer to correct and reissue compliant wage statements for the previous three years to all employees that received defective ones. The employer must take the opportunity to correct the deficiencies within 33 days of receiving notice of a PAGA claim.

Give 'Em a Rest – California Supreme Court Rules Employers Must Relieve Non-Exempt Employees of All Duties During Rest Break

Most employers have long known that California's Wage Orders require employers to relieve non-exempt employees of all duties during meal periods. Because the Wage Orders do not specifically state that employers must relieve non-exempt employees of all duties during rest breaks, however, many have believed that it was not necessary to do so, and that non-exempt employees could be required to remain "on call" during rest breaks. The California Supreme Court's recent decision in *Augustus v. ABM Security, Inc.* debunks that proposition and confirms that employers must relieve non-exempt employees of all duties during rest breaks, just as they do during meal periods.

In *Augustus*, thousands of current and former security guards claimed in a class action lawsuit that ABM Security had failed to consistently provide uninterrupted rest breaks to them. Instead, the company required its security guards to monitor their radios and pagers during rest periods, to "remain vigilant," and to respond as needs arose.

The company argued that employees commonly engaged in activities such as reading, smoking and making personal phone calls during rest breaks, and emphasized that the applicable Wage Order requires that non-exempt employees be "relieved of all duties" during meal periods, but contains no similar requirement with respect to rest breaks. The California Supreme Court sided with the employees, concluding that California prohibits "on-call" rest breaks and requires employers to relinquish all control over non-exempt employees during rest breaks.

The Court particularly focused on the practical realities of a ten-minute rest break, noting that the limitations on movement caused by the short duration of rest breaks, together with the obligation to remain on call imposed by ABM Security upon its guards, combine to force employees to remain "ready and capable of being summoned to action," which the Court found "irreconcilable" with employees' freedom to use rest periods for their own needs. As the Court plainly stated, "A rest period, in short, must be a period of rest."

While the Supreme Court insisted that non-exempt employees must be relieved of all duties during rest breaks, it also emphasized that nothing in its decision prohibits an employer from "reasonably rescheduling" a non-exempt employee's rest period when the need arises.

What Should Employers Do Now?

- Ensure that supervisors permit non-exempt employees to take uninterrupted rest breaks for every four hours of work, or major fraction thereof. If an employee cannot be relieved of all duty during a scheduled break, consider whether the employee should be paid for a full hour at her regular rate of pay or be given another 10-minute rest period.

- If necessary, update your Employee Handbook to confirm that employees are fully relieved of all work-related duties during rest periods.

The Equal Pay Act, the Fair Pay Act, and You

The right of employees to be free from discrimination in the workplace is protected under both state and federal law. With respect to compensation, the Equal Pay Act of 1963 (EPA) specifically prohibits discrimination on the basis of sex in compensation, including salary, overtime pay, bonuses, stock options, profit sharing, bonus plans, life insurance, vacation and holiday pay, and benefits. In practice, the EPA requires that men and women be given equal pay for jobs that require substantially equal skill, effort and responsibility, performed under similar conditions, within the same establishment.

More than a decade before the EPA became law, California enacted Labor Code Section 1197.5, the California Equal Pay Act (CEPA). Like its federal counterpart, the CEPA forbids an employer from paying, "...any of its employees at wage rates less than the rates paid to employees of the opposite sex, for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions...."

Since enacting the CEPA, California has strengthened its law in a number of ways. Under the current version of the law, an employee claiming discrimination in pay must show only that she is not being paid the same as a male counterpart for substantially similar work. The law expressly permits an employee to compare her pay to that of a male who holds a different job, but one that is substantially similar in terms of skill, responsibility and working conditions.

If the employee succeeds in demonstrating that she is paid less than a male employee for substantially similar work, the employer must then justify the difference by showing that it is attributable entirely to (a) a seniority system, (b) a merit system, (c) a system that measures earnings by quantity or quality of production, or (d) a bona fide factor other than sex (such as education, training or experience) consistent with a business necessity. Employers must also show that any factor cited as a reason for the discrepancy is applied in a reasonable fashion. The CEPA was further amended in 2016 to include race and ethnicity as protected categories.

