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2018 Midyear Employment Law Update

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Time flies when you're having fun — or when you're constantly having to abide by new laws and regulations. Before you know it, employers will be faced with new laws for 2019.

But we can't put 2018 in our rearview mirror just yet. It's been a busy year for employers, who have plenty of new developments to pay attention to. For updates to wage and hour, hiring and discrimination laws, to name just a few, read on.

Wage and Hour

California's wage and hour laws rank among the toughest in the nation and much has changed over the last seven months: There's a new test for independent contractors; an important ruling on off-the-clock work; a new intern test; and changes or clarifications to meal and rest break laws, exempt employees, joint employer liabilities and more.

New Test for Independent Contractors

The California Supreme Court issued a significant, and much-anticipated, decision on which test to apply when determining whether an individual is an employee or an independent contractor for purposes of the California Wage Orders — which cover the state's wage and hour laws (*Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018)).

Court rules: An independent contractor is a worker that meets each of the three-part ABC test.

The Court adopted a new three-factor test, known as the "ABC" test, which presumes workers are employees — not independent contractors — unless the company can prove that the worker:

- Is free from the hiring entity's control and direction in connection with the performance of the work — both contractually and in how the work is actually performed;
- Performs work that's outside the usual course of the hiring entity's business; and
- Is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

If the hiring entity fails to show that the individual worker satisfies each of the three criteria, **the worker is an employee.**

The California Supreme Court's decision to abandon the long-standing and flexible "right to control" test that had been in place since 1989 makes it much riskier to classify a

worker as an independent contractor. The Court's decision can be seen as part of a growing trend toward a more expansive definition of employer and employee — and greater liability for companies that contract for labor.

Employers who use independent contractors should consult with legal counsel and re-evaluate these workers under the new ABC test to determine if reclassification is necessary.

Small Amounts of Routine Off-the-Clock Work Must Be Counted

A Starbuck's employee who spent small amounts of time closing the store after he clocked out — an average of four minutes per shift — sued for unpaid wages.

In *Troester v. Starbucks*, the California Supreme Court held that California's Labor Code and wage orders have not adopted the federal *de minimis* rule that excuses payment for small amounts of time when the employer can show these amounts are administratively difficult to keep track of. California labor laws, according to the Court, don't allow employees to routinely work for minutes off the clock without being paid.

Whether some employee activities are so irregular or brief in duration that it's unreasonable to require employers to keep track of and pay for that time remains an open question.

Employers should review their practices for any tasks in which employees are engaging before clocking in or after clocking out (or any time the employee is under the employer's control). Employers who routinely have employees engage in tasks before or after the employees clock in and out for their scheduled shifts should ensure employees are compensated for all time — no matter how small the amounts may seem

New Intern Test

For years, a six-part test adopted by the U.S. Department of Labor (DOL) and followed by the California Division of Labor Standards Enforcement (DLSE) helped California employers determine whether an individual could be treated as an unpaid intern — but that test is on its way out the door.

An intern must be paid unless the primary beneficiary test is met.

In early 2018, the DOL abandoned the six-part test in favor of a new seven-factor "primary beneficiary" test, which looks at the "economic reality" of the intern/employer relationship to determine which party is the relationship's primary beneficiary — the employer or the individual.

The seven factors to consider are the extent to which the:

- Intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa.
- Internship provides training similar to that given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- Internship is tied to the intern's formal education program by integrated coursework or receipt of academic credit.

- Internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- Internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- Intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- Intern and employer understand that the internship is conducted without entitlement to a paid job at the internship's conclusion.

"Intern" is a loosely used term, but for an individual to qualify for a non-paid internship, the above criteria must be used in analyzing the position. All factors will be weighed, and no single factor is determinative. Most "interns" will be considered employees under state and federal law, and you will need to comply with wage and hour laws, including paying them at least minimum wage.

Overtime and Flat-Sum Bonuses

Overtime pay in California is based on the employee's "regular rate of pay," which isn't always an employee's normal hourly wage and must include almost all forms of pay the employee receives. But how do you calculate the regular rate of pay when an employee receives both an hourly wage and a flat-sum bonus — such as an extra $15 for working a weekend shift?

The California Supreme Court issued a decision approving the DLSE's method for calculating overtime on nondiscretionary flat-sum bonuses: Divide the employee's bonus by the number of *nonovertime* hours an employee worked (not the total number of hours worked, including overtime). This method provides you with the flat-sum bonus' per-hour value to use in calculating the regular rate of pay (*Alvarado v. Dart Container Corporation of California*, 4 Cal.5th 542 (2018)).

Employers who want to give "extra pay" to hourly workers are wise to consult legal counsel.

Meal Breaks

A recent California case reaffirmed that employers must provide meal breaks, but thethey are **not** required to police whether employees are taking them (*Serrano v. Aerotek, Inc.*, 21 Cal.App.5th 773 (2018)).

If you use staffing agencies, assign responsibility for meal and rest break compliance and put it in writing.

A worker at a food production facility sued the facility, and the staffing agency that placed her there, for failure to provide a lawful meal period. Her time records showed she took late meal breaks on several occasions and no meal break on a couple of occasions, but she never claimed she was prevented from taking the breaks. The court found that the staffing agency met its obligation to provide a meal period under the California Supreme Court's *Brinker* decision because the agency had a compliant meal break policy; trained employees on the policy; required employees to notify the staffing agency if they were prevented from taking a meal break; and had an agreement requiring the worksite facility to comply with meal break laws.

The court reiterated the holding of *Brinker* — an employer's duty is to provide the proper meal period; it doesn't have to police the taking of the break.

This decision highlights the need to have a clear, written agreement between the staffing agency and the client as to who is responsible for wage and hour compliance, including meal and rest breaks. Use legal counsel to draft the agreement and consider any duty to defend or indemnification provisions with the attorney's advice.

Joint-Employer Liability

A gas station manager brought a class action lawsuit against Shell Oil alleging failure to pay certain wages owed and unfair business practices. Shell didn't actually operate the service station; Shell leased the station to A.R.S, who operated it.

A California appellate court held that Shell wasn't jointly liable as an employer for wage and hour claims brought by A.R.S.'s employees because Shell didn't exercise control over the worker's wages, hours or working conditions; didn't hire, supervise or pay the workers; didn't control the day-to-day manner in which work was performed; and couldn't fire the worker or hire someone else to do the worker's job (*Curry v. Equilon Enterprises*, LLC, 23 Cal.App.5th 289 (2018)).

Joint-employer claims in California continue to vex employers. Carefully review any agreements to supply labor with your legal counsel.

Exempt Employees

The U.S. Supreme Court held that car dealership service advisors are exempt from the Fair Labor Standards Act (FLSA) overtime pay requirement under an exemption for any "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles …" (*Encino Motorcars, LLC v. Navarro*, 138 S. CT. 1134 (2018)). The Supreme Court overruled the Ninth Circuit, which had held that the FLSA exemption didn't include service advisors and the advisors were entitled to overtime pay. However, California wage and hour laws were not involved — only federal laws. California courts and enforcement agency generally construe the California Labor Code in favor of the workers.

If you are a car dealership in California, take time now to speak with legal counsel. Don't reclassify your service advisors to exempt and stop paying overtime before consultation!

PAGA Claims

The Private Attorneys General Act of 2004 (PAGA) authorizes individuals, also referred to as "aggrieved employees," to sue employers on behalf of a group of employees for California Labor Code violations and to recover civil penalties — two recent court decisions make it that much easier for an employee to bring a PAGA claim against an employer for a multitude of Labor Code violations.

Courts make it easier to bring PAGA claims against employers.

In one California case, the court held that an employee affected by at least one Labor Code violation can sue under PAGA to recover penalties for unrelated Labor Code violations by the same employer — even for violations that didn't affect the employee (*Huff v. Securitas Security Services USA, Inc.*, 23 Cal.App.5th 745 (2018)). In other words, the court concluded that under PAGA, an aggrieved employee can bring a lawsuit for any Labor Code violation, as long as that employee has suffered a single Labor Code violation of his/her own.