In late April 2017, the Ninth Circuit Court of Appeals decided *Rizo v. Yovina*, a case which examined whether a school district's reliance on a female employee's salary history can be considered "a bona fide factor other than sex" under the EPA. In that case, Fresno County hired a math consultant, Ms. Rizo, who had worked as a math teacher at a middle school in Arizona. The County considered Ms. Rizo's most recent prior salary and placed her within its compensation structure at a level that most closely matched her previous earnings, plus 5%. A few years after commencing her employment, Ms. Rizo discovered during a lunch conversation that several male math consultants were paid more than she was, and complained to the County. Dissatisfied with the County's response, Ms. Rizo filed suit.

The County conceded that it paid Ms. Rizo less than comparable male employees for the same work. However, it further argued that doing so was lawful because the pay differential was based on Ms. Rizo's salary history, a "factor other than sex," among other business reasons. Although Ms. Rizo argued that relying on prior salary history would perpetuate a discriminatory wage disparity between men and women, the court determined that an employee's salary can be considered a "factor other than sex," but that an employer must show that doing so "effectuates some business policy" and is done "reasonably in light of [its] stated purpose as well as its other practices."

What Should Employers Do Now?

- Recognize the differences between state and federal law on this topic – The *Rizo* case originated before California enacted the CEPA, which states that "prior salary shall not, by itself, justify any disparity in compensation." Stated differently, employers may in some situations use salary history as a factor in setting compensation, but any pay gap between sexes must be based on at least one other lawful factor such as job experience. Employers that have considered salary history in the past when making hiring decisions should reevaluate their compensation structure and confirm that differences in pay between employees of different genders who perform substantially similar work are justified by permissible factors.

- Do not inquire about salary history during the hiring process – Effective January 1, 2018, California Labor Code Section 432.3 prohibits employers from seeking information, orally or in writing, personally or through an agent, regarding an applicant's prior compensation and benefits. The new Labor Code section is similar in nature to San Francisco's "Parity in Pay" ordinance which will become effective on July 1, 2018.

Leaves of Absence Developments

Protected Leave, Failure to Return or to Provide Proper Documentation and Job Abandonment – A Reminder Not to Jump the Gun

Managing leaves of absence is one of the most vexing tasks for any company, particularly when the leave involves an employee who has performed poorly or been subjected to discipline recently. Employers are often tempted to use an employee's failure to comply with leave procedures as a basis for terminating an employee already on "thin ice." In fact, when a leave of absence involves an employee who has performed poorly or been subjected to recent discipline, employers should be especially sensitive to their legal obligations and avoid relying on leave issues as a convenient excuse to end the employee's employment. The *Bareno v. San Diego Community College District* case is a good example of how an employer went wrong in just such a scenario.

In *Bareno*, the plaintiff was a long-term employee who was performing poorly and had demonstrated unsatisfactory attendance and behavior. Immediately following a meeting to discuss these issues and a disciplinary suspension, Bareno informed the District that she was experiencing medical problems and needed a leave of absence. Upon returning from her suspension, Bareno requested a leave of absence for one week pursuant to the California Family Rights Act (CFRA). The District granted Bareno's request.

As Bareno's initial leave was expiring, controversy arose. Bareno contended that she submitted a second medical certification to the District, extending her leave of absence by another week. The District contended that it never received the second certification. After Bareno failed to return to work upon the expiration of her original leave and was absent for five more days without further communication, the District treated her as having abandoned her position and ended her employment.

Once Bareno received the District's termination letter, she contacted the District, provided it with another copy of the second medical certification, and challenged the decision to treat her as having abandoned her position. The District reviewed the second medical certification but decided to stand on its decision to treat Bareno as having abandoned her position.

Bareno filed suit, alleging that the District had violated her rights under the CFRA. While the District prevailed on summary judgment at the trial court level, the appellate court reversed the decision and, in doing so, provided a tutorial on an employer's obligations under the CFRA when it has knowledge that an employee has a medical condition that qualifies for a protected leave.

First, the court rejected the District's argument that Bareno did not notify the District of the need for an extension of her initial CFRA leave in a timely manner. The court also rejected the District's argument that the second doctor's note was deficient. In assessing the sufficiency of Bareno's request for CFRA leave and the sufficiency of her medical certification, the court focused on the regulations adopted by the Fair Employment and Housing Commission following the passage of the CFRA. Those regulations make clear that:

- Employees seeking leave pursuant to the CFRA need only provide notice sufficient to make the employer aware that the employee needs CFRA leave, and the anticipated timing and duration of the leave; and
- If necessary, the employer should inquire further of the employee to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information).

The court noted that the CFRA and its regulations contemplate that employees will be provided with reasonable time to request leave for a qualifying purpose, and to provide the supporting certification necessary to demonstrate their right to the requested leave, particularly when the need for leave is not foreseeable or when circumstances have changed subsequent to an initial request.

Finally, the Court concluded that the evidence could support Bareno's claim that the District elected to characterize Bareno as having abandoned her job in retaliation for her having exercised her rights under the CFRA.

What Should Employers Do Now?

- Review your leave policies and forms to make sure they are simple, clear and compliant – Leaves of absence are difficult to manage under the best of circumstances, but having a clear process that is communicated to employees and followed by management and human resources can help prevent missteps.
- Permit human resources to manage the process – Supervisors and managers generally lack the knowledge necessary to make proper decisions regarding leaves of absence, and they are more likely than human resources personnel to permit extraneous factors such as performance or discipline issues to influence their decisions.
- Resist the temptation to avoid communication with the employee – Employers should communicate proactively with employees regarding leave of absence issues, and generally should not rush to rely on an employee's failure to communicate as a basis for an adverse decision.
- Beware of retaliation claims – The CFRA and the FMLA prohibit retaliation against employees who exercise their right to take leave. Employers who are considering any adverse action against an employee who has recently taken or requested CFRA or FMLA leave should confer with counsel to understand all of the risks involved.

Are You Sick of Hearing About Paid Sick Leave Yet?

Since California enacted its paid sick leave law in 2015, the Division of Labor Standards Enforcement (DLSE) has issued interpretive guidance on multiple occasions and numerous cities and counties have enacted their own ordinances on the subject, leaving employers to confront a confusing patchwork of laws.

In 2017, the DLSE attempted to provide further guidance by issuing an update to its California Paid Sick Leave: Frequently Asked Questions (FAQs). The updated FAQs address questions regarding the use of "grandfathered" paid time off (PTO) policies and the interaction between California's paid sick leave law and employer attendance policies. Highlights from the updated FAQs include the following:

- The PTO Rate of Pay Issue – Previous FAQs stated that employers may comply with sick leave requirements through a "grandfathered" (i.e., existing) PTO policy that allows employees to take paid time off for the same reasons permitted by California sick leave law, and otherwise meets the minimum requirements of the law. In other words, if an employer's existing PTO plan offered at least the

minimum amount of paid leave that could be used for the purposes of California Paid Sick Leave, then the employer could continue to use its existing PTO plan. The FAQs updated during 2017 confirm that California law only prescribes the rate of pay for paid sick time, and does not regulate how employees are paid when they take time off for other purposes. As a result, employers with PTO policies may pay employees on vacation or personal leave at a different rate than the rate required by state law for sick leave.

- Attendance Policies and California Paid Sick Leave – Many employers utilize attendance policies which assign an "occurrence point" for unscheduled and unapproved absences. These policies expose employers to potential liability because any adverse action based on the use of paid sick time may be considered retaliation for the exercise of a legal right. The updated FAQs confirm that not all forms of leave taken for illness or related purposes qualify for the anti-retaliation protections, however. California law prohibits disciplinary action only with respect to an employee's use of "accrued and available paid sick leave as specified under the statute." The law specifically protects the right of employees to request paid leave that has been earned – not simply the right to seek leave for medical purposes. Accordingly, an employer may not discipline an employee for an unscheduled absence that occurs for a qualifying reason if the employee uses available and accrued paid sick leave time. Note that there are many laws that protect employees who are absent for medical reasons or to care for a family member who has medical issues. Accordingly, we generally counsel against occurrence – based attendance policies and employers should tread carefully when considering discipline against an employee who they know to be absent for a medical reason or for the care of a family member experiencing a medical issue.