In another case, a California court decided that an employee doesn't have to prove injury or a knowing or intentional violation of the law to bring a PAGA claim for failure to provide accurate itemized wage statements required under Labor Code sec. 226(a) — even though an employee would have to prove both of these things if he/she was bringing the same claim on an individual, non-PAGA basis (*Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667 (2018)).

Hiring

In the hiring arena, significant decisions have addressed the use of salary history in hiring decisions and the scope of arbitration agreements — an agreement employers often ask employees to sign at the time of hire.

Never Consider Salary History in Employment Decisions

The Ninth Circuit Court of Appeal held that under the federal Equal Pay Act, prior salary, whether alone or in combination with other factors, can never justify a wage differential (*Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018)).

The case challenged an employer's practice of determining employees' starting salaries based on what the person earned at their prior employment. In a strongly worded opinion, the court stated that "prior salary is not job related and it perpetuates the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end." The holding in this case sets the law for all the states under the court's jurisdiction, including California.

Hiring managers should never use prior salary when determining whether to hire or how much to pay an applicant.

While decided under federal law, this case has implications for California employers. California employers are also required to follow federal law and thus should not consider prior salary.

And a new law for this year — Labor Code section 432.3 — bars employers from relying on an applicant's salary history when making hiring and salary decisions, and from asking applicants about their salary history. Moreover, recent clean-up legislation (AB 2282) provides that prior salary cannot be relied on to justify a pay differential. In light of these developments, you should **never consider an applicant's prior salary history.**

Train all employees involved in recruiting and interviewing that they shouldn't use prior salary when determining whether to hire or how much to pay an applicant. "How much do you make?" is a question of the past.

Arbitration Agreements and Class Action Waivers

The U.S. Supreme Court ruled that class action waivers contained in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA) and don't violate the National Labor Relations Act (*Epic Systems Corp. v. Lewis*, 138 S.Ct. 42 (2017)). The Court's ruling permits employers to enforce arbitration agreements requiring employees to only arbitrate claims in individual proceedings rather than class actions. However, under California law, an employer

can't have an arbitration provision that completely waives representative PAGA claims, which can continue to be brought on a representative basis, subject to further interpretation from the courts.

If you want to use arbitration agreements, consult legal counsel to help draft a compliant agreement.

Discrimination: National Origin

New Fair Employment and Housing Act regulations addressing national origin protections went into effect on July 1, 2018. The regulations protect both applicants and employees — including those who are undocumented.

Never base employment decisions on someone's actual or perceived national origin.

The new regulations expand existing national origin protections, broadly define the term "national origin," and specify the types of policies or practices that may constitute national origin discrimination. For example, the regulations discuss:

- Language restriction policies, such as English-Only policies;
- Accent discrimination;
- English proficiency requirements;
- Height and weight requirements and how they may disparately affect members of some national origin groups; and
- Unlawful immigration-related practices, such as inquiries into immigration status unless necessary to comply with federal law.

It's important to understand the broad definition of "national origin" under the new regulations — it includes not just an individual's national origin, but that of the person's spouse or those with whom the individual is associated. It also includes perceived national origin.

Never base employment decisions on an applicant's or employee's actual or perceived national origin. Ensuring that employment decisions, including hiring, are based on consistently applied objective criteria can help minimize the risk of potential discrimination claims.

Workplace Safety

Protecting and improving the health and safety of workers in the Golden State is no small task — and it's the primary mission of the California Division of Occupational Safety and Health (known as Cal/OSHA) and the federal Occupational Safety and Health Administration (OSHA). Employers need to stay up to date on their compliance obligations or face stiff consequences.

Consequences for Violating Safety Rules

When an employer violates California workplace safety rules, Cal/OSHA can seek various administrative penalties. If the violation is willful and involves a worker's death or permanent

impairment, administrative fines can end up in the millions of dollars. Cal/OSHA also can refer matters to the local district attorney (DA) for prosecution, and criminal penalties of up to three years' imprisonment are on the table.

And now, employers also can face a civil lawsuit for unfair business practices, according to a ruling from the California Supreme Court involving a water heater explosion (*Solus Industrial Innovations, LLC v. Superior Court*, 4 Cal.5th 316 (2018), *petition for certiorari pending*).