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.

- If you are using a grandfathered PTO policy, confirm that it fully complies with the law – PTO policies will satisfy the requirements of state law only if they provide at least as much leave as required by state law to all employees who would be eligible for sick leave under state law (not just those who the employer deems eligible for PTO), and on terms and conditions at least as generous as those applicable under the law.

- Consult counsel regarding any potential adverse action for absences related to a medical condition – A variety of laws may come into play whenever an employer considers taking action against an employee for absences due to a medical condition. Prudent employers should assess their obligations under all applicable laws before taking action.

Let's Talk About Binding Arbitration Again…

Over the last several years, the California Supreme Court has issued several opinions that enhanced an employer's ability to use and enforce a mandatory arbitration agreement that forces an employee to resolve claims against the employer through the process of binding arbitration rather than through a jury or court trial. Provided the mandatory arbitration agreement does not violate the standards set by the Court for procedural and substantive unconscionability, an employer may require an employee to resolve wage disputes, which would otherwise be resolved through the Labor Commissioner process, through binding arbitration (*Sonic Calabasas A., Inc. v. Moreno*). Subject to the same standards, an employer may also require an employee to pursue claims against the employer in an individual capacity and not as part of a class action (*Iskanian v. CLS Transportation Los Angeles, LLC*). Given the potential advantages of having a dispute decided by an arbitrator instead of a jury, many employers are very interested in entering mandatory arbitration agreements with all of their employees.

While California law has certainly moved toward greater enforcement of such agreements over the last several years, there remain two areas of challenge. First, the one employment-related claim the California Supreme Court carved out from mandatory pre-dispute arbitration in the *Iskanian* decision is a claim brought by an employee in a representative capacity, such as under the (PAGA). Such claims are routinely brought by plaintiff employees in wage and hour class action proceedings and allow the plaintiff employee to sue, essentially as a proxy for the state enforcement agency, to recover Labor Code penalties. PAGA claims are favored by plaintiff lawyers because they allow for the award of attorney fees to the prevailing plaintiff.

The employer in *Iskanian* petitioned the United States Supreme Court to grant *certiorari* hoping the United States Supreme Court would conclude that the California PAGA carve-out was inconsistent with the Federal Arbitration Act (FAA) and case law interpreting that law. Unfortunately, the United States Supreme Court declined to grant *certiorari* and the *Iskanian* PAGA carve-out remains the law in California until a case reaches the United States Supreme Court and that Court issues a different opinion. During 2017, both a California state court of appeals and the federal Ninth Circuit Court of Appeals again held that California law will not enforce a mandatory arbitration agreement that attempts to force an employee to give up their right to bring a PAGA claim.

The second remaining obstacle to the enforcement of a mandatory arbitration agreement in California is the National Labor Relations Act (NLRA). The United States Supreme Court is poised to decide during 2018 whether a class action waiver contained within an otherwise enforceable mandatory arbitration agreement is unenforceable because it violates the right of an employee to engage in "concerted, protected" activity under the NLRA.

If the United States Supreme Court holds that the NLRA does not preclude a class waiver in an otherwise enforceable arbitration agreement, the only remaining carve-out will be the PAGA claim carve-out that has not yet been decided by the United States Supreme Court.

What Should Employers Do Now?

- <u>If you have not implemented mandatory arbitration agreements yet, you should consider waiting until the Court issues an opinion during 2018</u> – Rolling out arbitration agreements across a work force can be a time-consuming and expensive process, and should be carefully considered with counsel. If you have not gone through the process yet, it probably makes sense to await the United States Supreme Court opinion expected during 2018 on the NLRA issue. Consult with counsel after that opinion is issued to determine whether mandatory arbitration agreements make sense for your company and workforce.

- If you have already implemented mandatory arbitration agreements, sit tight – If you have already gone through the process of implementing mandatory arbitration agreements for your employees, wait to see what 2018 brings from the United States Supreme Court and then determine whether revisions to those agreements are necessary.

1. The Court heard oral argument in October 2017 in *Epic Systems v. Lewis*, *Ernst & Young LLP et al. v. Morris* and *NLRB v. Murphy Oil*. All three cases squarely raise the issue of the NLRA and the enforceability of a class action waiver in an arbitration agreement otherwise enforceable under the FAA.

New Legislation Affecting Employers in 2018

New Laws Restrict Inquiries Concerning Criminal Convictions and Salary History

In 2017, California passed two new laws that further restrict employers' ability to seek certain information regarding applicants during the hiring process – one relating to criminal history and the other to compensation history.

New Government Code Section 12952, the so-called "Ban the Box" law, prohibits public and private employers with five or more employees from (a) requesting disclosure of an applicant's criminal conviction history on a job application form, (b) seeking or considering information regarding the criminal conviction history of an applicant until that applicant has received a conditional job offer; and (c) seeking or considering information about arrests, participation in a diversion program, or certain convictions when conducting a criminal background check. If an employer rejects an applicant based solely or in part on the applicant's conviction history, the employer must comply with various procedures, including providing the applicant with written notice of the decision and an opportunity to respond.

The second new law, Labor Code Section 432.3, prohibits an employer from requesting compensation information about a job applicant. Employers are also prohibited from relying on the salary history of a job applicant in deciding whether to extend a job offer or in determining the salary to offer an applicant. If an applicant voluntarily and without prompting discloses her salary history, however, an employer may consider the information in determining the salary for that applicant. In addition to these proscriptions concerning salary history, the new law also requires employers to disclose the pay scale for a position in response to an applicant's request.

What Should Employers Do Now?

- Review and revise job applications and interview forms – Employers should review and update their job applications and interview forms to eliminate improper (but common) questions about criminal conviction and salary histories.
- Advise Human Resources staff and hiring managers of the new laws – Employers should inform anyone involved in the hiring process about the new requirements restricting pre-employment inquiries concerning criminal conviction and salary histories. Among other things, Human Resources staff and managers should be familiar with appropriate and inappropriate interview questions.

New Regulations Concerning Transgender Rights in the Workplace Issued by the California Department of Fair Employment and Housing

In last year's Annual Update, we reported about new guidelines issued in 2016 regarding the rights of transgendered employees. Since then, the California Department of Fair Employment Housing (DFEH) has gone beyond mere guidance by implementing new regulations regarding transgender identity and expression in the workplace, which became effective on July 1, 2017.

The new regulations re-define the term "transgender" as referring "to a person whose gender identity differs from the person's sex assigned at birth…," and they also provide updated definitions of "gender expression," "gender identity," "sex," "sex stereotype," and "transgender," as well as a definition of "transitioning" not previously provided.

The new regulations address many of the same topics that were addressed in last year's guidance, thereby converting non-binding advisory comments into law. Key provisions of the new regulations include the following:

- Restrooms – Employers must now provide equal access to comparable, adequate and safe facilities without regard to an employee's sex. Employers must permit employees to use facilities that correspond to their gender identity or gender expression, and they may not require employees to provide proof of their sex or gender to use facilities designated for use by a particular gender. . Single-occupancy facilities must use gender-neutral signage, such as "Restroom," "Unisex," "Gender Neutral," "All Gender Restroom," etc.

- Physical appearance, grooming, and dress standards – Employers are now prohibited from imposing upon an applicant or employee any physical appearance, grooming, or dress standard that is inconsistent with an individual's gender identity or gender expression in the absence of a business necessity.

- Transitioning – The new regulations prohibit employers from discriminating against an individual who is transitioning, has transitioned, or is perceived to be transitioning. "Transitioning" is defined as a process some transgendered persons go through to begin living as the gender with which they identify, rather than the gender assigned to them at birth. Some of the examples of transitioning include changes in name and pronoun usage, facility usage, and undergoing hormone therapy or other medical procedures.

- Preferred name and gender – Employers must abide by an employee's request to be identified by a certain name or pronoun, including gender-neutral pronouns. Employers can insist on using an employee's legal name or gender only if required by law to do so.

- Documentation – The regulations prohibit employers from inquiring about or seeking documentation regarding sex, gender, gender identity, or gender expression as a condition of employment.

What Should Employers Do Now?