Closely follow all Cal/OSHA standards to protect your workers and avoid liability.

A plastics manufacturer used a water heater designed for residential use at its facility — and when the water heater exploded, it killed two workers. Cal/OSHA charged the company with regulatory violations and willful violation. The local DA's office also filed felony criminal charges. What's unique is that the DA also brought a civil lawsuit claiming that the company's actions amounted to unfair competition, and its false and misleading representations about its commitment to workplace safety enabled it to retain employees and customers in violation of fair advertising laws.

This case stresses the importance of closely following all Cal/OSHA standards to protect your workers and avoid liability on multiple fronts.

Health Care Facilities

Cal/OSHA requires specified covered health care facilities to establish workplace violence prevention plans to protect health care workers and other facility personnel from aggressive and violent behavior. By April 1, 2018, a covered employer must have established a workplace violence prevention plan that meets specific requirements. The workplace violence prevention plan must be part of the employer's Injury and Illness Prevention Program (IIPP).

Employers must also provide all necessary personal protective equipment and training on workplace violence as part of the employer's IIPP. The requirements for employee training must also have been implemented by April 1, 2018.

Hotel Housekeepers

A new workplace safety and health regulation specific to housekeepers in the hotel and hospitality industry became effective July 1, 2018. This new regulation, which is enforced by Cal/OSHA, is the first ergonomic standard in the nation written specifically to protect hotel housekeepers from musculoskeletal injuries.

Under the new rule, covered employers are required to have a specific Musculoskeletal Injury Prevention Program that must include:

- Procedures to identify and evaluate housekeeping hazards through worksite evaluations;
- Procedures to investigate musculoskeletal injuries to housekeepers;
- Methods to correct identified hazards; and

- Training of employees and supervisors on safe practices and controls, and a process for early reporting of injuries to the employer.

When evaluating worksite hazards, investigating injuries and identifying corrective measures, input from the housekeepers and their union representatives is required.

California wrote the first ergonomic standard in the nation to protect hotel housekeepers from musculoskeletal injuries.

Laws from Last Year

The following laws were passed in prior years but didn't go into effect until July 1, 2018.

Workers' Compensation: SB 189 clarifies when owners, officers of businesses, members of boards of directors, general partners in a partnership and managing members of LLCs may be excluded from workers' compensation laws. This bill revisits AB 2883 from 2016, the structure of which was challenging to stakeholders. SB 189 also includes provisions allowing the ability to grandfather in prior waivers.

Janitorial Employers: Legislation enacted to protect janitorial workers from sexual violence, harassment and wage theft requires that beginning July 1, 2018, janitorial employers must register annually with the Labor Commissioner. A covered employer provides janitorial services with at least one employee and one janitor. The Labor Commissioner's Office has an online registration system, and failure to register by October 1, 2018, may result in a civil fine. Additionally, covered janitorial employers must provide employees with the Department of Fair Employment and Housing's sexual harassment prevention pamphlet. The pamphlet must be provided until the DLSE establishes a biennial, in-person sexual violence and harassment prevention training for janitorial employees and employers (it has until January 1, 2019, to do so).

Local Ordinances

Another thing to keep in mind is that several localities had minimum wage increases and other changes for July 1. Keeping track of applicable local ordinances is an ongoing HR challenge.

The following cities and county increased their local minimum wages on July 1 (eligibility rules may vary based on different locations):

- Emeryville;
- City of Los Angeles;
- County of Los Angeles (unincorporated areas only);
- Malibu;
- Milpitas;
- Pasadena;
- San Francisco;

- San Leandro; and
- Santa Monica.

The city of Belmont also enacted a new minimum wage ordinance that went into effect July 1, 2018, and Redwood City enacted a minimum wage ordinance that goes into effect on January 1, 2019.

New San Francisco Salary History Ordinance

In addition to San Francisco's minimum wage rate increase, San Francisco's new Consideration of Salary History Ordinance became effective on July 1, 2018. Under the ordinance, employers will be banned from considering the current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant.

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