- Accept the law and ensure that Human Resources staff and managers comply – Although some may disagree with the evolving law regarding transgendered rights, employers seeking to avoid unnecessary claims should ensure that their Human Resources staff and managers understand the law and comply with it. Among other things, Human Resources staff and managers should be familiar with rules regarding restroom use, dress and grooming standards, and the use of pronouns.

- Appropriate signage for single-occupancy restrooms – Employers who have single-occupancy facilities should review the signage to assure that gender-neutral language is used.

New Laws Expand Parental Rights in the Workplace

In keeping with the legislative trend favoring greater rights for parents, both the State of California and San Francisco enacted legislation in 2017 that expands the rights of working parents in the workplace.

California's New Parent Leave Act, codified as Government Code Section 12945.6, expands parental leave rights by requiring employers with 20 to 49 employees to provide up to 12 weeks of unpaid parental leave to eligible employees for the purpose of bonding with a new child. Employees eligible for leave pursuant to the new law include

those who have worked for the employer for at least a year, have worked 1,250 or more hours for the employer in the past year, and work in a facility with at least 20 employees or in a facility where there are at least 20 employees within 75 surface miles. Employees with no fixed work site will be considered to work from the site to which they report, the site from which their work is assigned, or the site designated as their home base. Upon completion of leave, employees are generally entitled to reinstatement unless their employment would have terminated even if they had not taken leave.

San Francisco has also enacted a new ordinance that expands the rights of nursing mothers working anywhere within the geographical boundaries of the city. Among other things, the ordinance requires employers to provide a reasonable amount of break time to nursing mothers, and to make reasonable efforts to provide nursing mothers with a room other than a toilet stall in close proximity to their work area to express milk in private. The lactation room must be safe and clean, with a place to sit, access to electricity, and a surface on which to place a breast pump and other personal items. Employers must maintain a written lactation accommodation policy that includes information enumerated in the ordinance.

What Should Employers Do Now?

- Carefully consider revisions of policies concerning parental leave and lactation – Employers with 20 to 49 employees should consider adding parental leave policies to their Employee Handbooks, and employers with employees working in San Francisco should consider adopting a written lactation accommodation policy.
- Inspect and update lactation rooms – Employers with employees working in San Francisco should inspect lactation rooms to make sure the required amenities are present.

The Minimum Wage Continues to Increase Throughout California and for Federal Contractors

On January 1, 2018, California's minimum wage rose to $11.00 per hour for employers with 26 or more employees, and rose to $10.50 per hour for employers with 25 or fewer employees. 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 that take effect in 2018 for some of California's largest job centers include:

City	Minimum Wage
Los Angeles	$13.25 per hour for employers with 26 or more employees as of July 1, 2018; $12.00 per hour for employers with 25 or fewer employees as of July 1, 2018
Mountain View	$15.00 per hour as of January 1, 2018
Palo Alto	$13.50 per hour as of January 1, 2018
San Francisco	$15.00 per hour as of July 1, 2018
San Jose	$13.50 per hour as of January 1, 2018
Santa Clara	$13.00 per hour as of January 1, 2018
Sunnyvale	$15.00 per hour as of January 1, 2018

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 a local ordinance that may apply id identified, 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.

Dazed and Confused by Prop 64? Here's What Employers Need to Know

In 2016, California voters approved Proposition 64, legalizing the recreational use of marijuana for persons 21 and older. In the wake of Proposition 64's passage, many employers have been puzzled about the impact of the new law upon their human resources' practices. Unlike some prior initiatives that were not passed, however, Proposition 64 should not have a substantial effect on employers.

What Does Proposition 64 Do?

In general, Proposition 64 changes the law with respect to marijuana, not employment practices. The statute:

- legalizes the possession and use of up to one ounce of marijuana for persons 21 and older;
- legalizes the smoking of marijuana in private homes and at licensed businesses; and
- regulates the cultivation, distribution, sale and use of marijuana.

What Does Proposition 64 Not Do?

As mentioned above, Proposition 64 changes California law regarding marijuana, but it does not alter employment law in any meaningful way. Among other things, Proposition 64:

- does not alter federal law, which still prohibits the possession and use of marijuana – Proposition 64 does not affect federal law, which has long prohibited the possession and use of marijuana for any purpose. Although federal authorities have generally been lenient in enforcing the law against persons using marijuana for medicinal purposes, the Trump administration has indicated that it may take a stricter and more aggressive enforcement posture than recent administrations with respect to marijuana enforcement.

- does not alter the right of employers to maintain a drug-free workplace – Just as the fact that alcohol is legal does not preclude employers from prohibiting alcohol in the workplace, the legalization of marijuana under state law does not prevent employers from adopting or maintaining drug-free workplace policies. Proposition 64 specifically states that it does not limit "the rights and obligations of public and private employers to maintain a drug and alcohol-free workplace."

- does not alter existing law regarding drug testing – California law generally permits employers to mandate drug tests for applicants as a condition of employment, but it severely restricts the right of most employers to require existing employees to submit to drug tests. Proposition 64 does not alter existing law regarding drug testing. We recommend that employers not require existing employees to submit to drug tests without conferring with counsel in advance.

- does not require employers to accommodate an employee's use of marijuana for medical purposes – Proposition 64 also specifically addresses the issue of accommodation by stating that it does not create an obligation "to permit or accommodate the use … of marijuana in the workplace." As a result, the California Supreme Court's decision in Ross v. RagingWire Telecommunications, holding that employers can lawfully refuse to employ persons who use marijuana for medicinal purposes, remains good law.

What Should Employers Do Now?

Because Proposition 64 does not really affect employment law, it does not require extensive action by employers. Nevertheless, prudent employers will review their general policies and practices regarding drugs in the workplace and ensure that employees understand them:

- Review and update policies as necessary – Employers that have not adopted policies regarding the use of drugs and alcohol in the workplace should do so, and those that have not reviewed their policies in recent years should determine whether revisions are appropriate. As employers adopt or update policies, they should recall that they generally cannot require existing employees to submit to drug or alcohol tests unless Department of Transportation regulations obligate them to do so.

- Clarify and communicate existing policies – Once policies are adopted or updated, employers should clarify and communicate their policies to their employees. Like some employers, many employees do not understand the impact of Proposition 64 upon their rights and obligations in the workplace. By communicating their policies, and explaining the new law, employers may be able to reduce the likelihood of policy violations by misguided employees.

NLRB Developments

Since the 2016 elections, many employers have been looking forward to promised changes in the composition of the National Labor Relations Board (NLRB). Although the pendulum is poised to swing back toward favoring employers, change has been and will continue to be slow in coming.

What the NLRB Does

The NLRB is the federal agency that oversees federal labor policy in two ways: First, by issuing regulations that govern how representation and unfair labor practice cases are brought before the agency; and second, by adjudicating disputes concerning union representation, employee rights, and complaints of violations of federal labor law by employers and unions. However, there are now fewer unions, union elections, and unionized workers than at any time in the last 90 years. Union membership has declined steadily since 1983 when 20.1% of the U.S. workforce was unionized.

Under the Obama administration, the NLRB attempted to reverse this downward trend by expediting the union representation election process, which is generally thought to benefit unions. Perhaps even more significantly, the NLRB has increased its focus on employment practices that it believes violate Section 7 of the NLRA. Section 7 protects both union and non-union employees from adverse action when they engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Changes in Membership on the NLRB

The NLRB has five members, who all are appointed by the President with the consent of the Senate to five-year staggered terms, with the term of one member expiring each year. By tradition, two of the Board members are Democrats and two are Republicans, with the NLRB Chairman serving as the fifth member of the Board who is usually a member of the same political party as the President.

NLRB Chair Philip Miscimarra's term expired on December 16, 2017, and the President has not nominated a successor for the Chairman position as this Annual Update goes to print, which could leave the NLRB deadlocked for some time.

The chief enforcer of federal labor policy is the NLRB General Counsel, who is also a Presidential appointee with a four-year term. Peter Rob, a management labor lawyer from Vermont, was nominated by President Trump to be the next NLRB General Counsel. Mr. Robb's nomination was confirmed by the Senate on November 8, 2017.

Pathways to Change

Federal labor policy for the most part remains predictable and not subject to change. However, there are some issues that historically seem to change based on which political party is in the White House. There are five ways in which federal labor relations law can change, none of which typically occurs quickly:

- The NLRB can change its regulations – Changes to the regulations promulgated by the NLRB must follow the federal Administrative Procedure Act which requires that the agency comply with a process that includes administrative hearings, posting of the proposed changes for a period of time to allow for public comment, and agency review of the proposed changes in light of the comments.

- The General Counsel can change enforcement priorities – As the chief enforcer of federal labor policy, the NLRB General Counsel has significant sway to direct the work of the 26 regional offices and emphasize which cases and issues are brought before the NLRB for determination. In this way, the General Counsel has a critical role in shaping federal labor policy.

- Prior NLRB precedent can be overturned – The NLRB has the authority to review cases and overturn prior case authority as circumstances warrant. Many federal courts of appeal have held, however, that the NLRB must have a cogent legal reason for overturning prior precedent. A change in political composition of the board would likely not be a sufficient justification.

- The NLRA can be amended – The NLRA establishes much of the foundation upon which the NLRB interprets federal labor policy. By tradition, the NLRA is only infrequently amended in an effort to maintain stability in labor policy. However, on June 14, 2017, Senator Lamar Alexander (R-TN) introduced the Workforce Democracy and Fairness Act in the United States Senate in response to changes that shortened the length of time between the filing of a representation petition and the union election. If enacted, Senator Alexander's bill would amend the NLRA to lengthen the time for union representation elections to give more time for workers to learn about what unionization would mean for them.

- Appellate court review of NLRB decisions – The Supreme Court has the final say on interpretation of federal labor policy by the NLRB. On October 2, 2017, the United States Supreme Court heard oral argument in three consolidated cases that will determine whether class action waivers are permissible in the employment context. These cases are *NLRB v. Murphy Oil USA, Inc.*, *Epic Systems Corp. v. Lewis*, and *Ernst & Young LLP v. Morris*.

The intermediate appellate courts for the various federal circuits, however, have the first opportunity to rule on changes to the law made by the NLRB. Sometimes the appellate courts agree with the NLRB, as in *Creative Vision Resources LLC v. NLRB*, in which the Fifth Circuit Court of Appeals agreed that the NLRB applied the proper successorship standard to an entity that took over staffing for a garbage collection contract. But other times, the courts of appeals reject the decisions of the NLRB, as in *NLRB and 1199 SEIU Healthcare Workers East v. New Vista Nursing and Rehabilitation*, in which the Third Circuit Court of Appeals ruled that the NLRB incorrectly applied the supervisory standard with respect to licensed practical nurses. In *T-Mobile USA, Inc. v. NLRB*, the Fifth Circuit Court of Appeals reviewed an NLRB decision on whether employee handbook provisions impeded union organization and both agreed and disagreed with the NLRB, finding that some of the employer's policies violated federal labor policy and other policies were permissible.

What Should Employers Do Now?

Ordinarily, the NLRB issues a significant number of opinions in August of each year. In 2017, however, due to the changes in composition to the Board, NLRB Chair Miscimarra announced that the opinions in the pipeline will be issued before he leaves office on December 16, 2017. As 2018 begins, employers should be alert for decisions in addressing the following issues:

- Whether common employee handbook policies, such as those regarding arbitration, confidentiality, social media, employee conduct, and non-disparagement, will continue to be scrutinized closely and found overbroad in many cases;
- Whether the shortened time for union representation elections will be increased to the prior standard;
- Whether class action waivers are found to violate the concerted action rules of the National Labor Relations Act;
- Whether franchisors will be considered joint employers with franchisees;
- Whether employers must allow employees to use company email to communicate about union organization or business;
- Whether very small bargaining units, known as micro-units, that are often easier for unions to organize, will be considered appropriate bargaining units;
- Whether non-union employees have the right to bring a representative to investigatory meetings that may lead to discipline (known as Weingarten rights); and
- Whether the standard for determining that workers are independent contractors who are exempt from collective bargaining will be viewed restrictively, thereby allowing some workers thought to be independent contractors to form a union, as in *Minnesota Timberwolves Basketball LP*, 365 NLRB No. 124 (August 17, 2017).

Conclusion

We hope that this summary assists you in understanding some of the recent developments that will affect employers in 2018. 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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